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

EMIL ANIS HALIM, Complainant,	)	
v.	)	8 U.S.C. § 1324b Proceeding
	)	CASE NO. 92B00037
ACCU-LABS RESEARCH, INC., Respondent.	)	

FINAL ORDER GRANTING IN PART RESPONDENT'S MOTION TO DISMISS AND GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION

ROBERT B. SCHNEIDER, Administrative Law Judge

APPEARANCES:

EMIL ANIS HALIM, Pro Se

WILLIAM C. BERGER, Esq.
for the Respondent, Accu-Labs Research, Inc.

DATED: November 16, 1992

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I. *Statutory and Regulatory Background*

This case arises under § 102 of the Immigration Reform and Control Act of 1986 ("IRCA"), amended by the Immigration Act of 1990, 8 U.S.C. § 1324b, which provides that it 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 indivi-dual's national origin or citizenship status. Congress established this cause of action in 1986 due to concern that the employer sanctions program, codified at 8 U.S.C. § 1324a, might lead to employment discrimination against those who appear "foreign," including those who, although not citizens of the United States, are lawfully present in the country. "Joint Explanatory Statement of the Committee on Conference," H.R. CONF. REP. NO. 99-1000, 99TH Cong., 2d Sess. 87 (1986).

A "protected individual" under the statute is either a citizen or national of the United States, an alien lawfully admitted for either permanent or temporary residence, an individual admitted as a refugee, or one who has been granted asylum. 8 U.S.C. § 1324b(a)(3). A protected individual alleging discriminatory treatment on the basis of national origin or citizenship status must file his or her charge with

the Office of Special Counsel for Immigration-Related Unfair Employment Practices ("OSC") within 180 days after the unfair immigration-related employment practice occurs. 8 U.S.C. § 1324b(d)(3); 28 C.F.R. § 44.300(b). OSC is authorized to file complaints on behalf of protected individuals before administrative law judges ("ALJs") desig-nated by the Attorney General. 8 U.S.C. § 1324b(e)(2). In the event that OSC decides not to file a complaint on behalf of a private party before an ALJ, IRCA permits private actions within ninety days of the private party's receipt of notice from OSC that it will not prosecute the case. 8 U.S.C. § 1324b(d)(2); 28 C.F.R. § 44.303.

This case involves a private action brought by Emil Anis Halim, a naturalized U.S. citizen of Egyptian national origin, against Accu-Labs Research, Inc. ("Accu-Labs"), alleging national origin and citizenship status discrimination which resulted in Accu-Labs' discharge of Mr. Halim from employment as a chemist and the company's subsequent failure to rehire him to such position.

II. *Procedural History and Factual Summary*

On July 29, 1991, Emil Anis Halim, Complainant herein, filed a charge with OSC alleging that Accu-Labs, Respondent herein, unlaw-fully discriminated against him by failing to rehire him on January 22, 1991 because of his national origin and citizenship status, in violation of § 102 of IRCA, 8 U.S.C. § 1324b. Complainant asserts that he was hired by Respondent on May 30, 1989 as a chemist and that his national origin is Egyptian. Complainant admits that Accu-Labs employs 15 or more employees.

Complainant alleges that August 26, 1989, he was involved in a car accident in which he suffered a head injury and consequently, did not work for Respondent from August 28 to October 8, 1989. During this period Complainant contends that he used some of his vacation time and sick leave to cover his absences from work. Complainant asserts that he returned to work on a part-time basis from October 9 to November 16, 1989 and that after Respondent told him he was being placed on a "leave of absence," he returned to Egypt on November 16, 1989.

Complainant contends that on March 9, 1990, he returned from Egypt on March 19, 1990, he began working for Respondent on a full-time basis. Complainant further contends that although he believed that he had been on a "leave of absence," he received a letter

from Respondent indicating that he had to be rehired. Complainant alleges that approximately one month later, on April 17, 1990, he had to leave work early because he was not feeling well. Complainant asserts that the next day, he called the Assistant Supervisor to tell her that he was ill and that he might have to go back to Egypt because his aunt was ill. Complainant contends that the assistant supervisor told him that he could not do so, but she would tell Complainant's supervisor that he would not be at work that day due to illness. Complainant further contends that he was disabled during this three week absence and his doctor "had not released [him] to return to work."

Complainant asserts that on May 9, 1990, he reported back to work and met with both the supervisor and assistant supervisor who told him he was fired because of his "excessive absenteeism." Complainant asserts that he was told he would not be rehired because he had not called in to report his absences. Complainant further asserts, how-ever, that he had his supervisor's permission to leave work because he was ill.

