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

Anthony F. Lundy, Complainant v. OOCL (USA) Inc., Respondent; 8 U.S.C. § 1324b Proceeding; Case No. 89200457.

FINAL DECISION AND ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION

(August 8, 1990)

MARVIN H. MORSE, Administrative Law Judge

SYLLABUS

1. The 180 day time period authorized by the Immigration Reform and Control Act of 1986 (IRCA) for filing charges respecting unfair immigration-related employment practices with the Special Counsel (OSC), 8 U.S.C. § 1324b(d)(3), may be equitably tolled and is not jurisdictional.

2. The rationale for equitable tolling is the protection of lay persons seeking redress for unlawful discrimination from the harsh consequences of strict application of procedural requirements. Equitable tolling is unavailable where complainant has been represented by counsel during the substantial part of the statutory period for filing the discrimination charge.

3. Equitable tolling is unavailable where scrutiny of complainant's claim that counsel abandoned the attorney-client relationship fails to establish that abandonment occurred, if at all, during the relevant filing period.

4. By virtue of a Memorandum of Understanding (MOU) between the Equal Employment Opportunity Commission (EEOC) and OSC a charge of discrimination timely filed with EEOC is deemed also to have been timely filled with OSC, whether or not citizenship discrimination is charged before the EEOC. The MOU is unavailing with respect to an alleged discrimination and filing of a charge with the EEOC which took place before the MOU went into effect.

5. A complaint will be dismissed on respondent's motion for summary decision where a charge is filed with OSC approximately a

year after the alleged discrimination and the administrative law judge finds no basis for equitable or other tolling of the 180 day period for such filing.

Appearances: **ANTHONY F. LUNDY**, Complainant.
LAURA ALLEN, Esq., for Respondent.
LINDA R. WHITE, Esq., for Office of Special Counsel for Immigration Related Unfair Employment Practices,Amicus Curiae

I. Statutory and Regulatory Background

A. Generally

The Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359 (November 6, 1986), enacted a prohibition against unfair immigration-related employment practices at section 102, by amending the Immigration and Nationality Act of 1952 (INA § 274B), codified at 8 U.S.C. §§ 1101 et seq. Section 274B, codified at 8 U.S.C. § 1324b, provides that ``[I]t is an unfair immigration-related employment practice to discriminate against any individual other than an unauthorized alien with respect to hiring, recruitment, referral for a fee, or discharge from employment because of that individual's national origin or citizenship status....'' (Emphasis added). Section 274B protection from citizenship status discrimination extends to an individual who is a United States citizen or qualifies as an intending citizen as defined by 8 U.S.C. § 1324b(a)(3).

Congress established new causes of action out of concern that the employer sanctions program enacted at Section 101 of IRCA (INA § 274A), 8 U.S.C. § 1324a, might lead to employment discrimination against those who are ``foreign looking'' or ``foreign sounding'' and those who, even though not citizens of the United States, are lawfully in the United States. See ``Joint Explanatory Statement of the Committee of Conference,'' Conference Report, IRCA, H.R. Rep. No. 1000, 99th Cong., 2d Sess., at 87 (1986).

Title 8 U.S.C. § 1324b contemplates that individuals who believe that they have been discriminated against on the basis of national origin or citizenship may bring charges before a newly established Office of Special Counsel for Immigration Related Unfair Employment Practices (Special Counsel or OSC). OSC, in turn, is authorized to file complaints before administrative law judges who are specially designated by the Attorney General as having had special training ``respecting employment discrimination.'' 8 U.S.C. § 1324b(e)(2).

IRCA also explicitly authorizes private actions. Whenever the Special Counsel does not within 120 days after receiving a charge of national origin or citizenship status discrimination file a complaint before an administrative law judge with respect to such charge, the person making the charge may file a complaint directly before such a judge. 8 U.S.C. § 1324b(d)(2).

B. Procedural Summary

Mr. Anthony F. Lundy (Lundy, charging party or Complainant) charges OOCL (U.S.A.), Inc. (OOCL or Respondent) with knowing and intentional discrimination by terminating his employment on the basis of his national origin an/or citizenship status in violation of 8 U.S.C. § 1324b.

Lundy, a citizen of the United States, filed his charge with OSC on March 8, 1989. After its investigation of the charge, OSC advised him by a determination letter dated July 6, 1989 that it would not file a complaint before an administrative law judge. OSC wrote ``that there is no reasonable cause to believe that you were discriminated against based on your citizenship status....'' OSC also stated that it lacked jurisdiction over Lundy's charge of national origin discrimination since OOCL (U.S.A.) is covered by Title VII [of the Civil Rights Act of 1964], not 8 U.S.C. § 1324b(a)(2)(B). Lundy was advised by OSC that he had until October 4, 1989, 90 days after OSC's statutory 120 day investigatory period, to file a private action before an administrative law judge.

On September 14, 1989 Lundy filed his Complaint, followed by an amended complaint filed November 2, 1989. This Office issued its Notice of Hearing on December 8, 1989, advising, inter alia, that the case was assigned to me.

By letter-pleading filed January 4, 1990 Respondent requested an extension of time in which to answer the Complaint. I granted that request, to which Complainant objected, authorizing an answer not later than January 30, 1990.

Respondent timely filed its Answer on January 30, 1990, accompanied by a Motion for Summary Decision with supporting Memorandum. On February 5, 1990 Complainant filed his opposition and requested an opportunity to present ``oral objections and arguments and motions.'' Lundy asserted that requiring arguments to be submitted in writing ``constitutes an unfair and entirely unreasonable burden upon the Complainant and conversely an unfair and unreasonable advantage favoring the Respondent not intended by the law and based on Respondent's overwhelming resources compared to Complainant....''

