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

JOAN A. LARDY,	)	
MARY A. MOORE,	)	
KAROLINA S. GANTCHAR,	)	
Complainants,	)	
	)	
v.	)	8 U.S.C. § 1324b Proceeding)
	)	OCAHO Case No. 92B00085
UNITED AIRLINES, INC.,	)	
Respondent.	)	
	)	

DECISION AND ORDER (1) DENYING RESPONDENT'S MOTION TO DISMISS FOR LACK OF JURISDICTION & FOR LACK OF TIMELINESS;
(2) GRANTING IN PART & DENYING IN PART RESPONDENT'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED;
(3) GRANTING IN PART & FINDING MOOT IN PART COMPLAINANTS' MOTION TO STRIKE CERTAIN AFFIRMATIVE DEFENSES;
(4) DENYING COMPLAINANTS' REQUEST FOR SANCTIONS; &
(5) LIFING THE DISCOVERY STAY

(January 11, 1994)

Appearances:

For the Complainant
Raymond Fay, Esq.
Susan King, Esq.
Christopher Mackeronis, Esq.
Bell, Boyd & Lloyd

For the Respondent
Michael Curley, Esq.
Robert Siegel, Esq.
Kenneth Goldberg, Esq.
O'Melveny & Myers

Before: ROBERT B. SCHNEIDER
Administrative Law Judge

TABLE OF CONTENTS

I. *Introduction*

A. Statutory Background

This case arises under § 102 of the Immigration Reform and Control Act of 1986 ("IRCA"), 8 U.S.C. § 1324b, as amended.[1] Congress enacted IRCA in an effort to control illegal immigration into the United States by eliminating job opportunities for "unauthorized aliens."[2] H.R. Rep. No. 682, Part I, 99th Cong., 2d Sess. 45-46 (1986), reprinted in 1986 U.S. Code Cong. & Admin. News 5649, 5649-50. Section 101 of IRCA, 8 U.S.C. § 1324a, thus authorizes civil and criminal penalties against employers who employ unauthorized aliens in the United States and authorizes civil penalties against employers who fail to comply with the statute's employment verification and record-keeping requirements.

---

[1] IRCA, Pub. L. No. 99-603, 100 Stat. 3359 (Nov. 6, 1986), enacted as an amendment to the Immigration and Nationality Act of 1952, was amended by the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990).

[2] An "unauthorized alien" is an alien who, with respect to employment at a particular time, is either (1) not lawfully admitted for permanent residence or (2) not authorized to be so employed by the Immigration and Nationality Act or by the Attorney General. 8 C.F.R. § 274a.1 (1993).

Congress, out of concern that IRCA's employer sanctions program might cause employers to refuse to hire individuals who look or sound foreign, including those who, although not citizens of the United States, are lawfully present in the country, included anti-discrimination provisions within the statute. "Joint Explanatory Statement of the Committee of Conference," H.R. Rep. No. 99-1000, 99th Cong., 2d Sess. 87-88 (1986), reprinted in U.S. Code Cong. & Admin. News at 5653. See generally United States v. General Dynamics Corp., 3 OCAHO 517, at 1-2 (May 6, 1993), appeal docketed, No. 93-70581 (9th Cir. July 8, 1993). These provisions, enacted at section 102 of IRCA, 8 U.S.C. § 1324b, prohibit as an "unfair immigration-related employment practice," discrimination based on national origin or citizenship status "with respect to hiring, recruitment, referral for a fee, of [an] individual for employment or the discharging of the individual from employment." 8 U.S.C. § 1324b(a)(1)(A) and (B).

IRCA prohibits national origin discrimination against any individual, other than an unauthorized alien, and prohibits citizenship status discrimination against a "protected individual," statutorily defined as a United States citizen or national, an alien, subject to certain exclusions who is lawfully admitted for permanent or temporary residence, or an individual admitted as a refugee or granted asylum. 8 U.S.C. § 1324b(a)(3). The statute prohibits citizenship status discrimination by employers of more than three employees, 8 U.S.C. § 1324b(a)(2)(A), and prohibits national origin discrimination by employers of between four and fourteen employees, 8 U.S.C. § 1324b(a)(2)(B), thus supplementing the coverage of Title VII of the Civil Rights Act of 1964 ("Title VII"), as amended, 42 U.S.C. § 2000 et seq., which prohibits national origin discrimination by employers of fifteen or more employees.

Section 102 of IRCA filled a gap in discrimination law left by the Supreme Court's decision in Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1973), in which the Court held that Title VII does not prohibit discrimination based on citizenship status or alienage. 414 U.S. at 95. The Court construed the term "national origin" as used in Title VII to refer "to the country where a person was born, or, more broadly, the country from which his or her ancestors came." Id. at 88. Based upon this definition, the Court held that national origin discrimination does not encompass discrimination solely based on an individual's citizenship status. Id. at 95; see Fortino v. Quasar Co., 950 F.2d 389 (7th Cir. 1991) (a treaty-sanctioned preference for Japanese citizens was not actionable under Title VII as national origin discrimination); Novak v. World Bank, 20 Empl. Prac. Dec. (CCH) ¶ 30,021 (D.D.C.

1979) (plaintiff's allegation of discrimination based on his U.S. citizenship posed a "reverse Espinoza" problem and was barred under Title VII because "'national origin' does not include mere citizenship"). The Court, however, recognized that "there may be many situations where discrimination on the basis of citizenship would have the effect of discriminating on the basis of national origin." Id. at 92.

While IRCA's purpose was to combat discrimination based on a person's "immigration (non-citizen) status," H.R. Rep. No. 682, Part 2, 99th Cong., 2d Sess., 13 (1986), "[t]he bill also makes clear that U.S. citizens can challenge discriminatory hiring practices based on citizen or non-citizen status. H.R. Rep. No. 682, Part 1 at 70.[3]

Individuals alleging discriminatory treatment on the basis of national origin or citizenship status must file a charge with the United States Department of Justice, Office of the Special Counsel for Immigration-Related Unfair Employment Practices ("OSC"). OSC is authorized to file complaints on behalf of such individuals before administrative law judges designated by the Attorney General. 8 U.S.C. § 1324b(d)(1), (e)(2). The Special Counsel investigates each charge and within 120 days of receiving it determines whether "there is reasonable cause to believe that the charge is true and whether . . . to bring a complaint with respect to the charge before an administrative law judge." 8 U.S.C. § 1324b(d)(1). If the Special Counsel decides not to file such a complaint within the 120-day period, the Special Counsel notifies the charging party of such determination and the charging party, subject to the time limitations of 8 U.S.C. § 1324b(d)(3), may file a complaint directly before an administrative law judge within 90 days of receipt of the Special Counsel's determination letter. 8 U.S.C. § 1324b(d)(2).

B. This Case

Complainants Joan A. Lardy, Mary A. Moore and Karolina S. Gantchar, each of whom is a United States citizen and former flight attendant with Pan American World Airways, Inc. ("Pan Am"), most

[3] See General Dynamics, 3 OCAHO 517, at 20 (asserting that the individuals against whom the respondent allegedly discriminated, as U.S. citizens, were protected against citizenship status discrimination); United States v. McDonnell Douglas Corp., 2 OCAHO 351, at 9 (July 2, 1991) (stating that IRCA protects native-born American citizens despite that fact that they were not the Act's primary target for protection); Jones v. DeWitt Nursing Home, 1 OCAHO 189, at 8 (June 29, 1990) (recognizing a U.S. citizen's standing to sue under section 102 of IRCA).

recently at its London-Heathrow base in England, have filed a complaint of citizenship status discrimination, in violation of IRCA, 8 U.S.C. § 1324b, against United Air Lines, Inc. ("United"), based on United's decisions not to retain, transfer or hire them for flight attendant positions following United's purchase of Pan Am's London routes, air services and operations in late 1990.[4]

II. *Procdural Summary*

Currently before me are (1) Respondent's Motion to Dismiss the Complaint For Lack of Jurisdiction and For Failure to State a Claim Upon Which Relief Can Be Granted,[5] filed pursuant to 28 C.F.R. §§

---

[4] Complainants purport to bring a class action on behalf of themselves and 170 other former Pan Am flight attendants who allegedly are "similarly situated" as "virtually all . . . were either United States [c]itizens or green-card holders," whom United did not hire for flight attendant positions. Compl. ¶ 5. Complainants assert that "[t]he class is approximately one-half of the 395 Pan Am flight attendants stationed at the Heathrow base," many of whom "were Americans by both birth and citizenship." Complainants' Supplemental Brief Re: Motion to Lift at 4. Complainants contend that this class was "not required to have British working papers pursuant to arrangements approved by the British Home Office, which regulated immigration in the United Kingdom." Id.; see Lardy Decl., Ex. G.

Respondent's records indicate, however, that it declined to hire about 93 of 320 former Pan Am flight attendants who applied for positions at London-Heathrow, and of those 93, about 60 have already signed a settlement and general release agreement, releasing any and all claims against United--including discrimination claims brought underU.S. law--as a result of negotiations between United and counsel for their former union, the Independent Union of Flight Attendants ("IUFA"). Answer ¶ 9; George Decl. ¶ 5; Boyle Decl. ¶ 7. In this settlement and general release agreement, which arises out of complaints brought in the United Kingdom covering the application of the British Transfer of Undertakings (Protection of Employment) Regulations of 1981 to the former Pan Am flight attendants, United denied and made no admission of liability or wrongdoing. Id. In exchange, the flight attendants were offered an interview with United and a cash settlement of between $500 and $3500, depending on how long the flight attendant had worked for Pan Am. Complainants' Supplemental Brief in Support of Motion to Lift at 10 n.9 (citing Lardy Decl. ¶ 17).

Although Complainants have argued their case as a class action, they have at no point moved for class certification. Complainants assert that they will file an appropriate motion after the jurisdictional and timeliness issues are resolved. Id. at 2 n.1.

[5] Complainants assert that Respondent's "motion is akin to a motion brought under Rule 12(b)(6) of the Federal Rules of Civil Procedure which has been converted into a motion for summary judgment under Rule 56 because evidence outside the pleadings is relied upon in support of the motion." Complainants' Motion to Lift at 3. I disagree with Complainants, however, and view this motion as a motion to dismiss.