Complainant states that he applied for unemployment benefits on May 10, 1990 and after winning his unemployment benefits appeal, he filed a charge with the Equal Employment Opportunity Commission ("EEOC") on June 19, 1990. He further states that he went to Egypt in June of 1990 to seek medical treatment and have his family members care for him. Complainant contends that he returned to this country in December of 1990. Complainant further contends that on or about January 22, 1991, he applied to Respondent for the position of chemist and was not rehired. Finally, Complainant contends that he did not file a charge with the EEOC before June 19, 1990 because he "was not mentally able to do so."

On December 3, 1991, OSC sent Complainant a certified letter notifying him that it had completed its investigation of Respondent's alleged discriminatory conduct and determined that it would not file a complaint based upon Complainant's allegations. OSC told Complainant that he could file his own complaint directly before an ALJ within 90 days of his receipt of this notification letter.

On February 18, 1992, Complainant, represented pro se, filed a complaint with the Office of the Chief Administrative Hearing Officer ("OCAHO"), alleging that on or about May 31, 1989, Respondent had fired him because of his Egyptian national origin, in violation of 8

U.S.C. § 1324b.[1] The complaint further alleges that on the date Com-plainant was fired, he worked for Respondent as a chemist, that he was qualified for the position, that after he was fired his position remained open and that Respondent continued to seek applications from individuals with Complainant's qualifications.

On March 24, 1992, Respondent filed its answer to the complaint, asserting inter alia, that I lack jurisdiction over this case because Respondent has more than 15 employees.[2] In addition, Respondent denies that Complainant is a United States citizen or of Egyptian national origin (because Respondent lacks sufficient information to know otherwise). Respondent further denies that the position former-ly held by Complainant remained open, but admits that "applicants for that position had academic credentials and/or work history comparable to [C]omplainant's." Respondent admits, however, that Complainant worked for Respondent from May 30, 1989 to April 17, 1990 as a chemist, and that Complainant's credentials qualified him for the position of chemist. Respondent argues, however, that Complainant's productivity was low. Respondent's answer also sets forth several affirmative defenses including lack of jurisdiction, legitimate business reasons for the discharge and Complainant's failure to file a timely charge with OSC.

On May 4, 1992, Respondent filed a motion to dismiss this action, asserting that (1) I lack subject matter jurisdiction to hear this case because Respondent, as an employer of more than fifteen individuals is not subject to IRCA pursuant to 8 U.S.C. § 1324b(a)(2)(b), but rather is subject to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. ("Title VII"); and (2) Complainant's charge filed with OSC was not timely because it was not filed within 180 days of the allegedly discriminatory act. 8 U.S.C. § 1324b(d)(3); 28 C.F.R. § 44.300.

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[1] The complaint is typed on OCAHO's standard form complaint which requires a complainant to fill in various blanks and to cross out items that do not apply. Complainant's allegations in his complaint differ from those made in his charge filed with OSC. In the complaint, Complainant specifically struck out citizenship discrimination as a basis for recovery, whereas in the charge, he alleged both national origin and citizenship discrimination.

[2] Respondent apparently found it unnecessary to address Complainant's allegation of citizenship discrimination in his charge because the complaint alleges only national origin discrimination.

Complainant admits that his charge that it was not timely filed. He apparently argues, however, that due to OSC's inadvertence, equitable principles should apply to toll the filing period. Complainant alleges that he called OSC and "they sent [him] - twice - an application in Spanish. [He] returned the application the third time, and was sent an application in English. Then [he] filled it out and sent it back to them." Complainant's Response 6 to ALJ's Interrogatories, filed August 19, 1992. Complainant apparently also contends that his alleged mental inability is another basis for equitable tolling.[3]

On June 8, 1992, Respondent filed a Supplemental Motion to Dismiss, which contains no additional legal arguments for dismissal but notes that Complainant has filed a charge of national origin discrimination in violation of Title VII against Respondent in U.S. District Court for the District of Colorado based upon the same facts involved in the case at bar. See Halim vs. Accu-Labs Research, Inc., U.S. District Court, Colorado, Civil Action No. 92-N-800.

Attached to the supplemental motion is a copy of the complaint filed in U.S. District Court, the "Determination" opinion of the EEOC dismissing Complainant's national origin discrimination charge against Respondent because the evidence did not establish a violation of the statute, and the decision of a referee from the State of Colorado, Division of Employment and Training, finding that Complainant was mentally unable to work between April 8, 1990 and May 9, 1990 and holding that Complainant was entitled.

On June 8, 1992, Complainant telephonically contacted this office and requested additional time to respond to Respondent's Motion to Dismiss. On June 15, 1992, I issued an order granting Complainant until on or before June 26, 1992 to file a response to both the motion to dismiss and the supplemental motion. Moreover, I specifically requested that Complainant state whether he alleges discrimination based upon his national origin, his citizenship status, or both.