On February 13, 1990 OSC filed a Motion for Leave to File Amicus Curiae Memorandum. OSC contended that Respondent's Motion for Summary Decision had raised an important issue concerning a Memorandum of Understanding (MOU) between OSC and the Equal Employment Opportunity Commission (EEOC). Complainant objected to OSC's Motion by a filing dated February 28, 1990, arguing that allowing OSC amicus status placed ``an unreasonable burden upon the Complainant to serve the public interest. ...'' By Order dated March 5, 1990 I held that ``[N]othing contained in Complainant's written objection persuades me that it is inappropriate for OSC to be heard amicus.'' I granted OSC's request to file as amicus curiae and set a briefing schedule.

By a pleading filed February 14, 1990 Lundy requested an oral hearing to determine the fitness of OSC to make representations in this case. By Order dated March 28, 1990 I overruled Complainant's objection to OSC's ongoing participation. I noted that ``it is not my function to investigate and adjudicate law enforcement activities of officials of the Department of Justice ... this is not the forum to take up Complainant's allegations that various officials and employees have been unresponsive to his claims of discrimination.'' Id. I did assure Complainant, however, that no determination would be reached on Respondent's Motion for Summary Decision until after the date for filing responses to OSC's Amicus Memorandum.

OSC filed its Amicus Curiae Memorandum on March 23, 1990. Pursuant to a one week extension for reply, Respondent filed its brief on April 9, 1990.

By letter-pleading filed May 17, 1990 in what appears to be a renewal of its request for Summary Decision, Respondent enclosed a copy of a pleading in a Federal Age Discrimination action (in U.S. District Court), in which Lundy asserts that he had been replaced at OOCL by Paul Devine. Respondent argues that because Devine is a caucasian American citizen, Lundy's federal court pleading should be dispositive of OOCL's claim that no genuine issue of material fact exists to preclude a favorable decision on its Motion, i.e., that Lundy can no longer set forth a claim that he was replaced by foreign nationals but was replaced by an American, according to his own claim.

On May 29, 1990 I issued an Order of Inquiry to the Parties to find out whether there is a genuine issue as to any material fact. Complainant replied to the Order on June 7, Respondent on June 15. Respondent recites that after Lundy was discharged by OOCL his duties were assumed by Paul Devine, Director of Sales, Far East Service, for both imports and exports. Complainant, however,

disputes that Mr. Devine was his replacement, instead identifying as his successor Ted Wang, Senior OOCL Vice President.

In a filing on July 2, 1990 Complainant renewed his objection to Respondent's Motion for Summary Decision, alleging that the documentation accompanying Respondent's Motion contradicted its written representations in its Memorandum in support of that Motion. On the same day a second filing by Complainant requested that I permit him to file a reply out of time to Respondent's June 15th filing because Respondent's documents ``are replete with representations resulting from numerous omissions and misstatements.''

In opposition to Complainant's July 2, 1990 filing, Respondent replied in a filing on July 9, 1990 that Complainant's filings had ``no real bearing on the salient issues.''

By Motion filed July 10, Complainant requested a temporary restraining order (TRO) to prohibit Ted Wang from going beyond the jurisdiction of the United States. The next day Complainant filed a copy of a July 8, 1990 letter he had sent to the New York State Supreme Court, First Judicial Department, Departmental Disciplinary Committee (Disciplinary Committee), requesting that the Chief Counsel place a protective order on ``all material documents and records relevant to the matter of Lundy vs. OOCL (USA), Inc. et al. ...''

In an Order issued July 12, 1990, prior to receipt of Respondent's letter-pleading dated and filed July 9, 1990 opposing Complainant's request, I denied his Motion, stating that ``Complainant has not made out a showing sufficient to justify injunctive relief pursuant to Rule 65 of the Federal Rules of Civil Procedure. ... Accordingly, I do not need to reach the question whether I have the authority to grant injunctive relief.''

On July 16, 1990 Complainant filed a Motion objecting to Respondent's July 9 pleading in opposition to Complainant's July 2 filing which sought to amend his Motion filed February 5, 1990 which opposed Respondent's Motion for Summary Decision.

II. Facts

Lundy alleges that he was wrongfully discharged by OOCL on March 3, 1988 because he is a citizen of the United States. In his original Complaint he states that the decision to fire him came from the OOCL's Hong Kong parent whose policies encouraged ``the obtaining of second citizenship abroad for key Hong Kong management staff personnel before 1997, and the scheduled return of the British Colony to mainland China's communist rule. ...'' He asserts that he was discharged from his position as Director of

Sales,Far East Exports, Eastern Division, so that OOCL could create a position for a Hong Kong citizen of Chinese national origin.

Respondent disputes Complainant's allegation that the reason for his discharge was a discriminatory scheme of OOCL to replace U.S. workers with Hong Kong nationals. In contrast, Lundy's discharge was performance-related according to an affidavit of Marsha Thrall, OOCL's General Manager of Human Resources and Administration, submitted in support of the Motion for Summary Decision. Respondent's answer further asserts that Lundy's position was merged with that of another division and that he was replaced not by a foreign national but by another Caucasian male U.S. citizen, Paul Devine.

On March 7, 1988 Lundy retained legal counsel, i.e., the Law Offices of Marshall E. Lippman, P.C., of New York City. A Lippman associate, Nancy F. Duboise, represented Complainant in various actions. She served as his agent, receiving his final OOCL paycheck and severance pay. She also received his final reimbursement check from OOCL; she paid his health insurance continuation fee which was transmitted to OOCL's counsel, Laura Allen of Hughes, Hubbard and Reed.

Additionally, Lippman's firm also helped in the preparation of an EEOC complaint dated March 15, 1988, which was filed in the New York district office of that agency on March 18, 1988. This charge which alleged discrimination based on age, race, and national origin was transferred to the New York State Division of Human Rights for investigation on April 6, 1988. A final determination in this action is pending.

