UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER
October 5, 1994

WARTAN BOZOGHLANIAN, Complainant,	)	
v.	)	8 U.S.C. 1324b Proceeding
	)	OCAHO Case No. 94B00072
MAGNAVOX ADVANCED PRODUCTS AND SYSTEMS CO., Respondent.	)	

ORDER GRANTING RESPONDENT'S MOTION TO DISMISS

On September 15, 1993, Wartan Bozoghlanian (complainant) commenced this action by filing a charge with the Office of Special Counsel for Unfair Immigration-Related Employment Practices (OSC). In that charge, he alleged that on Thursday, October 22, 1987, Magnavox Advanced Products & Systems Company (Magnavox or respondent) discriminated against him because of his citizenship status, in violation of the pertinent provisions of the Immigration Reform and Control Act of 1986, as amended (IRCA), 8 U.S.C. § 1324b.

In particular, complainant alleged that on that date, he attended an on-campus recruitment interview at California State University, Los Angeles and at the conclusion of that interview, Ron Gottesman (Gottesman), respondent's representative, asked complainant when he had become a naturalized United States citizen. Complainant replied that he became a naturalized citizen in late 1985, prompting Gottesman to respond that the position for which complainant was applying required a security clearance, and that in order to be eligible for that clearance, an individual was required to have been a citizen for a period

of five (5) to ten (10) years. Elsewhere in his charges, complainant also alleged that Gottesman told him that complainant had to have been a citizen for a minimum period of five (5) years in order to obtain the required security clearance. Complainant concluded that those statements by Gottesman resulted in his having been denied employment with Magnavox solely because of his citizenship status.

On March 10, 1994, after having reviewed complainant's charge, OSC informed him by letter that it had determined that there was no reason to believe that citizenship status discrimination had occurred as a result of the so-called "5/10 year rule," at issue in Huynh v. Cheney, 87-3436 TFH (D.D.C.). In addition, OSC advised complainant that he had failed to file his citizenship status discrimination charge in a timely manner.

For those two (2) reasons, OSC advised complainant that it would not file a complaint with this Office on his behalf and informed him that he was entitled to file a private action directly with an administrative law judge assigned to this Office.

On April 8, 1994, complainant did so by having filed the Complaint at issue, alleging therein that on October 22, 1987, respondent refused to hire him for a position for which he was qualified and for which respondent was looking for workers and did so based solely upon his citizenship status, as well as his Lebanese national origin.

As he had in his initial charge, complainant alleged that on October 22, 1987, during an interview at Cal State University, Los Angeles, respondent's company representative told him that in order to obtain employment with respondent, it would be necessary to obtain a security clearance, which would require that complainant must then have been a United States citizen for at least five (5) years.

On May 17, 1994, respondent filed its Answer, in which it denied that it had discriminated against complainant because of his national origin and citizenship status. In that responsive pleading, respondent also asserted four (4) affirmative defenses.

As its first affirmative defense, respondent asserted that complainant failed to state sufficient facts to constitute a cause of action against respondent.

In its second affirmative defense, respondent, while denying that complainant had been damaged in any way, asserted that if it was

determined that complainant has sustained damages, he has failed to mitigate those damages.

For its third affirmative defense, respondent has averred that the Complaint, and each purported claim for relief contained therein, was barred by the applicable statute of limitations, in particular, 28 C.F.R. Section 68.4(a), the pertinent implementing regulation which provides that an individual must file a charge with OSC within 180 days of the date of the alleged unfair immigration-related employment practice.

Respondent's fourth affirmative defense asserted that the Complaint, and each purported claim contained therein, was barred in whole or in part by complainant's failure to have exhausted internal and administrative remedies.

On May 17, 1994, respondent also filed a Motion to Dismiss, asserting therein that based solely on the facts alleged in the Complaint, this proceeding was barred by the applicable statute of limitations.