[3] In an attachment to Complainant's charge filed with OSC on July 29, 1992, he asserts that he was not "able to file an EEOC charge before [June 19, 1990] because [he] was not mentally able to do so." (Emphasis added.) Because Complainant filed his charge with the EEOC in June of 1990, and the time period for filing with the EEOC is analogous to the filing period at issue, I construe the charge and the complaint to allege that Complainant was mentally unable to file a charge with OSC at a date earlier than June 19, 1990.

On June 18, 1992, Complainant filed his response to the motion to dismiss the complaint and the supplemental motion, stating that he believes Respondent discriminatorily terminated him based on his Egyptian national origin, that he was not terminated because of his absence from work, and that he was late in filing his charge with OSC "due to his absence from the United States in 1990 and 1991."

On July 6, 1992, Complainant filed his responses to interrogatories I had directed him to answer in my order of June 15, 1992, stating: (1) that he alleges both national origin and citizenship status discrimination; (2) that on May 9, 1990, the date Respondent terminated his employment, Complainant was a citizen by naturalization which he obtained November 17, 1989 in the U.S. District Court in Denver, Colorado; (3) that the alleged acts of discrimination are based on both his discharge by Respondent and Respondent's failure to rehire him; and (4) in explaining why he was late in filing his charge with OSC, Complainant stated the following: On May 9, 1990, Complainant was fired; he then was in Egypt from June 20, 1990 until December 24, 1990; before Complainant left for Egypt, he did no know that he could file a discrimination charge with OSC; Complainant immediately filed a complaint with OSC and explained why he was filing late. Complainant later stated in response to my interrogatories that he only learned that he could filed a charge with OSC on June 15 or 16, 1990 only twelve or thirteen days before the filing deadline.

On July 13, 1992 Respondent filed a response to my order of June 15, 1992, in which Respondent moved to strike Complainant's responses to my interrogatories as untimely filed. Upon full consideration, the motion to strike is denied Respondent further contends in its responses that this case should be dismissed for lack of jurisdiction as Respondent has employed fifteen or more individuals at all times pertinent to this case and therefore Respondent is not subject to my jurisdiction under IRCA. In addition, Respondent asserts that Complainant has filed a case, currently pending in U.S. district court under Title VII, apparently arguing that pursuant to 8 U.S.C. § 1324b(b)(2), the duality of national origin claims under Title VII and IRCA is prohibited.

On July 17, 1992, Complainant filed a response to Respondent's response in which he alleges that Respondent has no employees from Egypt, the "Arabic Nations" or the Middle East. Complainant also states that he worked in Respondent's "Radio-Chem Department, which has [fewer] than 15 employees," apparently to support the

argument that Respondent is an employer of between 4 and 14 employees, and thus, IRCA applies.

On July 20, 1992, Complainant filed a reply to Complainant's response in which Respondent states that the number of employees in the department in which Complainant worked is irrelevant to determining jurisdiction. Respondent further states that Complainant must elect which action he wishes to prosecute--his complaint filed with OCAHO or his Title VII action filed in U.S. District Court.

On July 31, 1992, I issued an order directing Complainant and "a physician who treated [him] during 1990 and 1991" to respond to interrogatories in order to clarify some events in the record and to assess Complainant's mental capacity from the time of the allegedly discriminatory acts until the time he filed his charge with OSC.

On August 18 and August 21, 1992, this office received two sets of responses to the interrogatories addressed to Complainant's physician. The first set of responses was from a clinical psychologist, Dennis Helffenstein, Ph.D. C.R.C., and the second set was from a physician, Kasiel Steinhardt, M.D. On August 19, 1992, Complainant filed a response to the interrogatories addressed to him.

On September 25, 1992, I issued an order notifying the parties that I had made preliminary findings that Complainant's national origin allegations would be dismissed because I lack jurisdiction over them and that Complainant's discharge claim based on citizenship status discrimination would be dismissed because it was not timely filed. With regard to the remaining claim, that Respondent failed to rehire Complainant based on citizenship status discrimination, I informed the parties that I needed additional information to determine whether there were any material facts in dispute. I further informed the parties that the order would serve as notice that this case may be decided by summary decision. I directed Respondent to file with this office by October 19, 1992 its reasons for failing to rehire Complainant, and I directed Complainant to file its response to Respondent's stated reasons by October 29, 1992.

On October 9, 1992, Respondent filed a motion for summary decision, pursuant to 28 C.F.R. § 68.38, as amended by the Interim Rule of October 3, 1991, 56 Fed. Reg. 50049 ("28 C.F.R. § 68"), with supporting affidavits for several of its arguments. First, Respondent asserts that I have no jurisdiction over a claim of citizenship status discrimination because no such claim has been made. In addition, Respondent argues that Complainant has the burden of proof and that he is unable to prove a prima facie case of discrimination

because he has admitted that there is no evidence of discrimination, and that "no one at Accu-Labs ever said of did anything which he felt was overtly discriminatory, or indirectly offensive or hostile to him." Deposition of Complainant, pp. 107-09, 128-34. Moreover, Respondent asserts that of the two employees hired after Complainant's discharge, "who would effectively be [Complainant's] replacements," one was Latvian and one was Taiwanese.