On December 30, 1988 Marshall E. Lippman wrote Lundy raising the question whether it was appropriate for that firm to continue an attorney-client relationship with him. According to correspondence filed by Complainant in the course of motion practice in this case, the Lippman firm served as his legal representative until at least December 30, 1988, although the record is uncertain as to Lippman's role after that date. Claiming that the firm had abandoned him, Lundy filed a complaint against Lippman with the New York Supreme Court, Appellate Division, Departmental Disciplinary Committee. By letter dated April 20, 1990 the Committee's Chief Counsel, Hal R. Lieberman, wrote to Lundy that ``[A]fter careful investigation and further review . . . '' no action was taken against Lippman or his firm.[1]

[1]See discussion infra at III. B.6., as to the subsequent posture of this inquiry.

In a July 13, 1989 letter to Carol Scheuer of the Disciplinary Committee staff, Lippman stated that on December 18, 1988 ``[We] forwarded a letter to him (Lundy) . . . with copies of significant portions of this file for the purpose of his agency investigation.'' Lippman also mentioned that Lundy never replied to a December 30, 1988 letter regarding the termination or continuation of their attorney-client relationship. Lippman also mentioned that Lundy never replied to a December 30, 1988 letter regarding the termination or continuation of their attorney-client relationship.

Lundy filed a charge of citizenship-based employment discrimination with OSC under 8 U.S.C. § 1324b on March 8, 1989, 370 days after his discharge from OOCL, well beyond the 180-day statutory limit on such charges, 8 U.S.C. § 1324b(d)(3). On July 6, 1989, in spite of the untimeliness of Lundy's charge, OSC issued a determination that there was no reasonable cause to file a complaint before an administrative law judge.

Lundy's Complaint is timely, i.e., within the 90-day time frame authorized after OSC disposition of his charge, 28 C.F.R. § 44.303(c)(2). The question remains, however, whether his filing before the OSC was timely in the face of the 370-day delay between the alleged discriminatory act and his charge.

III. Discussion

A. Summary Decision Applied

The parties do not dispute that Lundy was employed by OOCL (USA) beginning July 5, 1977 or that he was discharged on March 3, 1988 from his position as Director of Sales, Far East Exports, Eastern Division. Four days later, March 7, 1988, he began a legal odyssey seeking redress for that discharge.

There are two unresolved issues:

1. Whether Lundy has standing to file a claim under IRCA, and if so, whether he filed the charge in a timely manner and;

2. Whether, as alleged by Lundy, his termination was motivated by citizenship discrimination, or whether, as alleged by Respondent, the discharge was based on Lundy's professional incompetence and ineffectiveness.

As discussed below, this case is resolved on Respondent's Motion for Summary Decision. The procedural issue of timeliness is determinative. For the reasons set forth below I conclude that Complainant failed to timely file his charge with OSC. As the result, he is ineligible for relief under 8 U.S.C. § 1324b. Accordingly, I do not reach the merits.

B. Jurisdiction Over The Claim

1. Complainant Has Standing Under IRCA

Respondent challenges jurisdiction of the administrative law judge on the grounds that both the national origin and the citizenship discrimination claims are barred as a matter of subject matter jurisdiction. Both Respondent and OSC are correct that I lack jurisdiction over the national origin portion of the discrimination claim. The national origin claim is exclusively within the jurisdiction of the EEOC because Respondent employs more than 14 individuals. 8 U.S.C. § 1324b(a)(2)(B).

In contrast, under IRCA administrative law judges retain jurisdiction of citizenship discrimination claims implicating employers of 4 or more individuals. 8 U.S.C. § 1324b(b)(2). Respondent misinterprets 8 U.S.C. § 1324b(b)(2) which prohibits concurrent filing of national origin claims under Title VII and IRCA. As citizenship claims are exclusively within the purview of IRCA, Title VII is inapplicable. U.S. v. Marcel Watch Corporation, OCAHO Case No. 89200085 (March 22, 1990, amended May 10, 1990) at 11. Therefore, I reject Respondent's analysis of jurisdiction over the citizenship discrimination charge, and hold that Lundy's dual filing at EEOC and here does not impair administrative law judge jurisdiction over the citizenship discrimination portion of his claim. As a citizen of the United States, Complainant is an individual qualified for protection by 8 U.S.C. § 1324b. Marcel Watch Corp.; Jones v. DeWitt Nursing Home, OCAHO Case No. 88200202 (June 29, 1990).

2. Equitable Tolling Available Under IRCA

IRCA stipulates that no charge may be filed with OSC more than 180 days after the occurrence of the alleged discriminatory employment practice on which the charge is based. 8 U.S.C. § 1324b(d)(3); 28 C.F.R. § 44.300(b). Complainant sought legal assistance promptly. He did not, however, file with OSC until March 8, 1989, 370 days after the alleged discriminatory discharge of March 3, 1988. His failure to comply with the 180 day filing deadline is not per se dispositive.

As noted by both respondent and OSC, the scant IRCA jurisprudence is supported by case law developed under analogous provisions of Title VII and the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621 et seq. Precedent holds that agency filing periods are parallel to statutes of limitations and distinct from jurisdictional bars. See e.g., Zipes v. Transworld Airlines, 455 U.S. 385, 393 (1982); Pruet Production Co. v. Ayles, 784 F.2d 1275, 1279 (5th Cir. 1986); Coke v. General Adjustment Bureau, Inc., 640 F.2d 584, 595 (5th Cir. 1981); Dartt v. Shell Oil Co., 539 F.2d

1256, 1259 (10th Cir. 1976), aff'd by an equally divided court, 434 U.S. 99 (1977), reh'g denied, 434 U.S. 1042 (1977); U.S. v. Mesa Airlines, OCAHO Case No. 88200001 (July 24, 1989) at 22. Accordingly, I conclude that my jurisdiction over Complainant's citizenship discrimination claim is not barred either by the EEOC/IRCA dual filing prohibition or by the requirement of 8 U.S.C. § 1324b(d)(3) for timely filing.

Time limits on agency filings, like statutes of limitations, are subject to waiver, estoppel, and, most pertinent to the case at bar, equitable tolling.[2]Due to Complainant's late IRCA filing, hurdling the difficult equitable tolling threshold is an indispensable prerequisite to a hearing on the merits.