68.10 and 68.11 (1993);[6] (2) Complainants' Motion to Strike Certain Affirmative Defenses; and (3) Complainants' Motion for Sanctions.

Complainants initiated the proceedings in this case on September 25, 1991 when each filed a charge pro se with OSC, alleging that United had unlawfully discriminated against her based on her U.S. citizenship.[7] Complaint, Ex. 2 [each Complainants' individual charge form]; see Lardy Decl. ¶ 9; Moore Decl. ¶¶ 4-6; Gantchar Decl. ¶¶ 4-5. Each charge form indicates the date the Complainant began employment with Pan Am and states that the date of termination was April 3, 1991. See Complaint, Ex. 2. Each form then states: "She was terminated upon transfer of Pan Am route sale to United Airlines. Her position was replaced by a D-1 applicant."[8] Id. OSC investigated Complainants' charges, after which the Special Counsel notified Complainants in a letter dated January 24, 1992 that OSC had "no jurisdiction over . . . Complainants' allegation of citizenship status discrimination" and therefore would not file a complaint on their

---

[6] References to "28 C.F.R. § 68" are to the Rules of Practice and Procedure for Administrative Hearings Before Administrative Law Judges in Cases Involving Allegations of Unlawful Employment of Aliens and Unfair Immigration-Related Employment Practices.

[7] On September 23, l99l, Complainants visited the Department of Justice's Immigration & Naturalization Service ("INS") office in New York and met with special agent, John Woods, to discuss their concerns regarding United's refusal to transfer or hire them. Gantchar Decl. ¶ 4.Complainants informed him of their allegations that "United was discriminating against the former Pan American flight attendants, all of whom were U.S. citizens or green-card holders, because [Respondent] wanted to hire European flight attendants in an attempt to impress European customers." Gantchar Decl. ¶ 4; accord Lardy Decl. ¶ 9; Moore Decl. ¶ 4. After hearing their story, agent Woods referred Complainants to Bruce Lupion, Chief Legal Counsel of the New York INS office. Complainants met with Lupion on September 23, 1991 and repeated their allegations. Moore Decl. ¶ 5. Mr. Lupion called OSC in Washington, D.C. and spoke with attorney David Palmer. Moore Decl. ¶ 5. On September 24, 1991, Complainants returned to the INS office where Lupion arranged for Complainants to speak with Palmer by telephone. Id. at 6. Moore, on behalf of the Complainants, told Palmer "that United was hiring foreign nationals and that we were losing our jobs as a result." Id. Palmer indicated that Complainants should file complaints that morning and that an immediate investigation of United's actions and hiring policies would follow. Id.

[8] D-1 nonimmigrant visas are available for "alien crewm[e]n serving in good faith as such in a capacity required for normal operation and service on board a vessel . . . or aircraft, who intend[] to land temporarily and solely in pursuit of [their] calling as . . . crewm[e]n and to depart from the United States with the vessel or aircraft on which [they] arrived or some other vessel or aircraft." 8 U.S.C. § 1101(a)(15)(D)(i).

behalf. Complaint ¶ 30; see id. at Ex. 3 [OSC's determination letter to Lardy].[9]

After Complainants received OSC's determination letters, they obtained counsel. Complainants' Memorandum in Response to Respondent's Reply Memorandum at 3 (citing Lardy Decl. ¶ 9, Moore Decl. ¶¶ 4-6 and Gantchar Decl. ¶¶ 4-5). Pursuing their right to bring a private action under 8 U.S.C. § 1324b(d)(2), Complainants filed a complaint on April 23, 1992 with the U.S. Department of Justice, Office of the Chief Administrative Hearing Officer ("OCAHO") within 90 days of the date they received OSC's determination letters.[10] On January 11, 1993, Complainants filed an amended complaint, in which they added the allegation of retaliation--which they had alleged merely as an act in the original complaint (see Original Complaint ¶ 29)--as a separate count in their amended complaint, pursuant to my Order of September 3, 1992. More specifically, Complainants allege that:

---

[9] All three Complainants have filed various charges arising out of United's refusal to hire or transfer them for the positions at issue in numerous forums. In addition to their charges of citizenship discrimination alleged in this action, Complainants have filed charges of national origin, age, sex and disability discrimination and charges of retaliation with the EEOC, the Office of Federal Contract Compliance, and the New York State Human RightsDivision. Lardy and Gantchar filed national origin and age discrimination charges as well as charges of retaliation with the EEOC on December 19, 1991 and January 3, 1992, respectively. Sawyer Decl. 4, Appendix 1 [EEOC Charge Nos. 160920721 and 160920714]. In addition, Moore and Lardy filed charges with the New York State Human Rights Division on April 23, 1991 and Gantchar did so on September 20, 1991. Sawyer Decl. ¶ 4, Appendix 2 (Case Nos. 1A-E-AD-91-2300242, 1A-E-ADO-91-2300241-A and 1A-E-ANO-91-2300767-A,respectively). Claims based on the same facts were filed on Complainants' behalf before the Industrial Tribunal in London, and the High Court of Justice, Chancery Division, C.H. 1991 G. No. 2740, in London. Sawyer Decl. ¶ 4, Appendix 2. The London High Court litigation was a class action brought on behalf of all former Pan Am flight attendants based in London-Heathrow, which alleged that United was obligated under English law to hire all former Pan Am flight attendants. That action was dismissed by stipulated consent order. Lardy also filed a claim on November 3, 1991 before the New York Workers' Compensation Board. Sawyer Decl. ¶ 4, Appendix 5.

[10] On January 11, 1993, Linda Walker, Susan Sutherland, Jurian Vreeburg, Hannelore Hainke, Helena Farquharson, Carolyn Harmar, and Carol Vieux, through the same counsel that represent Complainants in the instant case, filed a complaint against United, asserting that United's decision not to hire them as flight attendants violated IRCA's prohibition against citizenship status discrimination, based on substantially the same facts as the instant case. Walker, et. al. v. United Airlines, Inc., OCAHO Case No. 92B00004. On that same date, the Complainants filed a motion to consolidate Walker and the instant case or, in the alternative, to assign the case to me as a related case. Walker was assigned to me and I subsequently granted a motion filed by Respondent to stay all proceedings in that case pending resolution of Respondent's Motion to Dismiss in the instant case.

> United . . . has retaliated against Complainants, and others similarly situated, in violation of 8 U.S.C. § 1324b(a)(5) by (a) refusing to include Complainants in any settlement negotiations regarding all claims asserted by certain former Pan Am flight attendants, including, but not limited to, their claims before the High Court and the Industrial Tribunal in the United Kingdom regarding United's refusal to comply with the Transfer of Undertakings (Protection of Employment) Regulations 1981, and (b) treating them less favorably in the employment and settlement process than those who did not engage in protected legal activity under . . . [IRCA].

Complainants' First Amended Complaint ("Compl.") at ¶ 35.

Based on the allegations in the complaint, Complainants seek: (1) an injunction restraining United from discriminating against the Complainants and others similarly situated on the basis of citizenship status, in violation of IRCA; (2) an order compelling United to reemploy or hire Complainants, and others similarly situated, to full employment status in flight attendant positions, to allow them to continue employment on nondiscriminatory terms and conditions with respect to citizenship in the same or comparable positions as Complainants held immediately before their termination of employment, and to allow them full and continued participation in the applicable employee benefit plans and seniority systems; and (3) back pay, seniority, plus interest from the date when any amount became due; (4) an order compelling United to pay a civil penalty of $2000.00 for each individual it discriminated against; and (5) attorney fees.

Respondent has moved to dismiss this case on three alternative grounds, asserting: (1) that IRCA's antidiscrimination provisions do not apply extraterritorially, thus depriving me of subject matter jurisdiction over Complainants' claim; (2) that Complainants' filing of charges of discrimination with the EEOC and other agencies charged with investigating and determining charges of discrimination under the Age Discrimination in Employment Act ("ADEA"), Title VII of the Civil Rights Act and state antidiscrimination laws also deprives me of jurisdiction; and (3) that Complainants' charges were untimely because they were filed more than 180 days after the allegedly discriminatory act occurred. Respondent seeks reasonable attorney fees incurred in defending this action.

In support of its motion to dismiss, Respondent has submitted a Memorandum of Points and Authorities in Support of Respondent's Motion (1) to Dismiss Complaint For Lack of Jurisdiction and For Failure to State a Claim Upon Which Relief Can Be Granted; (2) To Stay All Discovery, and Respondent's Date For Filing an Answer and Other Pleadings, Pending Resolution of Motion to Dismiss; and (3) For Attorney Fees ("Respondent's Mot. to Dismiss") and the supporting

sworn declaration of United's Senior Vice President of Human Resources, Paul G. George ("George Decl.") and the supporting sworn declaration of United's Assistant General Counsel, Stephen P. Sawyer ("Sawyer Decl.") with an appendix; Respondent's Opposition to Complainants' Motion to Lift Discovery Stay and Compel Filing of Answer and Request For Attorney Fees ("Respondent's Opp. to Compls.' Mot. to Lift") with supporting sworn declarations of United's Manager of Flight Attendant Employment, Raymond E. Boyle ("Boyle Decl."); United's Director of Employee Relations Inflight, Frank Colosi ("Colosi Decl."); a supporting sworn declaration with an exhibit of United's then-counsel for this case, Craig A. Horowitz ("Horowitz Decl.") and a second sworn declaration of United's Senior Vice President of Human Resources, Paul G. George ("George Decl.2") with an exhibit. Respondent has also filed Respondent's Opposition to Complainants' Brief: (1) Regarding Propriety of Class and (2) Regarding Discovery Stay ("Respondent's Opp. to Compls.' Br. Re: Class and Disc. Stay"); a reply memorandum of points and authorities in support of its motion to dismiss ("Respondent's Reply"), with corrections filed January 13, 1993 and the supporting affidavits of Respondent's counsel, Michael A. Curley ("Curley Aff.") and Robert A. Siegel ("Siegel Aff."), United's Manager of Flight Attendant Employment, Raymond E. Boyle ("Boyle Aff.") and United's Manager of Advance Scheduling Operations Inflight Services, Richard E. Sebastian ("Sebastian Aff."); Respondent's Response to Complainants' Sur-Reply in Connection with Respondent's Motion to Dismiss ("Respondent's Response"); and Respondent's Supplemental Memorandum in Support of its Motion to Dismiss (Respondent's Supp. Mem.") with the second supporting affidavit of United's counsel, Michael A. Curley ("Curley Aff.2") and Respondent's Responses to Interrogatories, filed November 26, 1993.