Furthermore, Respondent contends that Complainant was discharged primarily for absenteeism,[4] but also for providing Respondent with false information. [5] Moreover, Respondent contends that Complainant was not rehired on January 22, 1992 because he did not ask to be rehired on that day. Respondent further contends that even if Complainant had asked, he would not have been rehired for the same reasons he was discharged.[6] Finally, Accu-Labs renews its motion to dismiss with regard to the alleged failure to rehire based on citizenship status discrimination "for the reasons set forth in its [m]otion to [d]ismiss."

On October 29, 1992, Complainant filed a response to Respondent's motion for summary decision and to my order of September 25, 1992. In his response, Complainant contends that on May 9, 1990, when he learned from Mr. Summers that he was being discharged, he begged that he be allowed to keep his job, but Mr. Summers ignored him.

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[4] Respondent contends that Complainant took an unauthorized leave of absence for approximately three weeks and that Accu-Labs was unable to locate him during this time to discuss his absence.

[5] William Gilgren, President of Accu-Labs, declares by affidavit that before Complainant left Accu-Labs on April 17, 1990, he told a staff member of Accu-Labs that he was returning to Egypt. Both Mr. Gilgren and Harry Summers, Complainant's supervisor, contend that Complainant instead "went to New York to visit friends." Respondent's counsel cites to Exhibit C and Exhibit D in support of this contention, but these exhibits do not appear to relate to Complainant going to New York to visit friends.

[6] Respondent submits a stipulation by the parties, dated September 2, 1992, in the civil action brought by Complainant against Respondent, Civil Action No. 92-N-800, in which Complainant admits that on April 17, 1990, he did not get approval from the assistant supervisor to take two to three weeks off from work, and that he had not received approval from his supervisor, Bud Summers, to be gone for two to three weeks.

Complainant further contends that during his unemployment hearing on January 22, 1991, he asked Mr. Summers to reinstate him, but Mr. Summers refused.

Complainant maintains that he did not falsify any information to Accu-Labs and that he did not have a problem with absenteeism. Complainant argues apparently that because he had documented medical authorization from Dr. Steinhardt for the time he took off Accu-Labs and because at some point Complainant gave Respondent this documentation, Respondent has no legitimate basis for failing to rehire him due to excessive absenteeism.

Complainant states that in November of 1989, Mr. Summers granted Complainant a medical leave of absence for three months. Complainant argues that he was wrongfully rehired rather than reinstated on March 19, 1990.[7] He further argues that Respondent took advantage of his "limited knowledge of English and discriminated against [him] by not allowing him his rightful position."

Complainant also contends that when he took the three weeks of medical leave in April of 1990, it was for medical reasons only and not to visit his ailing aunt in Egypt. Complainant further contends that he felt he should make an attempt to see her, but because of his condition and the unavailability of flights, he did not go and instead used the time to "attempt to recuperate." Complainant maintains that he did not "visit" friends in New York; rather, Complainant asserts that because he could not afford a hotel, he stayed with friends while he was recuperating.

Complainant states that when he spoke to his assistant supervisor on April 18, 1990, she assured him that she would forward his call to Mr. Summers. Complainant contends that he believed that there would be no problem with his leave of absence as "the request was granted for the same reasons in the past." Complainant further contends that he was never contacted by anyone from Accu-Labs, but he has since learned that Respondent contacted his wife and she allegedly said that she did not believe that Complainant was sick or disabled. Complainant says that he and his wife were having marital problems and were not in contact with each other. Complainant

[7] Complainant claims that being rehired instead of reinstated affected his eligibility to work the day shift as well as his benefit schedule.

argues that Respondent could have reached him easily by letter, but never attempted to do so.

Finally, Complainant addresses samples that needed to be retested because of his absence from work. Complainant argues that this issue did not arise during his "first [medical leave of absence] or [his] discharge" and that the work he left was minimal, and the loss, unavoidable. Complainant concludes his response by stating that "[i]t is apparent to [him] that had [he] been born in the United States, [he] would not have been subjected to statements misconstrued on purpose to mean that [he] was lying." Complainant goes on to say that he lost his position "because of [his] origin and/or [his] physical condition."

On November 6, 1992, Respondent filed its reply in support of its motion for summary judgment.

III. *Discussion, Findings of Fact and Conclusions of Law*

Respondent has moved to dismiss the complaint for failure to state a claim upon which relief can be granted and for lack of jurisdiction. As discussed below, Complainant's discharge claim will be dismissed as will the citizenship status portion of his refusal to hire claim. Accordingly, all that will remain to be resolved by the motion for summary decision is Complainant's claim that Respondent failed to rehire him based on citizenship status discrimination.