Id.

3. Equitable Tolling In General

The rationale for the judge-made doctrine of equitable tolling is to protect lay persons from the harsh consequences of strict application of procedural requirements. This is especially true for lay persons who seek redress for unlawful discrimination. As described below, case law has established criteria regarding the proper application of equitable tolling. Only by satisfying these criteria can Complainant qualify for equitable tolling and thereby obtain a hearing on the merits of his claim.

For example, equitable tolling is only available to a complainant who was pro se during the relevant filing period; a complainant who has had access to legal counsel during such period must demonstrate that tolling arises in a situation where counsel abandoned complainant. Erroneous information provided to a client by counsel does not trigger equitable tolling, and the potential damage to a defendant in any action where equitable tolling might be invoked must be balanced against the rights of the complaining party.

---

[2]Neither the parties nor OSC have raised an issue of waiver or estoppel and none seems to be lurking in this case. Accordingly, this decision deals exclusively with the remedy of equitable tolling. Zipes, 455 U.S. at 393; Pruet, 784 F.2d at 1279; Coke, 640 F.2d at 595; Dartt, 539 F.2d at 1261. Courts are traditionally parsimonious with grants of equitable tolling. See e.g., Earnhardt v. Comm of Puerto Rico, 691 F.2d 69, 71-73 (1st Cir. 1982), aff'd, 744 F.2d 1 (1st Cir. 1984):

Courts have taken a uniformly narrow view of equitable exceptions to Title VII limitations periods ***. This view is consistent with Congress' assumption, in adopting relatively short limitations periods, that employees will normally suspect discriminatory motives at the time of their discharge ***. In enacting relatively short limitations periods, Congress intended to provide employers a measure of repose ***. Courts, therefore, should not create generalized exceptions to limitations periods which will invite litigants to interrupt this repose with stale or dormant claims

Cases which have held that other considerations may support or deny equitable tolling are not material where, as here, representation by counsel during the critical time period dictates the result reached.[3]

4. Pro Se Status as a Criterion

The threshold criterion for invocation of this equitable relief is the pro se status of a complainant. Pro se status does not guarantee a grant of equitable tolling. Cruz v. Triangle Affiliates, Inc., 571 F.Supp. 1218 (E.D.N.Y. 1983) (neither pro se status nor the fact that English was a second language is sufficient to automatically invoke equitable tolling of the EEOC limitations period). Even constructive

[3]Such considerations include the legal sophistication of the party seeking equitable tolling and potential prejudice to the party opposing equitable tolling, congressional intent, and pendency of collateral review of an employment decision. See Dillman v. Combustion Engineering Co., 784 F.2d 57 (2d Cir. 1986) (equitable tolling is appropriate where employer's conduct misled employee about the need to file with the EEOC); Manning v. Carlin, 786 F.2d 1108 (11th Cir. 1986) (defendant's concealment of information and misleading of plaintiff regarding the nature of his rights provides a limited basis for equitable tolling); Felty v. Grave-Humphreys Co. (I), 785 F.2d 516 (4th Cir. 1986) (defendant not entitled to summary judgment based on timeliness where plaintiff had allegedly been coerced to delay filing an EEOC discrimination charge); Pruet, 784 F.2d at 1275 (no equitable tolling absent defendant misrepresentation or concealment sufficient to prevent plaintiff from making a timely filing); Welty v. S.F. & G., Inc., d/b/a/ Mercury, 605 F.Supp. 1548 (N.D. Ala. 1985) (time for filing EEOC charge not equitably tolled even though discharged employee was allegedly misinformed by the EEOC since employee had previous experience with EEOC procedures and was represented by counsel); Pfister v. Allied Corp., 539 F. Supp. 224 (S.D.N.Y. 1982) (statute of limitations on age discrimination complaint not tolled during time in which employer participated in private settlement negotiations with employee where there was no allegation that employer acted in bad faith or deceitfully lured employee into settlement discussions or attempted to cause employee to miss appropriate filing date); Franklin v. Lehman College, 508 F.Supp 945, 951 (S.D.N.Y. 1981) (``[a] Title VII statute of limitations should not be tolled under circumstances that would seriously prejudice a defendant not responsible for the delay ***'').

See also, as to effectuation of congressional intent and pendency of collateral review of an employment decision, Electrical Workers, IUE v. Robbins & Myers, Inc., 429 U.S. 229 (1976) (EEOC filing period is not tolled by arbitration procedure under a collective bargaining agreement); Johnson v. Railway Express Agency, 421 U.S. 454 (1975) and Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) (modified prevailing case law by holding that pendency of a grievance or other method of collateral review of an employment decision does not toll limitations); Jones v. Trans-Ohio Savings Assoc., 747 F.2d 1037, 1040 (6th Cir. 1979), citing Burnett v. New York Central R.R. Co., 380 U.S. 424, 427 (1965) (``The basic inquiry [in determining the appropriateness of equitable tolling] is whether congressional purposes is [sic] effectuated by the tolling of the statute of limitations.''); Leake v. Univ. of Cincinnati, 605 F.2d 255 (6th Cir. 1979) (equitable tolling should be granted where such a grant would not be inconsistent with the congressional purpose).

access to legal expertise during the filing period is fundamental to the inquiry of whether equitable tolling attaches. See Zipes, 455 U.S. at 397, citing Love v. Pullman Co., 404 U.S. 522, 527 (1972) (``a technical reading of Title VII's filing provisions would be particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process.'') (emphasis added); Burton v. U.S.P.S., 612 F.Supp. 1057 (N.D. Ohio 1985); Dillman, 784 F.2d at 57; Hart v. J.T. Baker, 598 F.2d 829 (3d Cir. 1979).