In opposition to Respondent's Motion to Dismiss or in part relevant to that motion, Complainants have filed a memorandum in support of their motion to lift the discovery stay and compel filing of an answer ("Compls.' Mem. Re: Mot. to Lift"); a Supplemental Brief of Complainants in Support of their Motion to Lift the Discovery Stay with exhibits[11] ("Compls.' Supp. Brief Re: Mot. to Lift") and the supporting sworn declarations with exhibits of Complainant Lardy ("Lardy Decl."), Complainant Gantchar ("Gantchar Decl.") Complainant Moore ("Moore Decl.") and Complainants' counsel Raymond C. Fay ("Fay Decl."); a Reply Memorandum in Support of Complainants'

[11] Complainants filed an original on July 15, 1992 and a corrected copy with incomplete exhibits on July 24, 1992. This decision refers to the July 24 brief and the July 15 exhibits.

Motion to Lift the Discovery Stay ("Compls.' Reply Re: Mot. to Lift"); a Memorandum in Opposition to Respondent's Motion to Dismiss (Compls.' Opp. to Mot. to Dismiss") with exhibits and the supporting sworn declarations of former Pan Am flight attendant, Linda S. Walker ("Walker Decl."), Complainants' counsel, Susan King ("King Decl."), and a second sworn declaration of Complainant Gantchar ("Gantchar Decl.2") with an exhibit; a Motion of Complainants For Leave To File a Brief in Response to Reply Memorandum of Points and Authorities in Support of Respondent's Motion to Dismiss Complaint For Lack of Jurisdiction (Compls.' Mot. For Leave"); a Supplemental Memorandum in Opposition to Respondent's Motion to Dismiss ("Compls.' Supp. Opp.") and the second supporting sworn declarations of Complainants' counsel, Susan King ("King Decl.2") and the second sworn declaration of former Pan Am flight attendant Linda S. Walker ("Walker Decl.2"); an addendum to Complainants' Supp. Mem. in Opp. ("Compls.' Supp. Opp. Addendum"); and Complainants' Response to United's Letter of December 2, 1993, with the supporting sworn declaration of Complainants' counsel, Christopher G. Mackaronis ("Mackaronis Decl.").

I also found helpful in resolving the motion to dismiss the Responses to Complainants' Depositions on Written Questions to (1) Raymond E. Boyle, United's Manager of Flight Attendant Employment, who was generally responsible for recruitment and selection of flight attendants domestically and worldwide, ("Boyle Dep."), (2) John Kurnick, United's Staff Representative for personnel, in late 1990 and early 1991, ("Kurnick Dep.") and (3) Deanna Popowcer, United's Employment Representative in late 1990 and early 1991, who was responsible for interviewing applicants for flight attendant positions ("Popowcer Dep.") attached as Exhibits A, B and C to Complainants' motion to compel Respondent to provide full and adequate answers to the questions set forth in Complainant's Depositions on Written Questions of those individuals, filed January 7, 1993.

Complainants have had an opportunity to conduct extensive discovery on the issues of jurisdiction, whether Complainants have made a claim upon which relief can be granted, and timeliness and both parties have submitted numerous detailed and lengthy briefs on these issues. Briefs have also been submitted in support of Complainants' Motion to Strike Certain Affirmative Defenses ("Compls.' Mot. to Strike") and Complainants' Motion for Sanctions ("Compls.' Mot. for Sanctions").

III. *Statement of Facts*

Each of the Complainants is a U.S. citizen (Compl. ¶¶ 6-8) and former Pan Am flight attendant or flight purser whose work most recently was based out of Pan Am's London operations center at London-Heathrow Airport and who worked flights between Europe and the United States. (Compl. ¶ 5). Complainants began employment with Pan Am as follows: Lardy on May 8, 1957, Gantchar on February 26, 1968 and Moore on September 5, 1979. During the course of their careers with Pan Am, Complainants Lardy and Gantchar were based in New York, San Francisco, Los Angeles, and London. (Compl.¶¶ 6, 8.) During Complainant Moore's career with Pan Am, she was based in those cities as well as Miami. (Compl. ¶ 7.) Lardy speaks French, Spanish and English (Compl. ¶ 6); Moore speaks those languages in addition to Italian (Compl. ¶ 7); and Gantchar speaks Russian and English (Compl. ¶ 8).

United, a Delaware corporation with its corporate headquarters and principal place of business located in Elk Grove Village, Illinois, is engaged in the business of transporting passengers and freight by air both domestically and internationally. United employs over 80,000 employees in the United States and abroad. (Answer ¶ 3). Central management and administrative decisions, including those relating to employment, are made at United's headquarters. (Id.) Respondent interviews candidates for positions abroad at various locations overseas, and makes its hiring decisions based on those interviews at its headquarters. (Id.)

United flight attendants who fly domestically within the U.S. or to or from the U.S. are employed pursuant to the Railway Labor Act ("R.A."), 45 U.S.C. § 151 et seq. (1993), and the terms and conditions of their employment are governed by the collective bargaining agreement between United and the Association of Flight Attendants ("AFA"). Irrespective of seniority, only those qualified in terms of U.S. immigration laws are permitted to transfer to a U.S. base. (Answer ¶ 25.) On or about November 14, 1990, United agreed to buy Pan Am route authority and other assets at London-Heathrow Airport. (Answer ¶ 10.) In January 1991, United sent a management team to London to discuss employment of Pan Am's employees and to organize a flight attendant base for United in London. (Compl. ¶ 12.) In late January and February of 1991, United accepted employment applications from Pan Am flight attendants who wanted to apply for positions with United. (Answer ¶ 12.)

Between approximately February 1 and 11, 1991, United interviewed the London-based Pan Am flight attendants who had applied for flight attendant positions with United. (Answer ¶¶ 13-14). The Pan Am flight attendants were informed that if they were unavailable to interview in London, they could arrange to be interviewed in the United States. (Compl. ¶ 14). United later interviewed a few applicants in the United States. (Answer ¶ 14.)

Complainants Gantchar, Lardy and Moore were interviewed in London by representatives from United's Illinois headquarters, and in the latter two cases representatives from other U.S. cities as well, on February 6, 7 and 13, 1991, respectively. (Lardy Decl. ¶ 2; Answer ¶¶ 18, 20.) As part of the interview process, each of the Complainants was required to fill out United's standard application form which asked the applicant for his or her "home base location preferred" and if he or she was "willing to relocate for employment" subject to any restrictions. (Compl. ¶¶ 15, 18, 20). Complainants Gantchar and Moore indicated on their applications that they preferred London as a home base and that they were willing to relocate for employment. See attachments to Respondent's Response to ALJ's Interrogatories, filed November 29, 1993 [Gantchar and Moore's applications]. Complainant Lardy indicated on her job application that she preferred a home base of London and that she would be willing to relocate only to France. King. Decl., Ex. F [Lardy's application].

Complainants assert that "[d]uring [Lardy's] personal interview she was told that United could not guarantee that any position she was offered would be for the London base." (Compl. ¶ 15.) In addition, Moore states that during her interview process she was told that United could not guarantee where she would be based: it could be London or the United States. (Moore Decl. ¶ 2.) Respondent disputes that any United representative told Moore that she could be located in London or the United States. See Boyle Dep. at 20, 22 (Boyle states that he interviewed Complainant Gantchar and that he does "not recall discussing [during the interview] the location of her domicile in the event of her hiring by United" and is "certain" that they did not discuss the possibility of Gantchar being hired for any position other than the London domicile).

Moore completed her physical during the week of February 17, 1991. (Moore Decl. ¶ 2.) During the week of February 14, 1991, Lardy completed United's pre-employment physical. (Lardy Decl. ¶ 2.) At the conclusion of her physical, the doctor told her that she had passed. (Id.) By a letter dated February 15, 1991, United informed Lardy that its

interview team had recommended her for a flight attendant position and that she would receive an offer of employment subject to certain conditions including: (1) that there would be flight attendant vacancies at the London base following the award of transfers to United flight attendants and (2) that she satisfactorily completed the United pre-employment physical. (Compl. ¶ 16; Lardy Decl. ¶ 3; see id. at Ex. A [recommendation letter]).

In March of 1991, Lardy telephoned United's Training Center in Chicago to find out her training date and was told that she was not on the list of persons to be trained. (Lardy Decl. ¶ 4.) After Lardy asked for the reason, she was told that the information was confidential. Lardy then asked to speak to United's Vice-President for Inflight Services, but her request was refused. (Id.) By a letter dated March 13, 1991, United informed Lardy that "we have reviewed your application and have concluded we have other candidates who more closely meet our selection criteria for the Flight Attendant position." (Compl.¶ 17; Lardy Decl. ¶ 5; see id. at Ex. B [rejection letter].). Lardy asserts that she received that letter on March 30, 1991. Lardy Decl. ¶ 5.

On April 1, 1991, Lardy wrote to Paul George, Senior Vice President of Human Resources at United in which she asked "if the letter [dated March 13] from United Airlines is a denial, as I do not understand what it means." (Lardy Decl. ¶ 6, Ex. C.) On or about April 16, 1991, Respondent mailed a letter to Lardy, clarifying that she had not been selected for a Flight Attendant position and indicating that it would not inform her of the "specific reasons for her non-selection" because "all assessment data . . . remain confidential." (Lardy Decl. ¶ 7; see id. at Ex. D [clarification letter].)