There are three unresolved issues in this case: (1) whether I have jurisdiction over Complainant's claims; (2) if I have jurisdiction, whether there are grounds to equitably toll the statutorily-prescribed period for filing a charge with OSC; and (3) if the filing period is equitably tolled, whether Respondent's failure to rehire him was motivated by citizenship status discrimination, or whether, as alleged by Respondent, it was based on Complainant's excessive absenteeism, low productivity and three-week unauthorized absence from work.

For the purpose of Respondent's Motion to Dismiss, I must assume that the facts alleges in the complaint are true. I cannot grant the motion unless it appears beyond doubt that Complainant can recover on no set of facts consistent with his allegations. See Hishon v. King and Spalding, 467 U.S. 69, 73 (1984); Conley v. Gibson, 355 U.S. 41, 45-46 (1957). I will now address the complaint.

A. Jurisdiction Over the Allegations in the Complaint

1. Interpreting the Allegations of the Complaint

Complainant's allegations have been inconsistent throughout this case. Complainant makes different allegations in his charge filed with OSC than in his complaint filed with OCAHO, and both sets of allega-tions are different than those made in his responses to my interrogatories. Complaints of pro se complainants, however, must be liberally construed and less stringent standards must be applied than when a plaintiff is represented by counsel. See Hughes v. Rowe, 449 U.S. 5, 9 (1980) (per curiam); Haines v. Kerner, 404 U.S. 519, 520 (1972) (per curiam).

In Complainant's charge filed with OSC, he asserts that both nation-al origin and citizenship status discrimination occurred in Respondent's failure to rehire him. In his complaint filed with OCAHO, however, Complainant asserts that Respondent discriminated against him only in his discharge and based only on his national origin. In order to clarify Complainant's allegations, I asked Complainant several interrogatories. In Complainant's responses, he alleges, inter alia, that Respondent discriminated against him both in his discharge and in Respondent's failure to rehire him and that both allegedly discriminatory acts were based on national origin and citizenship discrimination.

Although Complainant's allegation in his complaint is limited to national origin discrimination in his discharge, in view of Complainant's pro se status, I will liberally construe the complaint to include both the allegation of citizenship status discrimination and the refusal to hire claim. The complaint thus alleges two claims: (1) citizenship status and national origin discrimination in Respondent's discharge of Complainant; and (2) citizenship status and national origin discrimination in Respondent's failure to rehire Complainant.

2. National Origin Portion of Both Claims Dismissed

Respondent challenges my jurisdiction over Complainant's allegations of discrimination on the ground that Respondent, as an employer of more than fourteen individuals, is not subject to IRCA. I agree with Respondent only with regard to the national origin portion of the two claims. I do not have subject matter jurisdiction over these allegations as 8 U.S.C. § 1324b(a)(2)(B) excepts from my subject matter jurisdiction national origin discrimination with respect to employers covered by § 2000e-2 of Title 42. Therefore, because Respondent employs over

fourteen individuals, these national origin discrimination allegations, are exclusively within the EEOC's jurisdiction. Furthermore, Com-plainant has already filed a charge under Title VII with the EEOC. Therefore, since the EEOC did not dismiss Complainant's charge as being outside the scope of Title VII,[8] she is prohibited from filing a charge with OSC based on the same set of facts. See 8 U.S.C. § 1324b(b)(2). The national origin portion of Complainant's discharge and refusal to rehire claims is therefore dismissed.

3. Jurisdiction Over Citizenship Status Allegations

On the other hand, IRCA empowers ALJs with subject matter jurisdiction over complaints alleging citizenship status discrimination in violation of 8 U.S.C. § 1324b(a)(1)(B), where the employer has four or more employees. Therefore, I reject Respondent's analysis of juris-diction over Complainant's citizenship status discrimination allegation, and hold that the record in this case shows that I have jurisdiction to determine whether or not Complainant was a victim of citizenship status discrimination. Before deciding these allegations on the merits, however, I must first find that they were timely filed.

B. Timeliness and Equitable Considerations

Complainant filed his charge with OSC on July 29, 1991, approximately 14 months or 425 days after his allegedly discriminatory discharge on May 9, 1990 and 181 days after Respondent's allegedly discriminatory failure to rehire him on January 22, 1991. Therefore Complainant did not comply with 8 U.S.C. § 1324b(d)(3) and 28 C.F.R. § 44.300(b) which prohibit the filing of a charge with OSC more than one hundred eighty days after the allegedly discriminatory act. Complainant admits in his charge filed with OSC that it was not filed within the requisite period. Complainant apparently contends, however, that equitable principles should apply to toll the filing period because he was "mentally unable" to file his claim any earlier. Complainant also later contends in response to my interrogatories, that he only learned that he could file a charge with OSC on July 15th or 16th of 1991 (twelve or thirteen days before the filing deadline), that he called OSC for a charge form and OSC inadvertently sent him a charge form in Spanish. See Complainant's Response 6 to ALJ's

[8] The charge was dismissed because the evidence did not establish a violation of the statute.

interrogatories, filed August 19, 1992. Complainant contends that he returned this form and OSC again sent him a form in Spanish. Id. Complainant also contends that upon finally receiving a form in English, he filled it out and sent it back to OSC. Id.