Equitable tolling is almost always denied where counsel is available to a party. Comfort v. Rensselaer Polytechnic Institute, 575 F.Supp. 258 (N.D. N.Y. 1983); Cole v. CBS, Inc., 634 F.Supp. 1558 (S.D. N.Y. 1986); Williams v. Whirlpool Corp., 41 FEP 383 (W.D. Ark. 1986). See Leite v. Kennecott Copper Corp., 558 F.Supp. 1170, 1174 (D. Mass. 1983), aff'd without opinion, 720 F.2d 658 (1st Cir. 1983):

> `The courts have repeatedly held that equitable tolling is inappropriate when the plaintiff has consulted counsel during the statutory limitation period'. Needham v. Beecham, Inc., 515 F.Supp. 460, 467 (D. Me. 1981) (ADEA). See, e.g., Keyse v. California Texas Oil Corp., 590 F.2d 45, 47 (2d Cir. 1978) (per curiam) (Title VII); Edwards v. Kaiser Alum. & Chem. Sales, Inc., 515 F.2d 1195, 1200 n. 8 (5th Cir. 1975) (ADEA); Sanders v. Duke Univ., 538 F.Supp. 1143, 1146 n. 2 (M.D.N.C. 1982) (ADEA). `Counsel are presumptively aware of whatever legal recourse may be available to their client,' Downie v. Electric Boat Div., 504 F.Supp. 1082, 1087 (D. Conn. 1980) (ADEA), and `constructive knowledge' of the law's requirements is thereby imputed to an ADEA claimant. Abbott v. Moore Business Forms, Inc., 439 F.Supp. at 646.

Id.

Equitable tolling is denied even when an attorney's advice is inadequate. A client represented by a lawyer is presumed to have actual or constructive information regarding his potential causes of action, regardless of the competence of the lawyer or misinformation provided by the filing agency or other third parties. See Welty, 605 F.Supp. at 1548 (a party who retained a lawyer prior to contacting EEOC is ineligible for equitable tolling, even when the lawyer and EEOC had misinformed the party); Meckes v. Reynolds Metals Co., 604 F.Supp 598 (N.D. Ala. 1985), aff'd without opinion, 776 F.2d 1055 (11th Cir. 1985), reh'g denied, en banc, 779 F.2d 60 (11th Cir. 1985) (noting court's extreme reluctance in granting equitable discretion where party retained counsel during the filing period, even though attorney misinformed the client); Hamel v. Prudential Insurance Co., 640 F.Supp. 103 (D. Mass. 1986) (failure of EEOC to timely process Title VII intake questionnaire so as to preclude timely filing was not a ground for equitable tolling where the party was represented by counsel during the filing time).

Indeed, availability of counsel overrides had advice by others. See, e.g., Schier v. Temple University, 576 F.Supp. 1569 (ED Pa 1984), aff'd on other grounds, 742 F.2d 94 (3d Cir. 1984), cert. denied, 471 U.S. 1015 (1985) (equitable tolling denied where party had received erroneous filing information from EEOC since party had access to counsel, an EEOC brochure and was herself sophisticated); Otstott v. Verex Assurance, Inc., 481 F.Supp. 1269, 1271 (N.D. Tex. 1980) (even if employee had been misinformed by EEOC as to filing date, equitable tolling cannot attach, because ``part of employee's attorney's [responsibility] was his obligation to insure within a reasonable time that all required procedural steps had been taken''). See also, Downie, 504 F.Supp. at 1082 (even though plaintiff's lawyers during the statutory filing period focussed on securing his sick benefits and did not focus on his ADEA rights, equitable tolling cannot be invoked, citing Alabano v. General Adjustment Bureau, 478 F.Supp. 1209, 1215 (S.D.N.Y. 1979) (``Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent.'')). But cf. Dartt, 539 F.2d at 1262 (equitable tolling held available where a cursory attorney consultation had taken place during the limitation period, but the court cautioned that tolling would not be allowed where a plaintiff had slept on his rights or where a defendant could be potentially prejudiced by such a grant). The Dartt court, supra, at 1261 n. 4, suggested that had the discriminatee's contact with an attorney ``been more than a preliminary approach as to possible consultation, we might possibly be led to the conclusion reached in Edwards, supra, ...,'' quoting dicta in Edwards, supra, at 1200 n. 8, to the effect that equitable tolling is unavailable ``where the injured employee consulted an attorney....''

The authorities cited above, both under title VII and the ADEA, generally inform decision-making under 8 U.S.C. § 1324b. I conclude on the basis of that case law that equitable relief from application of limitations in unavailable in the present case where Complainant was represented by counsel, whether or not Respondent can establish specific prejudice as the result of late filing of the charge with OSC. Leite, 558 F.Supp. at 1174.

5. An Attorney-Client Relationship Existed

It is clear, as discussed below, that Complainant was represented by counsel at the outset of his actions against his former employer, OOCL. That representation is substantiated by numerous references made by Complainant and Respondent in pleadings and un-

rebutted affidavits and copies of correspondence tendered on motion practice in this case.

Evidence abounds that an attorney-client relationship existed at the time Complainant filed his original discrimination charge with the EEOC and during the relevant filing period for a charge before the OSC. At some time during 1989, Lundy lodged a malpractice and abandonment complaint against the law offices of Marshall E. Lippman, P.C. In an April 19, 1990 letter to Carol Scheuer, Legal Assistant to the Disciplinary Committee, he again characterized Mr. Lippman as his attorney. Lundy's Reply to my May 29, 1990 Order stated;

> The first communications between the Company and complainant [sic] attorneys' was established on March 7, 1988, as per attorney Laura H. Allen's affidavit already submitted to the Court ... Allen's affidavit established that his [Lippman's] firm, pursuant to contractual authority completed all preparatory and preliminary requirements of the private prosecution of the charge of discrimination....

Complainant's first communication with OCAHO, a letter to OCAHO legal counsel Jack Rivers, dated September 15, 1989, filed October 13, 1989, states:

> I am also attempting to obtain additional documents considered essential to this matter, but which are being withheld by the attorney originally and formally retained to effectively represent my interests in the matter of discrimination as claimed against my prior employer.(Emphasis added).