Also by letters dated March 13, 1991, United informed Gantchar and Moore that "[w]e have reviewed your application and have concluded we have other candidates who more closely meet our selection criteria for the Flight Attendant position." (Compl. ¶¶ 19, 21; Gantchar Decl., Ex. A [rejection letter]; Moore Decl., Ex. A [same].) Gantchar states that she received her letter on March 30, 1991. (Gantchar Decl. ¶ 3; see id. at Ex. B [a redacted copy of a page from Gantchar's personal diary, on which she wrote that she had received the letter on March 30, 1991.) Moore states that she received her letter on March 29, 1991. (Moore Decl. ¶ 3.) The record indicates that Moore maintained the envelope in which the letter arrived, and that she wrote the date of receipt, March 29, 1991, upon the envelope at the time of receipt. Id. at Ex. B [a copy of the envelope, with "March 29, 1991" written on it]. Moore states that

she did so in accordance with her practice to mark envelopes of important mail with the date of receipt. Moore's Decl. ¶ 3.[12]

United asserts that it did not hire Lardy because she failed the medical examination required of all flight attendant applicants due to "a severe back problem which had required her to take a 15-month leave of absence from Pan Am." (Boyle Decl. ¶ 8; Answer ¶¶ 17, 44.) United asserts that it did not hire Gantchar or Moore because they failed the personal interview due to a confrontational attitude in addition to the former's poor interpersonal skills and haughtiness and the latter's poor communication skills. (Answer ¶¶ 45-46.)

On or about April 3, 1991, United commenced its operations on the London route purchased from Pan Am. (Compl. ¶ 10.) On that date, each of the Complainants was furloughed from Pan Am's London operations center as a result of United's refusal to retain, transfer or hire her. (Compl. ¶¶ 6-8.)

Since United's purchase of the London base, it has awarded transfers to approximately 170 incumbent United flight attendants to work out of its London base and hired approximately 227 former Pan Am flight attendants (or approximately 71% of those who applied) (Answer ¶ 23; Boyle Decl. ¶ 5), approximately 78% of whom were United States citizens. (Answer ¶ 47; see Compls.' Supp. Br. Re: Mot. to Lift at 8 (citing Fay Decl. Ex. H at 6) [stating that United currently has a total of 212 flight attendants from Pan Am of whom 166, or approximately 78%, are U.S. citizens.]) It is undisputed that all of the Pan Am applicants whom United hired, except for one (see infra note 13), were hired for positions in London. Respondent's Supp. Mem. at 3; Respondent's Reply Mem. at 14.

United then advertised for applicants for flight attendant positions at the London base (see Complaint ¶ 23, Ex. 1 [advertisements]; Answer ¶ 23), and locally hired approximately 441 additional flight attendants in London, the majority of whom were not U.S. citizens or permanent residents (Answer ¶ 11), and some of whom had no previous flight attendant experience. (Answer ¶ 23.)

Of United's scheduled flights for London-based flight attendants from April 1991 through October 1992, almost 47% were from the London to

---

[12] While each Complainant asserts that she received her rejection letter from United on either March 29 or March 30, Respondent asserts that she must have received it earlier. See discussion infra at section IV(A)(2)(b).

the U.S. or from the U.S. to London. Joint Stipulation Regarding Discovery in Connection With Respondent's Motion to Dismiss, filed January 25, 1993, ("Joint Stipulation"), ¶ 1. On a weighted average, these flights constituted almost 84% of the paid flight time of those flight attendants. Id. at ¶ 2. Of all the scheduled flights for United's London-based flight attendants, 53% involved flying between two points in Europe and thus had no contact with the United States. Joint Stipulation, ¶ 1; Sebastian Aff. ¶ 3. Approximately 44% of the total involved flights to or from London and approximately 9% of the total involved flights between two European cities other than London. Joint Stipulation, ¶ 1. On a weighted average, these flights constituted approximately 16% of the flight attendants' paid flight time. Id. at ¶ 2. Of that 16%, approximately 13% involved flights to or from London and approximately 3% involved flights between two European cities other than London. Id.

Also from April, 1991 through October, 1992, United's London-based flight attendants were scheduled on 34 "dead-heading" flight segments between two United States cities--that is, flying as a passenger to another city to fly a service flight from that destination city back to London. Joint Stipulation ¶ 3; Sebastian Aff. ¶ 4. Those dead-heading flights account for 23% of the total flight segments scheduled, and .14% of the total pay hours for London-based flight attendants. Joint Stipulation, ¶ 3. Other than these dead-heading flights, there were no scheduled intra-U.S.flights by United London-based flight attendants during the period referenced above. Id.

IV. *Discussion*

A. Respondent's Motion to Dismiss For Lack of Jurisdiction & Lack of Timeliness is Denied

1. I Have Subject Matter Jurisdiction Over This Claim

Complainants, as U.S. citizens, are "protected individuals" under 8 U.S.C. § 1324b(a)(3)(A), and thus have standing to bring a claim of citizenship status discrimination under IRCA. My jurisdiction over claims of citizenship status discrimination extends to employers of four or more employees. See 8 U.S.C. § 1324b(a)(2)(A) (exempting employers of three or fewer employees from IRCA's prohibition of discrimination based on national origin or citizenship status). It is undisputed that at the time of the allegedly discriminatory conduct, United employed and continues to employ four or more employees. United thus admits that it is subject to IRCA with respect to jobs based

in the United States. Answer ¶ 3. United argues, however, that it is not subject to IRCA with respect to jobs based outside the United States, like the flight attendant positions at issue in this case. United argues that because these jobs were based in London, IRCA's application to the challenged decisions requires that the statute apply extraterritorially. United then contends that IRCA does not apply extraterritorially, and thus I do not have subject matter jurisdiction over Complainants' claim.[13]

---

[13] If Respondent had considered Complainants for U.S.-based positions, the employment decisions at issue would clearly be covered by § 1324b. Complainants contend that at the time of their interviews, "it was entirely possible that any job offered to them would be in the United States." Compls.' Opp. to Mot. to Dismiss at 14-15; see Moore Decl. ¶ 2 (asserting that Moore was told at her interview that she was not guaranteed a position in London); Complaint ¶ 15 (same re: Lardy); see also Compls.' Opp. to Mot. to Dismiss at 15 (Complainants assert that this is consistent with United's Railway Labor Act contract with the Association of Flight Attendants which "provides that United 'may assign the most junior flight attendant qualified, to fill [a domicile] vacancy.'"). Furthermore, the sales agreement between Pan Am and United indicates that United may have considered Complainants for positions based in the United States as it provides that United in its hiring of former Pan Am flight attendants "will give first priority to Buyer's language-qualified London-based flight attendants but with no guarantee as to their United domicile assignment"). Walker Decl.2, Ex. A at 80 (the Agreement of Sale with Pan Am, dated November 14, 1990). Complainants assert that "[t]his contractual term is consistent with . . . the terms of the United employment application" and "a January 1991 'Hotline Message' from Pan Am to the Complainants and others indicating that there was 'no guarantees to their United domicile assignment.'" Compls.' Supp. Opp. at 5-6; Walker Decl.2, Ex. B.

Complainants have established that "the application process for Pan Am flight attendants encompassed United's U.S., as well as London, domiciles." Compls.' Response to United's Letter of December 2, 1993, at 2; see Mackaronis Decl., Ex. A at 2 (a memorandum, dated February 14, 1991, issued by United Vice President of Inflight Service, Sara Fields, indicating that in order to be considered for vacancies in the United States, the Pan Am applicants need only "indicate their interest during their interview."); see also Mackaronis Decl., Ex. B (a United document confirming that the London interviews were intended to include Pan Am applicants seeking U.S. domicile assignments).

Complainants have thus established that it was possible that United would consider them for positions in the United States. All former Pan Am flight attendants hired by United in early 1991, however, were hired for London-based positions. Boyle Aff. ¶ 4; see Lardy Decl., Ex. A (the letter which United sent Lardy, informing her that United's interview team had recommended her for a flight attendant position at its "London-Heathrow domicile," subject to several conditions, including that there would be vacancies at the London-Heathrow domicile and that Lardy would pass the pre-employment physical). While one former Pan Am flight attendant who was offered a London-based position "[e]lected to wait for domestic class," see Mackaronis Decl., Ex. E, Complainants have failed to establish that any of them were considered for a flight

(continued...)

Complainants have two main arguments regarding why extraterritoriality is not an issue in this case. First, they argue that a weighing of "all relevant factors" indicates that jurisdiction belongs in the United States. Next, Complainants contend that the issue of extraterritoriality has not been triggered because United's London-based flight attendant positions are within the scope of "employment" covered by § 1324b. In the alternative, Complainants argue that even if IRCA needs to reach extraterritorially to cover the challenged decisions, IRCA does so. I conclude, based on the following, that Complainants have stated a claim under 8 U.S.C. § 1324b and that IRCA need not apply extraterritorially to reach the challenged decisions.

a. This Case Does Not Present an Issue of Extraterritoriality

i. Respondent Argues That Complainants Seek Extraterritorial Application of IRCA and That the Statute Does Not So Apply

Respondent argues that 8 U.S.C § 1324b does not apply to its decisions not to hire Complainants for London-based flight attendant positions because Congress did not intend for IRCA's antidiscrimination provision to apply extraterritorially. "Extraterritoriality is essentially, and in common sense, a jurisdictional concept concerning the authority of a nation to adjudicate the rights of particular parties and to establish the norms of conduct applicable to events or persons outside its border." Environmental Defense Fund v. Massey, 986 F.2d 528, 530 (D.C. Cir. 1993). More specifically, the principle of extraterritoriality provides that "[r]ules of United States statutory law, whether prescribed by federal or state authority, apply only to conduct occurring within, or having effect within, the territory of the United States." Id. (quoting Restatement (Second) of Foreign Relations Law of the United States § 38 (1965) and Restatement (Third) of Foreign Relations Law of the United States § 403, Com. (g) (1987)).

There is no IRCA case law that addresses whether IRCA applies extraterritorially or that sets forth the factors which trigger the issue of extraterritoriality. Furthermore, in general, there is a lack of clarity as to the facts which give rise to an extraterritorial case. See Independent Union of Flight Attendants v. Pan Am, 923 F.2d 678, 685 n.1 (9th Cir. 1991) (J. Nelson, dissent) ("Extraterritoriality is

---

[13](...continued)
attendant position based anywhere other than London. I therefore conclude that the record establishes that Complainants were considered only for London-based positions.

admittedly one of the looser concepts. As the jurisprudence in this field suggests, the decision whether to label a case 'extraterritorial' is far from clear-cut.").