In particular, respondent noted that complainant asserted in paragraph 13(b) of the Complaint that he interviewed for a job with respondent on October 22, 1987, but that complainant alleged in paragraph 18 of the Complaint that he did not file a charge with OSC until April 15, 1993, or some five and one-half (5 1/2) years after respondent's alleged wrongful failure to hire complainant, and thus clearly beyond the 180-day deadline for filing charges under IRCA, 8 U.S.C. § 1324b(d)(3).

Complainant had 15 days from the date of service of respondent's Motion To Dismiss, or until May 31, 1994, to have responded thereto, 28 C.F.R. §§ 68.8(c)(2), 68.11(b), but failed to do so.

On June 23, 1994, the undersigned, after having given full consideration to complainant's motion, issued an Order To Show Cause Why Motion To Dismiss Should Not Be Granted.

It was determined in that June 23, 1994 Order that respondent had demonstrated that complainant had failed to file his charge with OSC within the 180-day filing deadline provided for in IRCA. 8 U.S.C. § 1324b(d)(3). Furthermore, respondent had also failed to offer an explanation justifying or excusing his failure to have met the 180-day filing deadline.

Accordingly, complainant was ordered to show cause why his claim should not be dismissed based upon its having been untimely filed, and to have done so within fifteen (15) days of complainant's receipt of the June 23, 1994 Order.

On July 1, 1994, complainant filed a pleading captioned Motion For Amending The Complaint, which requested that the Complaint be amended to add the Department of Defense (DoD) as a respondent in this proceeding.

Complainant asserted that at the time he filed his Complaint he did not know that he could also have filed a complaint against DoD, but subsequently had learned that he could have done so, and that the inclusion of DoD was "an integral part of the whole issue." Motion for Amending, at 2.

Furthermore, complainant contended in that July 1, 1994 motion, that if he was unable to amend his Complaint to add DoD as a respondent in this matter, the foundations of his Complaint would be so weakened as to make it impossible for complainant "to obtain a complete, just and fair hearing." Id.

The procedural regulation governing amendments and supplemental pleadings provides that the Administrative Law Judge may allow appropriate amendments to complaints and other pleadings at any time prior to the issuance of the final order based on the complaint. 28 C.F.R. § 68.9(e).

However, filing a charge with OSC alleging that a person or entity has committed or is committing an unfair immigration-related employment practice is a prerequisite to filing a private action with this Office. 8 U.S.C. § 1324b(d)(2). See George v. Bridgeport Jai-Alai, 3 OCAHO 537, at 6 (7/12/93). Accordingly, a complainant cannot amend a private action to assert claims against individuals who were not named in a charge filed previously with OSC. See Wije v. Barton Springs/Edwards Aquifer C.D., OCAHO Case No. 94B00046 (Order Denying Complainant's Motions for Supplementary Complaint of Retaliation by Mr. William Couch, General Manager of the Respondent District and for Supplementary Complaint of Retaliation by Members of the Board of Directors of the Respondent District), at 5 (7/21/94).

As previously mentioned, complainant asserted in his July 1, 1994 Motion for Amending the Complaint, that "DoD is an integral part of this whole issue." Motion for Amending, at 2. This assertion

notwithstanding, complainant failed to name DoD as a respondent in his charge filed earlier with OSC, and he has failed throughout these proceedings to assert any facts which implicate DoD as a potential respondent in this matter.

Accordingly, complainant's motion to add DoD as a respondent in this proceeding is improper and therefore must be denied since complainant failed to name or implicate DoD as a respondent or potential respondent in the earlier OSC charge.

On July 11, 1994, complainant filed a pleading captioned Motion Showing Cause Why My Complaint Should Not Be Dismissed As Having Been Untimely Filed, in response to the June 23, 1994 Order To Show Cause Why Motion to Dismiss Should Not Be Granted.

Complainant contended in that July 11, 1994 motion that his Complaint should not be dismissed as having been untimely filed because equitable modification of the 180-day filing deadline was justified in this case. Complainant's Motion, at 3.