Complainant made a parallel reference in a January 5, 1990 letter to Wyletta Barbee, Division of Human Rights, Executive Department, State of New York, in which he made reference to the attorney, writing as follows:

> [N]o doubt you recall Mr. Lippman refused to make available essential documents, materials and direct evidence relating to my discrimination complaint under investigation by your Department.

In the four separate contexts just mentioned, i.e., Lundy's letter to Carol Scheuer of the Disciplinary Committee, to Jack Rivers of OCAHO, to Wyletta Barbee of the New York State Division of Human Rights, and in pleadings here, Complainant made unequivocal statements confirming Mr. Lippman's role as his attorney during the relevant filing period. Complainant's correspondence points unmistakably to the conclusion that he had considered the Lippman firm to be his attorneys during the months following his discharge, i.e., the IRCA filing period.

Lundy's reply to my May 29 Order included a copy of a letter from Lippman to Scheuer, responding to Lundy's malpractice and abandonment complaints. Lippman's letter, dated July 13, 1989, reviewed communications between Lundy and the Lippman law office:

> Mr. Lundy consulted with our firm in connection with his claim of being improperly terminated by a Japenese [sic] business corporation. Mr. Lundy was advised of the time limits within which agency complaints must be filed and determined that it was in his best interest to attempt to receive his benefits before taking further action. We believe that judgment was correct. (Emphasis added).

According to that letter, Lundy and Lippman had addressed agency filing procedures for redress of Lundy's termination during his early consultations with the firm. According to Lippman, ``We [Lundy and Lippman] ... select[ed] a single Federal forum for his race and age complaints.'' Id. The wisdom of that tactic is irrelevant. I infer from the fact that Lippman filed Lundy's EEOC charge on March 18, 1988 that the advice Lippman says he provided must have been given before that date.

Furthermore, according to the letter from Lippman to Scheuer, supra, not only did Lippman and Lundy focus on Lundy's discharge, but over time they also developed the details of the attorney-client relationship between them, e.g., fee arrangements, termination possibilities, and the feasibility of a continuing relationship. The letter described a negotiated sliding scale fee arrangement. The Lippman/Scheuer letter also described the December 30, 1988 letter from Lippman to Lundy, which suggested prospective termination of their relationship. Lippman, however, concluded his letter to Scheuer, ``[W]e can continue to represent Mr. Lundy in any capacity.'' (Emphasis added).

Respondent's filings substantiate Lundy's understanding that Lippman had been his attorney. Laura Allen's April 7, 1990 affidavit rebutting OSC's assertion (Amicus Memo at 3) that Lundy had been proceeding pro se, attests that she had telephonic and written communication with Lippman's associate Nancy F. Duboise, who acted on Lundy's behalf between March 7, 1988 and June 2, 1988. Allen's statement is supported by attachments which include correspondence and checks regarding Lundy's severance pay, travel reimbursement, etc., mailed from Allen's office to Lippman's office. Allen attests also that Lundy's initial EEOC charge was notarized by Lippman's office. Allen's office also corresponded with Lippman's office regarding Lundy's continued health care coverage. I find more persuasive Allen's statement and attachments regarding Lippman's role as Lundy's legal agent during the filing period, confirming Complainant's acknowledgement of an attorney-client relationship, than I do OSC's unsupported assertion that Lundy had proceeded pro se during the filing period. Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311 (7th Cir. 1978), cert. den. 439 U.S. 955 (1978); Keoseian v. Von Kaulbach, 707 F.Supp. 150, 152 (S.D. N.Y. 1989).

The role of the Lippman law office in obtaining from OOCL outstanding employee benefits and reimbursement, filing the EEOC charge, and Lippman's posture before the Disciplinary Committee in which he did not deny but rather argued the fact of such relationship unmistakably point to an attorney-client relationship. For all the foregoing reasons, considering also the pleadings, correspondence, and documents submitted by Complainant and Respondent, I find an attorney-client relationship existed between Lundy and Lippman during the statutory filing period. The substantial consistency of the documents provided by these multiple sources, including those implicating Lippman's interests as presented to the Disciplinary Committee, buttresses this conclusion. Consistent with this finding, I reject the OSC contention that Lundy acted pro se during the statutory filing period and conclude that Lundy was represented by counsel.

Complainant is pro se on his Complaint before me. Having found, however, that he was represented during the OSC statutory filing period, even a factor such as his putative lack of legal sophistication does not entitle him to equitable tolling. Furthermore, nothing contained in his responses to Respondent's Motion for Summary Decision suggests that his tardy OSC filing was due to coercion or misinformation on Respondent's part.

6. Complainant Was Not Abandoned by Counsel

Abandonment by counsel is an exception to the rule that equitable tolling is unavailable to parties with access to an attorney. The exception is only invoked, however, upon a finding that counsel flagrantly and irresponsibly abandoned the party during the filing period. See, e.g., Burton, 612 F.Supp. at 1057 (equitable tolling allowed where filing was 14 days late because client was abandoned by his attorney who, without notification to the client, left town without filing the complaint). It follows that having found Complainant to have been represented by counsel during the time he could have timely filed his charge with OSC he is ineligible for equitable tolling unless, as he alleges, he is also found to have been abandoned by counsel. As discussed below, I conclude that no abandonment occurred in the present case.

Complainant's claim of abandonment depends on Lippman's letter of December 30, 1988 to Lundy suggesting termination of the relationship; nothing occurred prior to that date to suggest that the representation had been terminated. Even that reference, however, is not consistent with abandonment, suggesting instead that the two might sever their relationship prospectively. But an abandonment at or about the time of that letter is unavailing as a basis for

an exception to the access to counsel bar to equitable tolling. The statutory period for filing Complainant's charge with OSC ran out 180 days after March 3, 1988, i.e., August 31, 1988, four months before the first reference to a falling out between attorney and client. Whether or not Lippman represented Lundy generally or only as they might agree for specific activity, Lundy was represented by counsel throughout the substantial part of the critical 180 day period within the meaning of the cases collected at III.B.4, supra.