To support its theory that IRCA's antidiscrimination provisions do not apply extraterritorially, Respondent relies on EEOC v. Arabian American Oil Co. ("Aramco"), 499 U.S. 244, 111 S.Ct. 1227 (1991) (superseded by § 109 of the Civil Rights Act of 1991, Pub. L. 102-166 (1991)), in which a naturalized U.S. citizen was hired in Houston, Texas in 1979 as an engineer for Aramco Service Co. ("ASC"), a Delaware corporation with its principal place of business in Houston. In 1980, plaintiff was transferred to work for Arabian American Oil Company ("ARAMCO"), ASC's parent, a Delaware corporation which is licensed to do business in Texas and has its principal place of business in Dhahran, Saudi Arabia. In 1984, while still working in Saudia Arabia, plaintiff was discharged. He then filed Title VII claims against both ARAMCO and ASC alleging employment discrimination. The defendants moved to dismiss the case for lack of subject matter jurisdiction.

The Supreme Court in Aramco affirmed the court of appeals' decision that the district court lacked subject matter jurisdiction. 111 S.Ct. 1227, 1236. The Court stated that the task before it in determining whether Title VII applied extraterritorially was "a matter of statutory construction." Id. at 1230. The Court noted that it is a longstanding principle of statutory construction that "legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." Id. at 1229 (1991); see Foley Bros., Inc. v. Filardo, 336 U.S. at 285 (1949) (laws generally apply only in those geographical areas or territories subject to the legislative control of the United States, absent Congress' affirmative intent to the contrary). The Court had previously found that Congress could manifest its intent to apply a statute beyond the territorial borders of the United States without expressly so stating. See, e.g., Steele v. Bulova Watch Co., 344 U.S. 280, 286-87 (1952) (relying on "broad jurisdictional grant" to find intention that Lanham Trade-Mark Act of 1946 ("Lanham Act") applies abroad to cover trademark infringement by an American citizen doing business in Mexico, where Congress had not expressly stated that it intended to cover extraterritorial activity).

In Aramco, however, the Court transformed this presumption against extraterritoriality "unless a contrary intent appears" into a presumption against extraterritoriality "unless there is 'the affirmative intention of the Congress clearly expressed.'" Aramco, 111 S.Ct. at

1230 (quoting Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138, 147 (1957)). Relying on the lack of a clear showing in the statute that Congress specifically intended Title VII to apply extraterritorially, the Court held that Title VII did not apply "extraterritorially to regulate the employment practices of United States employers who employ United States citizens abroad."[14] Id. at 1229, 1234. The Court stated that other factors which supported its conclusion included Congress' failure "to provide any mechanism for overseas enforcement of Title VII," id., and the "difficult issues of international law [which would have arisen] by imposing this country's employment-discrimination regime upon foreign corporations operating in foreign commerce." Id. at 1234.

Respondent contends that because in the instant case none of the relevant facts relating to Complainants' allegations of discrimination occurred in the United States, Complainants are seeking extraterritorial application of IRCA. Respondent's Reply at 11. Respondent asserts that "the locus of [the] duties and . . . job location are controlling with regard to the issue of whether an employment law is being applied extraterritorially." Respondent's Supp. Mem. at 5. Respondent further asserts that because "[i]n the airline industry, it is plainly the domicile which defines the locus of employment," the fact that the flight attendant positions at issue had a London domicile disposes of this case. Respondent's Reply at 10. Respondent contends that the weighted average statistics indicating that 84% of time on the job of United's London-based flight attendants is spent working on

[14] In response to the Supreme Court's decision in Aramco, Congress passed section 109 of the Civil Rights Act of 1991, Pub. L. No. 102-166 (1991), which amended Title VII and the Americans with Disabilities Act, by extending their protection to U.S. citizens working overseas for U.S. employers. Section 109(a) of the 1991 Act adds to the end of the definition of the term "employee" (statutorily defined at 42 U.S.C. § 2000e(f) as "an individual employed by an employer . . .,") "[w]ith respect to employment in a foreign country, such term includes an individual who is a citizen of the United States." Section 109(b) provides an exemption for otherwise unlawful employer actions if compliancewith Title VII would violate the laws of the foreign country in which the workplace is located. Section 109(c)(1) sets forth the circumstances under which a foreign corporation's relationship to a U.S. company renders the employees of the foreign corporation subject to Title VII protection, creating a presumption that a violation of these sections of Title VII by a foreign corporation controlled by an American employer is a violation of Title VII by the American employer. Whether an employer controls a corporation is determined by four common law agency requirements enumerated at section 109(3)(A), (B), (C) and (D): the interrelation of the operations of the business, whether they have common management, whether there is centralized control of labor relations, and whether there is common ownership or financial control of the employer and the corporation. Finally, section 109(c) states that the amendments of section 109 do not apply retroactively.

flights between the U.S. and London prove only that intercontinental flights take longer than intra-European flights. Respondent's Reply at 13. Respondent further contends that "[w]here the majority of . . . work[] time [for a position] is spent in the air over the ocean [as in the instant case], there is an even stronger logical basis for looking to the . . . domicile or work station in determining whether [a complainant] is seeking extraterritorial application." Respondent's Reply at 13-14.

ii. Complainants Contend That They Are Not Seeking Extra-territorial Application of IRCA

Complainants agree that Aramco affirms the general proposition that statutes are presumed to not apply extraterritorially and concede that if they have requested extraterritorial application of IRCA, I must follow the test set forth in Aramco to determine whether Congress intended IRCA to apply extraterritorially. Complainants contend, however, that the overwhelming and fundamental factual distinctions between Aramco and the instant case render Aramco inapposite. Complainants assert that these differences include the fact that an overwhelming majority of time on the job for United's London-based flight attendants involves working on flights departing from the United States or with a United States destination, in contrast to the Aramco plaintiff who "remained with [ARAMCO] in Saudi Arabia until he was discharged in 1984." 111 S.Ct. at 1230. Moreover, Complainants assert that the allegedly discriminatory decisions challenged in this action were made in the United States, in contrast to Aramco where the alleged discriminatory conduct was "the discriminatory treatment which [the plaintiff] allegedly received while in Saudia Arabia from his Aramco supervisor." Boureslan v. Aramco, 857 F.2d 1014, 1016 (5th Cir. 1988), aff'd, 892 F.2d 1271 (5th Cir. 1990) (en banc), aff'd sub nom. EEOC v. Arabian American Oil, 111 S.Ct. 1227 (1991).

Complainants thus assert that applying IRCA to "the decisions of an American corporation made in the United States regarding the employment of U.S. citizens for ambulatory jobs in which 85% of the paid time is spent in transit to [or from] the United States is simply not an 'extraterritorial' application of law." Compls.' Supp. Opp. at 4; see generally Compls.' Opp. to Mot. to Dismiss at 1; Compls.' Supp. Opp. at 1-2. The issue before me thus is whether IRCA, in order to reach United's nonselection of Complainants for the flight attendant positions at issue, must apply extraterritorially, and if so, whether IRCA so applies.

Complainants agree with Respondent that the situs of the job at issue in a case is relevant to the determination of whether an employment discrimination law needs to reach extraterritorially to apply to an employment decision regarding that job. See Compls.' Opp. to Mot. to Dismiss at 13 (citing Lopez v. Pan Am World Services, Inc., 813 F.2d 1118, 1120 (llth Cir. 1987) (holding that the ADEA did not apply to a U.S. company's nonselection of the plaintiff for a position in Venezuela, even though the plaintiff's interview and the company's hiring decision both were in the U.S., since the location of the employee's work station is controlling)); see also Pfeiffer v. Wm. Wrigley Jr. Co., 755 F.2d 554, 559 (7th Cir. 1985) (holding that although both the employee and employer were American, the ADEA (before it was amended to apply extraterritorially) did not apply because the employee had a foreign work station).

Complainants disagree with Respondent, however, as to the facts regarding the situs of the work of United's flight attendants which are relevant to determining whether IRCA needs to reach extraterritorially to apply to the challenged decisions. Complainants contend that "where the complainant's employment is ambulatory and [a majority of time on the job is spent] traveling to (or from) the United States," the "base" of employment is not determinative. Compls.' Opp. to Mot. to Dismiss at 19. Complainants assert that "in each instance (both before and after Aramco) in which a court has been asked to determine whether it has jurisdiction over employment-related claims of individuals who travel to and from the United States as part of their employment, the court has found that it does." Compls.' Opp. to Mot. to Dismiss at 6 (citing EEOC v. Bermuda Star Line, Inc., 744 F. Supp. 1109 (M.D. Fla. 1990); EEOC Decision 77-1, EEOC Decision [CCH] ¶ 6557 at 4362 (1976)). Relying primarily on the first cited case, Complainants assert that because the work station in this case is not fixed, I must consider several factors to determine jurisdiction and that by doing so, I will conclude that this is not an extraterritorial case. In the alternative, Complainants, relying primarily on the second cited case, assert that because the positions at issue involve "employment in the United States," this case does not present an issue of extraterritoriality.

A. Complainants Assert That I Must Weigh and Balance All Relevant Factors

Complainants assert that in "the rare instances, such as [those present in the case at bar], where the location of employment cannot be fixed by reference to an office or work station at a fixed geographic

location," Compls.' Opp. to Mot. to Dismiss at 8-9, it is appropriate to "weigh[] and balance . . . all relevant factors," in order to determine whether there is jurisdiction. Id. at 11. Complainants contend that the relevant factors are: (1) the type of work performed by the flight attendants; (2) the overwhelming number of U.S. flights and the relative proportion of time spent working on them; (3) the undisputed applicability of other U.S. law and U.S. labor contracts; (4) United's insistence before the British High Court that British law regarding the terms and conditions of employment is inapplicable;[15] (5) the

---

[15] Complainants have argued that United should be estopped from arguing against IRCA's extraterritorial reach in the instant case because United has argued in proceedings before the High Court in England that the Railway Labor Act ("R.A."), 45 U.S.C. § 151 et seq., governs certain aspects of United's treatment of its London-based flight attendants. Compls.' Opp. to Mot. to Dismiss at 4-5.