Complainant asserted that the 180-day filing period is regularly extended for periods during which an employer held out hope of employment or the applicant was not informed that he was no longer being considered for the position. Complainant further asserted that because respondent sent him a postcard containing the language "[y]our resume will be carefully examined and if a suitable opening matching your background and interest exists in any of our operating divisions, you will be contacted," complainant contended that he was justified in not giving up hope for employment since he was never notified that he was no longer being considered for the position. Id.

It was found in the June 23, 1994 Order to Show Cause that complainant was not adversely affected by the so-called "5/10 year rule" because complainant had been a resident of the United States for more than ten (10) years on the date that complainant was allegedly wrongfully refused employment by respondent. Complainant contended that he obtained his permanent resident status in July 1977, but had resided in the United States for only eight (8) years and seven (7) months on October 22, 1987, the date of the alleged violation.

Complainant attempted to explain the discrepancy between the date he obtained permanent resident status and the date he actually began to reside in the United States by contending that after he became a permanent resident alien, he went to Lebanon, where he remained

until he returned to the United States on April 14, 1979. Complainant supported his assertion by attaching copies of pertinent pages of his Lebanese passport and United States Reentry permit, and a Clearance Certificate dated February 4, 1979 from his Lebanese employer, Middle East Airlines (MEA), showing that he was to be employed by MEA until March 31, 1979.

Complainant additionally asserted that although Lebanon, his country of origin, did not appear on the "List of Designated Countries," (a list that enumerated the countries of origin to whose natives the "5/10 year rule" pertained and whose interests were determined by DoD to be hostile to the United States, 32 C.F.R. Section 154, Appendix G (1987)), Lebanon had in fact been hostile to the United States. Complainant directly attributed his having been denied employment by respondent on that hostility.

On July 22, 1994, complainant filed an additional responsive pleading captioned "For Augmenting the Record. More Facts Concerning My Assertion That I Did Not File My Charges Late With The Office Of Special Counsel."

Complainant maintained in that motion that his charge was timely filed in response to a posting from OSC notifying individuals potentially adversely affected by the "5/10 year rule," which posting was, according to complainant, in effect at the time that he filed his OSC charge.

On August 16, 1994, respondent filed a "Reply Of Moving Party To Response Of Complainant To OSC Re Motion To Dismiss," in which it asserted that complainant's motions of July 11 and July 22, 1994 were flawed for three reasons, any one of which would justify the dismissal of the Complaint at issue.

Initially, respondent argued that complainant's motions did not "address the four corners of the pleadings, as is proper in responding to a Motion to Dismiss." Respondent's Reply of August 16, 1994, at 2. Secondly, complainant's motions referenced "unsworn documents" that should not be considered. Id. Finally, respondent contended that complainant's motions did not address the merits of either the Motion to Dismiss or the OSC determination that the Charge was untimely filed. Id.

Discussion

As noted earlier, the filing of a timely charge with OSC is a pre-requisite for filing a private action with this Office. See 8 U.S.C. § 1324b(d)(1) and (2). Under IRCA and the pertinent regulations, a charge must be filed with OSC within 180 days after the occurrence of the alleged unlawful act on which the charge is based. 8 U.S.C. § 1324b(d)(3); 28 C.F.R. § 44.300(b); 28 C.F.R. § 68.4(a). See Lundy v. OOCL (USA) Inc., 1 OCAHO 215, at 8 (8/8/90).

As also noted previously, complainant alleged in his charge and in the resulting Complaint that the unfair immigration-related employment practice complained of namely, respondent's alleged wrongful failure to hire him because of his citizenship status and Lebanese national origin, had occurred on October 22, 1987. The record in this case clearly discloses that OSC did not accept complainant's charge as complete until September 15, 1993, or almost six (6) years later, and thus well in excess of the 180-day statute of limitations provided for in IRCA. Even accepting complainant's assertion in the Complaint that he filed his charge with OSC on April 15, 1993, as opposed to September 15, 1993, that charge would still have been filed some 1823 days after the 180-day filing deadline of April 19, 1988.