Complainant's failure to comply with the 180-day filing deadline is not dispositive of his citizenship allegations. Agency filing periods are parallel to statutes of limitations and distinct from jurisdictional bars. Zipes v. Transworld Airlines, 455 U.S. 385, 393 (1982); Martinez. v. Orr, 738 F.2d 1107, 1109 (10th Cir. 1984); U.S. v. Mesa Airlines, 1 OCAHO 74 (7/24/89) at 22. Therefore, time limits on agency filings, like statutes of limitations, are subject to waiver, estoppel, and most pertinent to the case at bar, equitable tolling. Because Complainant was late in filing his charge with OSC, he must meet the stringent requirements necessary to permit equitable tolling in order to be entitled to a hearing on the merits.

IRCA case law generally follows federal case law developed under analogous provisions of Title VII. It is well settled that equitable tolling of Title VII's filing limitations periods is an extraordinary remedy appropriate only in a narrow class of fact situations. Kocian v. Getty Refining & Marketing Co., 707 F.2d 748, 753 (3rd Cir. 1983); Mondy v. Sec. of the Army, 845 F.2d 1051, 1057 (D.C. Cir. 1988); Kerver v. Exxon Production Research Co., 40 Emp. Prac. Dec. (CCH) para. 36,172 (S.D. Tex. 1986). Complainant bears the burden of demonstrating that equitable tolling should be allowed. Jackson v. Seaboard Coast Line R.R. Co., 678 F.2d 992, 1010 (11th Cir. 1982); Hatcher-Capers v. Haley, 786 F. Supp. 1054 (D.C. 1992). The Supreme Court has noted in the context of an employment discrimination case that the periods of limitation prescribed by Congress are to be strictly applied:

> Procedural requirements established by Congress for vesting access to the federal courts are not to be disregarded by courts out of a vague sympathy for particular litigants . . . in the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law.

Baldwin County Welcome Center v. Brown, 466 U.S. 147, 152 (1984) quoting Mohasco Corp. v. Silver, 447 U.S. 807, 826 (1980); see also Earnhardt v. Comm. of Puerto Rico, 691 F.2d 69, 70-71 (1st Cir. 1982), aff'd, 744 F.2d 1 (1st Cir. 1984) (advising against judicially created generalized exceptions to Title VII's relatively short limitations periods as such practice would invite litigants with stale or dormant

claims to interrupt the measure of repose which Congress intended to provide employers).

Complainant was approximately 245 days late in filing his charge with OSC as it relates to his claim of discriminatory discharge and was one day late in filing with regard to his claim of discriminatory failure to rehire. Complainant apparently contends that IRCA's 180-day filing period should be equitably tolled because (1) he was out of the country during much of the filing period and did not know that he could file a charge with OSC until June 15 or 16, 1991; (2) Complainant was mentally unable to file the charge any earlier; and (3) OSC was at fault for inadvertently and more than once sending him charge forms in Spanish.

I will now consider the federal courts' treatment of Title VII's ana-logous limitations period for filing a charge with the EEOC and equitable considerations made with regard to timeliness.

1. Equitable Tolling Generally

The Supreme Court makes it clear in Baldwin County Welcome Center v. Brown, 466 U.S. 807, that various factors will be examined in order to determine whether a filing period under Title VII may be equitably modified. The Court set forth the following instances in which tolling may occur: (1) when a claimant has received inadequate notice; (2) where a motion for appointment of counsel is pending; (3) where the court has misled the plaintiff to believe that he or she complied with the court's requirement; or (4) where affirmative misconduct on the part of the defendant lulled the plaintiff into inaction. Furthermore, the absence of prejudice to a defendant may be considered in determining whether tolling should apply once a factor that might justify tolling is identified, but it is not an independent basis for invoking the doctrine. Brown, 466 U.S. at 151.

2. Ignorance of the Law and Pro Se Status

Complainant argues that because he was out of the country for some of the 180-day period at issue, the filing period should be equitably tolled. However, a complainant "who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence." Brown, 466 U.S. at 151. Furthermore, mere ignorance of filing requirements does not justify equitable tolling. Quina v. Owens-Coring Fiberglass Corp., 575 F.2d 1115, 1118 (5th Cir. 1978); Tillet v. Carlin, 637 F.