In early 1991, the former Pan Am flight attendants (including Complainants), represented by their Pan Am union, brought a claim before the British High Court of Justice seeking to apply the British Transfer of Undertakings law to the transfer of Pan Am's route authority to United to the exclusion of the R.A. and the collective bargaining agreement between United and its flight attendant union. Under this law, United would be required to transfer all of the London-based Pan Am employees to United employment. Through an affidavit of Paul G. George, United's Senior Vice President of Human Resources, United opposed the application of the Transfer of Undertakings to the Pan Am flight attendants arguing that the flight attendants' "employment is subject to United States federal law" (Lardy Decl., Ex. F, ¶ 18 at 9), and therefore the British courts did not have jurisdiction to apply British law. The British court never resolved the issue of whether the R.A. or English law applied, since the matter was settled before trial. Respondent's Reply at 5 (citing Siegel Aff. ¶ 3).

The R.A. by its terms applies to common carriers by air engaged in commerce between the United States and a foreign country. 45 U.S.C. ¶¶ 151, 181; see also Local 553, Transp. Workers Union of America, AFL-CIO v. Eastern Air Lines, Inc., 544 F. Supp. 1315, 1322-23 n.1 (E.D.N.Y.), aff'd, 695 F.2d 668 (2d Cir. 1982). All terms and conditions of employment of United flight attendants, including those based in London and Paris, are governed by the R.A. and the collective bargaining agreement between United and the Association of Flight Attendants ("AFA") under the R.A.. Lardy Decl., Ex. F at 7.

Section 1324b, unlike Title VII and the R.A., does not apply to terms (or conditions) of employment; rather, § 1324b(a)(1) makes clear that IRCA's antidiscrimination provisions apply only to the hiring, recruitment or referral for a fee of an individual for employment or discharge of an individual from employment. Prieto v. News World Communications, Inc., 1 OCAHO 177, at 4-5 (May 23, 1990), amended on other grounds, 1 OCAHO 178 (May 24, 1990); Fayyaz v. The Sheraton Corp., 1 OCAHO 152, at 5 (April 10, 1990), amended on other grounds, 1 OCAHO 153 (April 11, 1990). United, however, in a notice sent to United flight attendants transferring to the airline's new Paris base, recently stated that U.S. law governs not only the terms and conditions of employment but any grievance related to the employment of United's foreign-based flight attendants:

(continued...)

undisputed location of the challenged decisions; (6) United's incorporation in the United States; (7) the extent of United's business in the United States; (8) the inevitable need to transfer from London along with the unrestricted right to do so at any time after hire (depending on contractual seniority);[16] and (9) alleged statements made to the Complainants that United could not promise them that they would be based in London. Compls.' Opp. to Mot. to Dismiss at 19-20.

In support of this theory, Complainants rely on the rationale underlying a Title VII maritime cases involving a foreign-flagged ship, EEOC v. Bermuda Star Line, Inc., 744 F. Supp. 1109 (M.D. Fla. 1990), in which the court, drawing upon precedent under the Jones Act, 46 U.S.C. § 688, reviewed several factors to determine jurisdiction. In Bermuda Star, a U.S. citizen had applied for a seaman position on a foreign-flagged cruise liner that was docked in a Florida port. The plaintiff had called the cruise line's office in Miami and was told that because she was female, her employment application could not be accepted. The defendant, citing the circuit court's decision in Boureslan v. Arabian American Oil Co., 892 F.2d 1271 (5th Cir. 1990) (en banc), argued that the EEOC did not have jurisdiction over the charges because Title VII did not apply extraterritorially. The court, however, concluded that the case was "not really an extraterritorial application case, as all allegations against the defendant concern activities which occurred in U.S. territory." 744 F. Supp. at 1110.

The court in Bermuda Star distinguished a Title VII maritime case from a Jones Act case, stating that "in Title VII maritime cases, the ['place of the wrongful act'] merits considerable weight." 744 F. Supp. at 1111. The court also concluded that the fact that the plaintiff was a U.S. resident and citizen and the fact that "defendant's base of

---

[15](...continued)

[T]ransferring flight attendants' employment terms will be governed exclusively by the applicable United States law, including the Railway Labor Act, and jurisdiction over any and all grievances, charges, claims, disputes, and lawsuits regarding or in any way related to their employment shall be vested exclusively in the AFA-United grievance procedure and board of adjustment or in courts of competent jurisdiction of the United States and the State of Illinois where such is permitted by the Railway Labor Act and the AFA.

Moore Decl., Ex. F.

[16] The applicable collective bargaining agreement allows for transfer only if (1) the flight attendant has been at his or her domicile for at least six months; (2) the flight attendant has the necessary level of seniority; and (3) there is a vacancy at another domicile. (Boyle Aff. ¶ 4.)

operations is the United States" were significant. Id. at 1112-13. In addition, the court concluded that under the facts of the case, the other factors deserved little weight. Id. at 1113. Based on the U.S. weight of the factors it considered relevant, the court held that there was subject matter jurisdiction over the plaintiff's Title VII claim.

Complainants also point to another Title VII maritime case, EEOC v. Kloster Cruise Ltd., 939 F.2d 920 (11th Cir. 1991), in which the court of appeals reversed the district court's denial of the plaintiffs' Application for an Order to Show Cause Why an Administrative Subpoena Should Not Be Enforced and stated that the district court had prematurely decided that Title VII did not cover the plaintiffs' employment discrimination claims. 939 F.2d at 924 n.5. Where the charging parties, as part of the crew of a cruise ship which would begin its weekly trip in Miami and continue at various ports of call through out the Caribbean, actually worked both in the United States and elsewhere, the court stated that when it would reach the issue of whether Title VII covers the employment discrimination claim before it, "the issue will be whether the situs of employment for employees aboard foreign flag vessels is 'abroad' or extraterritorial as contemplated by [Aramco]." Id.

Both Bermuda Star and Kloster Cruise drew (or indicated that they would draw) upon precedent established by Lauritzen v. Larsen, 345 U.S. 571 (1953) and expanded by Hellenic Lines, Limited v. Rhoditis, 398 U.S. 306 (1970) in which the Supreme Court used a "choice of law" approach to determine whether an injured seaman canrecover damages for personal injury sustained in maritime service under the Jones Act. Rhoditis, adding an eighth factor to the seven established by Lauritzen, looked at the following: (1) place of the wrongful act; (2) law of the flag; (3) allegiance or domicile of injured; (4) allegiance of the defendant shipowner; (5) place of contract; (6) inaccessibility of foreign forum; (7) law of the forum; and (8) whether the defendant has substantial and continuing contacts with the United States. Bermuda Star, 744 F. Supp. at 1111-13; Kloster, 939 F.2d at 923-24.

United contends that Complainants' reliance on Rhoditis and Lauritzen, which use a choice of law approach, is inappropriate because those cases both involve the issue of whether an injured seaman can recover damages for personal injury under the Jones Act, not whether an antidiscrimination statute's provisions apply to jobs based overseas. This argument is not persuasive, however, as Complainants relied on Bermuda Star and Kloster, both of which are Title VII maritime cases which applied (or as indicated, would apply) those factors developed

under the Jones Act which the court found (or would find) relevant to determining whether the plaintiff sought to apply Title VII extraterritorially.

United further contends that the multi-part test set forth in Bermuda Star and Kloster to determine whether a shipowner is an employer for Jones Act purposes does not apply to the airline industry, given that well settled principles governing international aviation differ from those governing shipping. Respondent's Opp. to Compls.' Br. Re: Class Discovery at 35 n.18 (citing Restatement (Third) § 512 at 40 [discussing the right of foreign ships to enter a sovereign's territorial waters and noting that the principles are different from those governing the right to enter sovereign airspace]). Respondent's argument is not persuasive as the issue in the instant case is not international principles of sovereignty of airspace and territorial waters, but whether a U.S. law applies. Moreover, Complainants do not assert that the seven-part test established in Jones Act cases and used in Title VII maritime cases applies to the airline industry; rather, they contend that it is logical to apply an evaluation of "all relevant factors" to the facts of this case. In support of their theory is the fact that at least some U.S. laws, including immigration laws, treat shipping and aviation together. See Compls.' Supp. Opp. at 16 n.7 (citing 8 U.S.C. §§ 1281, 1282 (treating together alien crewmen of aircraft and ships)). Moreover, it is undisputed that some U.S. laws, like the Railway Labor Act, apply to United's London-based flight attendant positions.

Respondent asserts that Complainants' reliance on Bermuda Star is misplaced because the plaintiff in that case "applied for and was refused employment in the United States" unlike Complainants in the instant case who applied and interviewed overseas, for jobs based overseas. I find Respondent's focus on the situs of Complainants' application and interviews to be misguided because even though Complainants applied for flight attendant positions in London, they were given the opportunity to apply and interview in the United States (as some former Pan Am flight attendants did.) See Answer ¶ 14. In addition, Complainants, like the Bermuda Star plaintiffs, were refused employment in the United States as United made the challenged decisions in the United States. I conclude, however, that a multi-factor test is inappropriate to determine jurisdiction in this case because, as discussed infra at section IV(A)(1)(a)(iii), United's London-based flight attendant positions constitute "employment in the United States" under IRCA.

B. Complainants Assert That The Positions At Issue Constitute "Employment in the United States"

As an alternative to the multi-factor test, Complainants, relying on EEOC Decision 77-1, EEOC Decisions (CCH) ¶ 6557 at 4362 (1976) and pointing to dictum in Wolf v. J.I. Case Co., 617 F. Supp. 858, 863 (E.D. Wis. 1985), argue that while the situs of the work duties involved in a job directly relate to whether an anti-discrimination law needs to reach extraterritorially to apply to a claim regarding that position, cases in which the work station is a fixed location are distinguishable from the instant case where the work station--an airplane--is ambulatory. Thus, Complainants contend that "the technical designation of a 'domicile' is legally irrelevant for IRCA purposes," as a flight attendant's 'base' bears no relationship to the location at which a flight attendant's job duties are actually performed, ie., [her] 'work station.'" Compls.' Opp. to Mot. to Dismiss at 12; Compls.' Reply Mem. Re: Mot. to Lift at at 9 n.6.