Lippman's letter to Scheuer suggests a retainer arrangement which might not have taken effect until there was a decision to commence a lawsuit. Nevertheless, Lippman acknowledged to the Disciplinary Committee that he had represented Lundy within four days of the discharge and continuing at least through December 1988. There is no basis on which to conclude that Lundy was abandoned by his attorney. So far as appears, any severance of the attorney-client relationship took place, if at all, not earlier than December 30, 1988, the date of Lippman's letter to Lundy, a date well beyond the 180 days authorized for an IRCA filing.

In an April 20, 1990 letter from Hal R. Lieberman, on behalf of the Disciplinary Committee, found ``no basis for taking further action'' on the malpractice and abandonment allegations. According to a July 8, 1990 letter from Lundy to Lieberman the Disciplinary Committee may have reopened the Lundy/Lippman inquiry. I do not understand, however, that the results of that inquiry, whatever the outcome, can have any impact on Lundy's IRCA claim. This is so because the documents filed by the parties make clear that an attorney-client relationship had been established which endured throughout the 180 day period and at least until December 30, 1988.

For the foregoing reasons, I am constrained by the weight of judicial authority and by the underlying principles reflected by the cases not to equitably toll the statutory filing time. This is not a case where the charge was filed shortly after expiration of that time period. Here, where the charge was filed more than a year after the alleged discriminatory discharge, 190 days after limitations expired, I hold that equitable tolling is unavailable for a complainant who was represented by counsel during the substantial part of the statutory time period.

IV. Memorandum of Understanding Unavailable

Title VII jurisprudence is replete with dual filing cases. They turn on the potential for complainants' confusion where the laws and regulations governing separate agencies implicate overlapping or similar sets of interests.

Case law in this area is inconsistent. Some allow equitable tolling for pro se complainants. EEOC v. Nicholson File Co., 408 F.Supp. 229 (D. Conn. 1976) (granted equitable tolling where plaintiff filed a sex discrimination charge with the Office of Federal Contract Compliance (OFCC) instead of the EEOC, since the OFCC simply duplicates for government contract employees the rights given employees in the private sector under EEOC jurisdiction); Morgan v. Washington Mfg. Co., 660 F.2d 710 (6th Cir. 1981) (granted equitable tolling where plaintiff timely filed a sex discrimination charge with the Wage and Hour Office of the Department of Labor instead of with the Wage and Hour Office of the EEOC, and Labor transferred the complaint to the EEOC too late); Oliver v. Nevada, 582 F.Supp. 142 (D. Nev. 1984). Others do not, Bledso v. Pilot Life Ins. Co., 602 F.2d 652 (4th Cir. 1978) (tolling denied where plaintiff timely filed with the Wage and Hour Division of the U.S. Department of Labor instead of the EEOC); Meckes, 604 F.Supp. at 598 (tolling denied where plaintiff timely filed an age discrimination charge with the OFCC when he should have filed with the EEOC, even though the OFCC used to be the proper forum for such filings).

It is significant but not controlling, that OSC and EEOC announced an interim Memorandum of Understanding (MOU) effective April 18, 1988, 53 Fed. Reg. 15904 (May 4, 1988), followed by a later text published August 8, 1989 (54 Fed. Reg. 32499). The effect of the MOU is that a filing with EEOC is understood to be a simultaneous constructive filing with OSC and vice versa. As described by OSC (Amicus Memo at 5), EEOC and OSC ``appointed each other as their respective agents to accept charges and, thereby, to toll the time limits for filing charges.'' The question arises whether this effort at ameliorating uncertainty as to the correct forum resulting from separate jurisdiction (EEOC on the one hand, and IRCA administrative law judges on the other) assists Complainant.

Equitable tolling in light of the EEOC/OSC MOU was discussed in U.S. v. Mesa, OCAHO Case No. 88200002 at 29. In Mesa I refused to rely on the interim MOU as the basis for equitable tolling because the MOU was not in effect at the time of the discrimination. Id. The pro se complainant in Mesa was granted equitable tolling on the basis of misleading statements by the employer. However, Mesa did draw some inferences from the pendency of the MOU:

> Without applying that agreement to the present case, its issuance by the agencies with which discrimination charges must be filed illuminates the very concern that ... there be no ``... loss of rights arising from the operation of a filing deadline against an individual or entity who has mistakenly filed a charge with the wrong

agency.'' [Interim MOU, supra]. The agreement confirms that the two agencies assigned to initiate antidiscrimination enforcement proceedings recognize that this is not a situation where a charging party, having selected one of mutually exclusive remedies, is penalized for having made an inappropriate choice.
Id.

OSC concedes that the MOU does not apply in the instant action:

> Mr. Lundy filed his charge with the EEOC on March 15, 1988. The first MOU was not in effect until April, 1988. Accordingly, the MOU does not apply to the filing of Lundy's charge with the EEOC.

(Amicus Memo. at 5)

OSC makes plain its view, however, that had the MOU been in place by the time of the alleged discrimination, Lundy's filing would have been deemed timely, id., at 6, in contrast to Respondent's claim that it would only have been availing had he mistakenly filed a charge with EEOC.

Respondent argues that because Complainant correctly selected EEOC as the forum for his national origin claim, prompt filing there does not cure the untimeliness of his filing his citizenship based claim with OSC a year later; therefore, the MOU cannot assist him here. (Resp. Memo in Support of Motion to Dismiss at 15). Respondent would have me conclude that the MOU is available to toll limitations only where a timely charge had mistakenly been filed in the wrong forum.