Complainant's failure to comply with this 180-day filing deadline is not per se dispositive, because the deadline is subject to equitable modification on a case-by-case basis. United States v. Mesa Airlines, 1 OCAHO 74, at 26 (7/24/89). The filing period is generally extended for periods during which: (1) the employer held out hope of employment or the applicant was not informed that he was not being considered; (2) the charging party timely filed his charge in the wrong forum; or (3) the employer lulled the applicant into inaction during the filing period by misconduct or otherwise. United States v. Weld County School Dist., 2 OCAHO 326, at 17 (5/14/91). The charging party bears the burden of demonstrating that equitable modification is appropriate. Becker v. Greenwood Police Dep't, OCAHO Case No. 92B00228 (Order Granting Respondent's Motion for Dismissal) (4/19/93). As discussed further momentarily, complainant is not entitled to an equitable modification of the 180-day filing deadline under these facts.

Complainant, in his July 11,1994 "Motion Showing Cause Why My Complaint Should Not Be Dismissed As Having Been Untimely Filed," argued that the 180-day filing deadline should be extended from October 22, 1987 to September 15, 1993, the date upon which he filed his charge with OSC, because he justifiably held out hope of employment during that six (6) year period because respondent had failed to notify him that he was no longer being considered for the position for

which complainant had applied almost six (6) years earlier, on October 22, 1987.

Complainant's contention is weak at best since it is simply not reasonable for a job applicant to believe that he is still being considered for a position almost six (6) years after receiving a perfunctory pre-printed card informing him that if a position should open up that fits his interest and qualifications, the company will notify him. This should be regarded as nothing more than common courtesy on respondent's part.

Furthermore, complainant has alleged facts implicating the "5/10 year rule," and the explicit waiver of timeliness as an affirmative defense to causes of action under IRCA, 8 U.S.C. § 1324b, resulting therefrom under the Settlement Stipulation in Huynh v. Cheney, 87-3436 TFH (D.D.C. March 14, 1991), which was subsequently approved by the United States District Court for the District of Columbia on December 31, 1991.

The "5/10 year rule" denied security clearances to naturalized citizens whose countries of origin were determined to have interests adverse to the United States. Huynh v. Cheney, 679 F. Supp. 61, 63 (D.D.C. 1988). Pursuant to the "5/10 year rule," DoD published a list of twenty-nine (29) countries and areas determined to have those hostile interests. See 32 C.F.R. § 154, Appendix G (1987).

But the nation of Lebanon, complainant's country of origin, did not appear on the "List of Designated Countries" prepared by DoD. Regardless of complainant's contention that Lebanon had interests that were hostile to the United States, the fact remains that Lebanon was not on that list and thus the "5/10 year rule" was not involved in respondent's refusal to hire, or even to interview, complainant.

Accordingly, complainant's case does not come under the scope of the settlement stipulation in Huynh v. Cheney, 87-3436 TFH (D.D.C. March 14, 1991), and as such, complainant's untimely filed Complaint is not entitled to the Huynh waiver of timeliness.

Based upon that determination, coupled with complainant's demonstrated failure to have timely filed his IRCA charge with OSC within the required 180-day filing period, complainant's request for administrative review must be denied.

Order

In view of the foregoing, and in accordance with the findings in the undersigned's June 23, 1994 Order to Show Cause in this proceeding, respondent's May 17, 1994 Motion to Dismiss is granted and complainant's April 8, 1994 Complaint is hereby ordered to be and is dismissed with prejudice to refiling.

JOSEPH E. MCGUIRE
Administrative Law Judge

Appeal Information

In accordance with the provisions of 8 U.S.C. § 1324b(g)(1), this Order shall become final upon issuance and service upon the parties, unless, as provided for under the provisions of 8 U.S.C. § 1324b(i), any person aggrieved by such Order seeks a timely review of this Order in the United States Court of Appeals for the circuit in which the violation is alleged to have occurred or in which the employer resides or transacts business, and does so no later than 60 days after the entry of this Order.