Complainants rely on EEOC Decision 77-1, EEOC Decisions (CCH) ¶ 6557 at 4362, in which the EEOC, without discussing principles of extraterritoriality, found that a Canadian citizen and resident who worked as a brakeman-conductor on round-trips from several points in Canada to three states within the United States was an "employee" within the meaning of § 701(f) of Title VII "because he worked within the United States in the employ of a United States company." Compls.' Opp. to Mot. to Dismiss at 6; Compls.' Supp. Br. Re: Mot. to Lift at 11. Respondent argues that Complainants' reliance on EEOC Decision 77-1 is misplaced as the Supreme Court in Aramco discounted prior EEOC interpretations of the extraterritorial reach of Title VII on the ground that "the EEOC interpretation is insufficiently weighty to overcome the presumption against extraterritorial application." Aramco, 111 S.Ct. at 1235. Respondent's argument is not persuasive, however, because Title VI did not need to reach extraterritorially to apply to the plaintiff's claim in EEOC Decision 77-1, as he was an "employee" under the statutory definition.

Complainants also point to Wolf v. J.I. Case Co., 617 F. Supp. 858 at 863, in which the court held that the employee's work station was controlling on the question of whether he sought extraterritorial application of the ADEA even though he had substantial contacts in the U.S. and even though his contract called for him to return to the U.S., where (1) he had spent only 17 days in the U.S. during the last four years of his employment, (2) his business visits concerned his employer's European operations, and (3) with the exception of

occasional business trips to the United States, he performed his employment duties continuously abroad. The court distinguished the plaintiff's employment from that of an "'ambulatory' job, such as an airline pilot, bus driver or tour director where workweek employment may occur both within and outside the United States." 617 F. Supp. at 862 (citing Pfeiffer, 755 F.2d at 558). Furthermore, the court noted that "[s]uch jobs, in given circumstances, might present true cases of dual foreign and United States employment subject to ADEA protection." 617 F. Supp. at 862.

iii. The Positions At Issue Constitute "Employment" As That Term is Used In § 1324b

Like EEOC Decision 77-1, which did not present an issue of extraterritoriality, extraterritoriality is not an issue in the instant case because I conclude, as discussed below, that United's London-based flight attendant positions come within the definition of "employment" as Congress intended that term to be used in IRCA's antidiscrimination provisions. Congress explicitly stated in the statute that IRCA's antidiscrimination provisions, § 1324b, cover "employment"[17] and that its sanctions provisions, § 1324a, cover "employment in the United States."[18] Despite the difference in statutory language indicating that

---

[17] The prohibitions of § 102 read as follows:

> (1) GENERAL RULE. It is an unfair immigration-related employment practice for a person or other entity to discriminate against any individual (other than an unauthorized alien . . .) with respect to the hiring, or recruitment or referral for a fee, of the individual for employment or the discharging of the individual from employment--
>
> (A) because of such individual's national origin, or
>
> (B) in the case of a protected individual (as defined in paragraph (3)), because of such individual's citizenship status.

8 U.S.C. § 1324b(a)(1) (emphasis added).

[18] Section 101 of IRCA provides in pertinent part:

> (1) IN GENERAL. It is unlawful for a person or other entity--
>
> (A) to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien (as defined in subsection (h)(3) with respect to such employment, or

(continued...)

§ 1324b, by covering "employment" could have a broader scope than § 1324a's coverage of "employment in the United States," I conclude, based on IRCA's legislative history and the statute's structure that Congress was concerned in both provisions only with employment within the territorial boundaries of the United States, and thus this difference in language is inconsequential.

The legislative history indicates that Congress, concerned with "secur[ing] our borders" from the unlawful entry of unauthorized aliens, established IRCA's sanctions provision in order to have employers share the burden by making employment opportunities in the United States unavailable to undocumented aliens. H.R. No. 99-682(I) at 5650. Congress enacted IRCA's antidiscrimination provisions based on concern that some employers' fear of sanctions would result in employment discrimination against those who "appear 'foreign,' whether by name, race or accent." Anti-Discrimination Provision of H.R. 3080: Joint Hearing Before the House Subcomm. on Immigration, Refugees and International Law and the Senate Subcomm. on Immigration and Refugee Policy, 99th Cong., 1st Sess. 111 (1985) (Testimony of Rep. Robert Garcia (N.Y.)) (quoted in H.R. Rep. No. 682, 99th Cong., 2d Sess., pt. 1, at 68, reprinted in 1986 U.S. Code Cong. & Admin. News 5840. 5672; see H.R. Rep. No. 99-682(I) at 5650 (the House Judiciary Committee expressed concern that "failure to control our borders could lead to increasing resentment against the continued admission of lawful immigrants and refugees.").

The House Judiciary Committee believed that every effort had to "be taken to minimize the potentiality of discrimination and that a mechanism to remedy any discrimination that does occur must be a part of this legislation." H.R. No. 99-682(I) at 5672; see H.R. Rep. No. 682(II), at 12 (Congress realized that "if there is to be sanction enforcement and liability there must be an equally strong and readily available remedy if resulting employment discrimination occurs.").

---

[18](...continued)

> (B)(i) to hire for employment in the United States an individual without complying with the requirements of subsection (b) . . . ..
>
> (2) CONTINUING EMPLOYMENT. It is unlawful for a person or other entity, after hiring an alien for employment in accordance with paragraph (1), to continue to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment.

8 U.S.C. § 1324a(a)(1) and (2) (emphasis added).

IRCA's antidiscrimination provisions thus are a "complement to the sanctions provision and must be considered in this context." H.R. Conf. Rep. No. 1000, 99th Cong., 2d Sess., at 87 (1986), reprinted in 1986 U.S. Code Cong. & Admin. News 5840.

Evidence that Congress intended "employment" in § 1324b to have the same meaning as "employment" in § 1324a is the fact that § 1324b is structured to cover employment discrimination that occurs only while IRCA's sanctions provisions are in force. See 8 U.S.C. § 1324b(k)(1) (stating that § 1324b does not apply to discrimination that occurs after the date § 1324a is terminated if § 1324a is terminated under 8 U.S.C. § 1324a(l)). In addition, § 1324b was designed to terminate if, among other things, it was found that the implementation of IRCA's sanctions provisions did not cause discrimination. See 8 U.S.C. § 1324b(k)(2) (stating that the provisions of § 1324b would have terminated 30 calendar days after the last GAO Report required under § 1324a(l) if (1) the Comptroller General had reported that (a) no significant discrimination had resulted, against citizens or nationals of the United States or against any eligible workers seeking employment, from the implementation of § 1324a, or (b) such section had created an unreasonable burden on employers hiring such workers; and in addition to either of the above, there had been enacted within such period of 30 calendar days, a joint resolution stating in substance that the Congress approved the findings of the Comptroller General contained in such report).[19]

---

[19] Section 1324a(j)(1) required the General Accounting Office ("GAO") to submit three annual reports to Congress concerning problems with IRCA's implementation. The GAO's report was to address (1) whether IRCA's provisions had been carried out satisfactorily; (2) whether IRCA caused a pattern of discrimination; and (3) whether IRCA created an unreasonable regulatory burden on employers. 8 U.S.C. § 1324a(j)(1).

Section 1324a(l) provides that the provisions of § 1324a:

> shall terminate 30 calendar days after receipt of the last [GAO] report required to be transmitted under subsection (j) of this section, if--
>
> (A) the Comptroller General determines, and so reports in such report, that a widespread pattern of discrimination has resulted against citizens or national or the United States or against eligible workers seeking employment solely from the implementation of the section; and
>
> (B) there is enacted, within such period of 30 calendar days, a joint resolution stating in substance that the Congress approves the findings of the Comptroller General contained in such report.

(continued...)

Furthermore, "it is not proper to confine interpretation to the one section to be construed." Sutherland, Statutory Construction at § 46.05 (5th ed. 1993); see also Hammontree v. National Labor Relations Board, 925 F.2d 1486 (D.C. Cir. 1991) (statutes should be harmoniously construed if reasonably possible); Commissioner of Internal Revenue v. Estate of Ridgway, 291 F.2d 257 (3d Cir. 1961) ("[T]he need for uniformity becomes . . . imperative where the same word or term is used in different statutory sections that are similar in purpose and content . . . .").

Therefore, it is clear that Congress intended for IRCA's antidiscrimination provisions to cover the scope of "employment" covered by § 1324a. But cf. General Dynamics, 3 OCAHO 517 at 21-24 (§ 1324b applied to General Dynamics' use of contract labor where General Dynamics was an "employer" of the contract laborers under common law agency principles, even though contract labor is not covered under § 1324a, except for § 1324a(a)(4), under which "[a] person or other entity who uses a contract, subcontract, or exchange . . . to obtain the labor of an alien in the United States knowing that the alien is an unauthorized alien . . . shall be considered to have hired an alien" in violation of the prohibition of § 1324a(a)(1)(A) against knowingly hiring an unauthorized alien). Thus, IRCA's anti-discrimination provisions cover only "employment in the United States."

Congress, however, did not indicate whether positions like those at issue constitute "employment in the United States" as Congress failed

---

[19](...continued)
In its third and final report, the GAO reported that IRCA's provisions had been carried out satisfactorily and IRCA had not created an unreasonable regulatory burden on employers. However, the report also found that IRCA had caused widespread discrimination. U.S. General Accounting Office, Report to the Congress Immigration Reform: Employer Sanctions and the Question of Discrimination, at 3 GAO/GGD-90-62 (March 1990) ("GAO Report"). The GAO Report found that among the most common forms of discrimination was an employer's demand for more or different documents than are required to satisfy 8 U.S.C. § 1324a. GAO Report at 53, 59. After reviewing the GAO Report and a report by a task force established by the Attorney General, Congress addressed this problem by passing the Immigration Act of 1990 ("IMMACT"). IMMACT's section 535 addressed one of the problems identified by the GAO Report. See 8 U.S.C. § 1324b(a)(6) (making it an unlawful immigration-related employment practice for an employer to ask for more or different documents that are required under 8 U.S.C. § 1324a(b) or to refuse to honor documents "that on their face reasonably appear to be genuine").

to provide statutory definitions of the terms "employment," "employer" or "employee." Compare Title VII (42 U.S.C. § 2000e(b) defines "employer" and § 2000e(f) defines "employee"); ADEA (29 U.S.C. § 630(b) defines "employer" and § 630(f) defines "employee"). "It is an appropriate legislative function to define the words contained in a statute and to prescribe rules for their interpretation." Sutherland, Statutory Construction § 20.08 (5th ed. 1992). "Where the legislature has not defined words used in [an] act, the court must then determine the meaning of the language in accordance with the legislative intent and common understanding to prevent absurdities and to advance justice." Id.