Supp. 245, 249 (D.Conn. 1985). Even coupled with pro se status, lack of knowledge of proper filing procedure does not entitle a complainant to an extension of time. See 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 was sufficient to automatically invoke equitable tolling of the EEOC limitations period); see also Williams v. Deloitte & Touche, 1 OCAHO 258 (11/1/90) (ALJ refused to equitably toll a pro se complainant's filing of complaint four days after expiration of the 90-day filing period).

Even where a pro se complainant is just one day late in complying with IRCA's filing periods, the ALJ need not grant equitable tolling. See Grodzki v. OOCL (USA), 1 OCAHO 295 (2/13/91) (ALJ did not extend the limitations period one day in the absence of a recognized equitable consideration). Therefore, the fact that Complainant was out of the country for part of the filing period, tantamount to his ignorance of the law, is not grounds for the equitably tolling the filing period.

3. OSC's Inadvertence as Basis for Equitable Tolling

The circumstances in this case are similar to the third basis for equitable tolling announced in Brown, "where the court has misled the plaintiff to believe that he or she complied with the court's requirements." I find that OSC misled Complainant, although inadvertently, to believe that he would be sent a charge form which he would be able to read, appropriately fill out and timely file.

Complainant acted diligently with regard to his failure to rehire claim by discovering his rights under IRCA and pursuing them by calling OSC for a charge form approximately two weeks before the filing deadline. Based on Complainant's response to my interrogatory and Respondent's failure to dispute it, I accept as true Complainant's allegations with regard to OSC and find that OSC's inadvertence is grounds for equitable tolling the filing period one day to make timely Complainant's failure to rehire claim based on citizenship status discrimination. This claim will therefore have to be resolved on the merits.

The filing of Complainant's discharge claim, however, was clearly not affected by OSC's inadvertence as that claim was filed approximately 245 days late. Thus, in order for Complainant's discharge claim to be timely, another basis for equitable tolling will have to be found.

4. Mental Incapacity As a Basis for Equitable Tolling

Although none of the other factors announced in Brown apply to Complainant's discharge claim, when an employer has not in any way been responsible for a claim having been filed late, courts consider other factors to determine whether to modify the filing requirements. The Tenth Circuit permits tolling of Title VII's time limits if a plaintiff "has in some extraordinary way been prevented from asserting his or her rights." Martinez, 738 F.2d at 1110 citing Wilkerson v. Siegfried Insurance Agency, Inc., 683 F.2d 344, 348 (10th Cir. 1982).

Although research has revealed no Tenth Circuit case law on the type of circumstances considered "extraordinary" within the meaning of Wilkerson, supra, the Second Circuit has stated that an "extraordinary" circumstance which would permit tolling of the time bar on equitable grounds might exist if the employee could show that it would have been "impossible for a reasonably prudent person to learn that his discharge was discriminatory." Miller v. Int'l Telephone & Telegraph Corp., 755 F.2d 20, 24 (2d Cir.), cert. denied, 474 U.S. 851 (1985).

In view of Complainant's contention that his filing with OSC was not timely because he "was mentally unable" to file any earlier than June 19, 1990, or even that he was mentally unable to file before July 29, 1991, the date of his filing, I must determine whether Complainant's mental inability was so extraordinary as to prevent him from asserting his rights under IRCA. Few federal courts have dealt with the issue of whether mental disability should toll the EEOC filing requirements in Title VII cases. While the Supreme Court has advised against broadening equitable modification of Title VII limitations periods, see supra Baldwin County, 466 U.S. 147, some federal courts have adopted narrow rules permitting equitable tolling for mental incapacity.

At least one federal court has ruled that mental disability will not toll the statute of limitations filing period in Title VII suits. See Steward v. Holiday Inn, Inc., 609 F. Supp. 1468 (E.D. La. 1985) (court refused to extend the doctrine of equitable tolling to cases of mental and physical incapacity). Furthermore, at least one federal court has held that in order to toll a limitations period, a plaintiff must be adjudicated mentally incompetent or be institutionalized during the filing period under a diagnosed condition or disability which rendered him of unsound mind. See Bassett v. Sterling Drug, Inc., 578 F.Supp. 1244 (S.D. Ohio 1984), appeal dismissed, 770 F.2d 165 (6th Cir. 1985)

(in order to guard against abuse, court even reserved right to deny tolling where plaintiff had been institutionalized).