In my judgment, whether or not a charging party embraces citizenship discrimination in an EEOC filing, the effect of the MOU is that timely filing there is tantamount to timely filing with OSC; the mistake that is protected is the erroneous forum selection, not the gravamen of the charge or the artfulness by which it is expressed. The MOU, if it had been in effect, would have been available to toll limitations precisely in such a case as this one. Accordingly, I do not agree with Respondent; I reject its narrow reading of the MOU as inconsonant both with its stated purpose ``to prevent any loss of rights ..,'' 54 Fed. Reg. supra, at 32499, and with the remedial character of Section 102 of IRCA.

Moreover, I agree with OSC's discussion at pages 7-10 of its Amicus Memorandum to the effect that Complainant's filing with EEOC can be reasonably understood to have embraced citizenship as well as national origin discrimination claims. It is well settled that redress for discrimination does not turn on trifling distinctions. See e.g., Sanchez v. Standard Brands, Inc., 431 F.2d 455, 462 (5th Cir. 1970); Silver v. Mohasco Corp., 602 F.2d 1083, 1090 (2d Cir 1979), rev'd on other grounds, 447 U.S. 807 (1981); Ekunsumi v. Hyatt Regency Hotel of Cincinnati, OCAHO Case No. 89200186

(February 1, 1990) (Interim Order Granting in Part Without Prejudice and Denying in Part, Respondent's Motion to Dismiss).

It follows that once the MOU went into effect it became available to a putative discrimination victim whether the claim was filed mistakenly or otherwise in the other forum. Had the MOU been operative, according to its terms it would have been effective whether or not Lundy inartfully articulated a citizenship based claim with EEOC or filed only a claim implicating national origin discrimination. Unfortunately for Complainant, however, the MOU was not in effect when his alleged IRCA cause of action arose. In contrast to the pro se status of the aggrieved individual in Mesa, Lundy had access to counsel, as already discussed. Absent the protection of the MOU, confusion between EEOC and IRCA causes of action does not provide a basis on which to toll the statutory 180 day filing requirement.

V. Conclusion

Respondent has asserted as an affirmative defense that Complainant has failed to state a claim upon which relief can be granted. In practical terms, Respondent's Motion for Summary Decision is tantamount to an identical claim, turning on a timeliness bar to Complainant's case, and not on the merits, resulting in a failure to allege a case of action cognizable under § 1324b.

Title 28 C.F.R. § 68.1 provides that ``[T]he Rules of Civil Procedure for the District Courts of the United States shall be used as a general guideline in any situation not provided for or controlled by these rules....'' Because our rules of practice and procedure do not contain any provision for dismissal of a complaint for failure to state a claim upon which relief can be granted, it is appropriate to apply the pertinent Federal Rule. I have previously applied Federal Rule of Civil Procedure (FRCP) 12(b)(6) to a case under 8 U.S.C. § 1324b. Williamson v. Autorama, OCAHO Case No. 89200540 (May 16, 1990). Where, as here, however, affidavits and additional documents have been filed (and considered) beyond the motion for judgment on the pleadings, it remains appropriate to resolve the case on the Motion for Summary Decision, although I do not reach the merits. Preston v. United States Trust Company of New York, 394 F.2d 456 (2d Cir. 1968), cert. den. 393 U.S. 1019 (1969).

The determination that Complainant filed his charge with OSC out of time disposes of the case entirely, rendering moot any issue of fact. 8 U.S.C. § 1324b(d)(3). Accordingly, there can be no genuine issue as to any material fact, Respondent is entitled to summary decision, 28 C.F.R. § 68.36; FRCP 12(b)(6).

VI. Ultimate Findings of Fact and Conclusions of Law

I have considered the pleadings, testimony, evidence, memoranda and arguments submitted by the parties and by OSC, including Complainant's pleadings filed February 5, 1990 and July 2, 1990 in opposition to Respondent's Motion for Summary Decision. All motions and requests not previously disposed of are denied. Accordingly, and in addition to the findings and conclusions already stated, I make the following determinations, findings of fact and conclusions of law:

1. That Complainant, Anthony F. Lundy, is a citizen of the United States.

2. That Complainant, as a United States citizen is entitled, by virtue of the prohibition of 8 U.S.C. § 1324b against unfair immigration-related employment practices, to protection from citizenship status-based discrimination in discharge from employment.

3. That I have no jurisdiction under IRCA to review claims of national origin discrimination by a person or other entity, such as Respondent, which employs more than 14 employees.

4. That Complainant was discharged from his employment by Respondent, in New York City on March 3, 1988.

5. That Complainant filed his charge with the OSC on March 8, 1989, more than 180 days after the date of the alleged unlawful discrimination, i.e., 370 days after his discharge on March 3, 1988.

6. That the 180 day period is one of limitations, subject to equitable tolling, and not jurisdictional.

7. That equitable tolling is available to a charging party who acted pro se during the statutory filing period for filing of a charge, but is not available to a party who was represented by counsel during that period.

8. That Complainant was represented by counsel from at least March 7, 1988 through the remainder of the 180 day statutory period for timely filing a charge with the OSC, and until at least December 30, 1988, notwithstanding his unsupported contention that he had been abandoned by counsel.

9. That on account of representation by counsel during all but the first few days of the 180 day period, Complainant is not entitled to equitable tolling of the filing deadline.

10. That notwithstanding that OSC and the EEOC have agreed in a Memorandum of Understanding that filing in one agency is understood to be a filing in the other, Complainant is ineligible to obtain its benefit so as to toll the running of the 180 day period because that Memorandum was not yet in effect at the time of the alleged discrimination or when Complainant filed with EEOC a discrimination claim against Respondent.

11. That based on Complainant's failure to overcome the procedural hurdle of establishing his entitlement to tolling of the statutory filing deadline, the Motion for Summary Decision is granted and the complaint is dismissed.

12. That pursuant to 8 U.S.C. § 1324b(g)(1), this Decision and Order is the final administrative order in this case and ``shall be final unless appealed'' to a United States court of appeals in accordance with 8 U.S.C. § 1324b(i).

SO ORDERED.
Dated this 8th day of August, 1990.

MARVIN H. MORSE
Administrative Law Judge