Other courts reject such narrow views in light of Title VII's remedial purpose. See Llewellyn v. Celanese Corp. v. Celanese Fibers Operations, 693 F. Supp. 369, 379 (W.D.N.C. 1988); Lopez v. Citibank, 808 F.2d 905, 906 (1st Cir. 1987); Moody v. Bayliner Marine Corp., 664 F. Supp. 232, 234 (E.D.N.C. 1987). In Lopez, the court recognized that mental incapacity could operate to toll the filing period, but found that it did not do so in the case before it where plaintiff, who was suffering from mental illness during the filing period, had "presented no strong reason why, despite the assistance of counsel, he was unable to bring suit." Lopez, 808 F.2d at 907.

In Moody, 664 F. Supp. at 235, the court noted that "the period for filing a charge with the EEOC in Title VII cases may be tolled, in the discretion of the court, for that period of time which mental incapacity rendered the plaintiff incapable of pursuing remedy." The court did not allow tolling of the statute in the case before it, however, because (1) there was no improvement or significant change in plaintiff's condition between the date she was discharged from employment and the date she filed her EEOC charge challenging the discharge and (2) plaintiff had retained an attorney before the 180-day period expired. Id. at 236.

In Llewellyn, 693 F. Supp. at 379, the court held that the combination of plaintiff's mentally disabled condition and defendant's failure to post a statutorily-required notice justified tolling the statute of limitations eleven months until plaintiff first consulted her attorney and learned that she was required to file a charge with EEOC. The court's finding of mental disability was based on plaintiff's medical leave because of severe emotional and physical symptoms, her diagnosis of depression and anxiety, complicated by a seizure disorder, the variety of medications which significantly impaired her level of functioning and her doctors' focus on her seizure disorder which served to divert her attention and their attention away from the facts on which her EEOC charge was based. Id. at 379.

Under very narrow fact situations, in the discretion of the ALJ, mental incapacity may equitably toll the limitations period in IRCA cases for the period of time in which such incapacity prevented a complainant from filing a charge or complaint within the requisite period of time. The evidence before me, however, suggests that while

Complainant experiences physical pain and functioned below normal cognitively during the filing period, his doctor and neuropsychologist have stated that there was no improvement or significant change in Complainant's condition between the date he was discharged and the date he filed his charge with OSC. Furthermore, the fact that Com-plainant was mentally able to file a charge with the EEOC, while represented pro se, shows that he had the mental capacity to learn of his rights under IRCA and pursue them in a timely manner. Complainant's mental incapacity therefore was not severe enough to constitute an "extraordinary" circumstance which would justify equitable tolling the filing period. Therefore, his discharge claim based on citizenship status discrimination is dismissed.

C. Summary Decision As to Remaining Claim

All that remains in this case is Complainant's failure to rehire claim based on citizenship status discrimination. I will therefore address Respondent's motion for summary decision, filed pursuant to 28 C.F.R. § 68.38 only with regard to this claim. The parties dispute whether Complainant actually asked to be rehired on January 22, 1991. Neither party has submitted evidence supporting their arguments. Assuming, however, that Complainant did ask Respondent to hire him, I find that summary decision must be granted in favor of Respondent.

First, the record is completely devoid of evidence that Respondent discriminated against Complainant based on citizenship status. I directed Complainant several times throughout this proceeding to respond to interrogatories addressing his citizenship status discrimination allegation. Complainant, however, only described circumstances which may be relevant to his national origin discrimination allegation, over which I have no jurisdiction in this case.[9] Moreover, even after I informed the parties that Complainant's national origin allegation was dismissed, Complainant continued to argue that he was discharged "because of [his] origin and/or [his] physical condition."[10] Furthermore, Complainant has admitted that there is no evidence of

[9] Complainant states that Respondent has no employees from Egypt, the "Arabic Nations" or the Middle East.

[10] IRCA does not protect individuals against unfair employment practices related to physical disability. I therefore have no jurisdiction over such claims.

discrimination, and that "no one at Accu-Labs ever said or did anything which he felt was overtly discriminatory, or indirectly offensive or hostile to him." Deposition of Complainant, pp. 107-09, 128-34.

Second, even if Complainant had been able to prove a prima facie case of citizenship status discrimination, I find that Respondent had legitimate business reasons for refusing to rehire Complainant. Respondent has stated that its decision was based on Complainant's excessive absenteeism, low productivity and his unauthorized three week absence from work April 18 to May 8, 1990. There is strong evidence in the record that Complainant's absence from work was excessive and that his productivity was consequently low. Furthermore, Complainant admits that he took three weeks of unauthorized leave. I therefore find that Respondent's refusal to rehire Complainant was legitimate and not based on citizenship status discrimination. Accordingly, Respondent's motion for summary decision is hereby granted.

This Decision and Order is the final administrative order in this case, pursuant to 8 U.S.C. § 1324b(g)(i). Not later than 60 days after entry, Complainant may appeal this Decision and 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. 8 U.S.C. § 1324b(i)(1).

SO ORDERED.

DATED: November 16, 1992

ROBERT B. SCHNEIDER
Administrative Law Judge