Congress mandated that the Attorney General issue regulations to implement § 274A of the Act, IRCA's sanctions provisions, stating that: "The Attorney General shall, not later than the first day of the seventh month beginning after the date of the enactment of this Act [Nov. 6, 1986], first issue, on an interim or other basis, such regulations as may be necessary in order to implement this section."[20] See Pub. L. 99-603, § 101(a)(2). Congress thus implicitly left to the Attorney General the duty to define the scope of "employment" in order to effectuate § 1324a. See Sutherland, Statutory Construction § 31.06 (5th ed. 1993) ("The very object of delegating rule-making power to administrative agencies . . . is to insure flexibility and effectiveness in regulation by making it possible for the rules governing a subject to be refined and reduced to specific, detailed and definitive terms.").

The Attorney General in turn authorized the Commissioner of the INS to promulgate regulations to implement § 1324a. 8 C.F.R. § 2.1 (1993); see 8 U.S.C. § 1103(b) (indicating that the Commissioner shall be charged with such duties as delegated by the Attorney General).

---

[20] The Attorney General is charged with the administration and enforcement of Chapter 12 (addressing immigration and nationality) of Title 8 (concerning aliens and nationality) of the United States Code, and all other laws relating to the immigration and naturalization of aliens, except insofar as that chapter or such laws relate to the powers or duties conferred upon other specified individuals. 8 U.S.C. § 1103(a). The Attorney General has the power and duty to control and guard the boundaries and borders of the United States against the illegal entry of aliens . . . ." Id. Determinations and rulings by the Attorney General with respect to all questions of law are controlling. Id. The Attorney General is authorized to designate any of the duties and powers imposed upon her to any officer or employee of the Department of Justice, in her discretion. Id. She is also authorized to establish such regulations as she deems necessary for carrying out her authority under the provisions of Chapter 12. Id.; Matter of Bilbao-Bastida, 11 I & N Dec. 615 (BIA 1966), aff'd, Bilbao-Bastida v. INS, 409 F.2d 820 (9th Cir. 1969), cert. denied, 396 U.S. 802 (1969).

The INS Commissioner is thus empowered to delineate the terms of IRCA's sanctions provisions. See Morton v. Ruiz, 415 U.S. 199, 231 (1974) ("The power of an administrative agency to administer a congressionally created and funded program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress."); see also Patel v. INS, 638 F.2d 1199 (9th Cir. 1980) (Attorney General has authority to promulgate regulations governing immigration into the U.S., and has delegated that authority to the INS). On May 1, 1987, the INS Commissioner enacted regulations, inter alia, defining the term "employment" as

> any service or labor performed by an employee for an employer within the United States, including service or labor performed on a U.S. vessel or U.S. aircraft which touches at a port in the United States, but does not include casual employment by individuals who provide domestic service in a private home that is sporadic, irregular, or intermittent.

8 C.F.R. § 274A.1(h) (1987).

Approximately three years later, on June 25, 1990, the INS Commissioner amended this definition of "employment" to include:

> any service or labor performed by an employee for an employer within the United States, including service or labor performed on a vessel or aircraft that has arrived in the United States and has been inspected, or otherwise included within the provisions of the Anti-Reflagging Act codified at 46 U.S.C. 8704, but not including duties performed by nonimmigrant crewmen defined in §§ 101(a)(10) and (a)(15)(D) of the Act. However, employment does not include casual employment by individuals who provide domestic service in a private home that is sporadic, irregular or intermittent.

8 C.F.R. § 274A.1(h) (1990).[21]

The INS has stated that the reason for the change in the language defining the scope of "employment" from "including service or labor

---

[21] Section 101(a)(10) states that "[t]he term 'crewman' means a person serving in any capacity on board a vessel or aircraft." 8 U.S.C. § 1101(a). Section 101(a)(15)(D) states that a nonimmigrant crewman is:

> an alien crewman serving in good faith as such in a capacity required for normal operation and service on board a vessel, as defined in § 258(a) (other than a fishing vessel having its home port or an operating base in the United States), or aircraft, who intends to land temporarily and solely in pursuit of his calling as a crewman and to depart from the United States with the vessel or aircraft on which he arrived or some other vessel or aircraft.

8 U.S.C. § 1101(a)(15)(D)(i).

performed on a U.S. vessel or U.S. aircraft which touches at a port in the United States" to the current definition "including service or labor performed on a vessel or aircraft that has arrived in the United States and has been inspected, but does not include duties performed by nonimmigrant crewmen defined in §§ 101(a)(10) & 101(a)(15)(D) of the Act" is that "it is well settled that a vessel coming into the United States territorial waters from any place outside the United States constitutes an 'arrival' for purposes of § 235 [(regarding inspection of aliens by immigration officers)] and § 251 [(regarding the duty to deliver a list of alien crewmen and to report illegal landings to an immigration officer)] of the Act." 55 Fed. Reg. 25928 at 2 (supplementary information) (citing 8 C.F.R. 235.1 (1989)).

The INS states that an "entry"--the "coming of an alien into the United States, from a foreign port or place or from an outlying possession, whether voluntarily or otherwise" (8 U.S.C. § 1101(a)(13)--is not effectuated until inspection of the vessel is completed. 55 Fed. Reg. 25928 at 2 (supplementary information) (citing In re Dubbiosi, 191 F. Supp. 65 (E.D. Va. 1961) (a deportation proceeding in which the crewman of a foreign vessel who was issued a D-1 visa did not "enter" the U.S. because he was under physical restraint in the sense that his D-1 visa was not effective until the search was completed, and therefore he was not subject to deportation, but to exclusion)). Based on that statement, I infer that the INS has asserted that the requirements of section 101 of IRCA, 8 U.S.C. § 1324a, are not triggered unless and until an employee is inspected.[22] I conclude, based on 8 C.F.R. § 274A.1(h) (1993), that United's London-based flight attendant positions clearly come within the scope of "employment" covered by IRCA's sanctions provisions.[23]

---

[22] U.S. citizens as well as aliens are inspected. See Gordon & Gordon, 6 Immigration Law & Procedure (1993) § 148.03[2][a] ("A person who established U.S. citizenship status at any level of the inspection hierarchy is admitted. If the applicant is a U.S. citizen, no misrepresentation during inspection can be deemed material."); see generally id. at 148.03[1] - [2].

[23] Administrative regulations generally have the force and effect of law. See Batterton v. Francis, 432 U.S. 416, 425-26 & n.9 ("Legislative . . . regulations are 'issued by an agency pursuant to statutory authority . . . . . Such rules have the force and effect of law.'"); United States v. Nixon, 418 U.S. 683, 693-96 (1974) (a duly promulgated regulation has the full force and effect of law until such time as it is amended or repealed); In re Escalona, 311 F. Supp. 648 (D.C. Guam 1970) (administrative regulations regarding the naturalization of aliens generally have the force and effect of law).

The Office of Special Counsel ("OSC") is authorized by the Attorney General to promulgate regulations to effectuate and enforce IRCA's antidiscrimination provisions. 8 U.S.C. § 1103(a). OSC thus has the power and duty to formulate policy and make rules "to fill any gap left, implicitly or explicitly, by Congress." Morton v. Ruiz, 415 U.S. 199, 231 (1974). As neither Congress nor OSC have explicitly defined "employment" as that term is to be used in § 1324b, see 28 C.F.R. Part 44 (1993), I conclude that because the positions at issue are within the scope of "employment" covered by § 1324a as set forth in 8 C.F.R.§ 274A.1(h), that Congress intended for them to constitute "employment" under § 1324b as well. See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984), (where "Congress has not directly addressed the precise question at issue" and there is no administrative interpretation," the court "imposes[s] its own construction on the statute . . . ."); see also Foley Bros., 336 U.S. at 285-88 (in which the Supreme Court considered administrative interpretations along with statutory structure and legislative history to ascertain unexpressed congressional intent).

Respondent asserts that in contrast to the R.A., a statute which does not apply extraterritorially but clearly governs the terms and conditions of employment of the London-based flight attendants, IRCA does not expressly apply to United's London-based flight attendants or to common carriers by air engaged in commerce between the U.S. and a foreign country. Respondent's Reply at 6. While Respondent is correct that IRCA does not expressly apply to these positions or to such common carriers by air, the fact that the regulations which implement section 101 of IRCA, 8 U.S.C. § 1324a, explicitly consider the positions at issue to come within the definition of "employment" leads me to conclude that IRCA's antidiscrimination provisions need not reach extraterritorially to apply to the challenged decisions.[24]

---

[24] The main purpose of the presumption against extraterritoriality is "to protect against the unintended clashes between our laws and those of other nations which could result in international discord." Aramco, 111 S.Ct. at 1230; McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 20-22 (1963). My conclusion that IRCA applies to the challenged decisions in this case is buttressed by the fact that in order to extend Title VII's reach to apply extraterritorially, Congress enacted § 109(b) of the the Civil Right Act of 1991, which amended Title VII to providean exemption for otherwise unlawful employer actions if compliance with Title VII would violate the laws of the foreign country in which the workplace is located. Pub. L. 102-166, § 109 (1991). IRCA, in contrast, already provides for conflicts of law with other countries in applying IRCA extraterritorially as § 1324b provides an exception to its prohibition of citizenship status discrimination where that discrimination "is otherwise required in order to comply with law, regulation, or executive order, or required by Federal, State, or local government (continued...)

As I conclude that IRCA's coverage of the challenged decisions does not require the statute to reach extraterritorially, I need not address Complainants' argument that even if the work of the London-based flight attendants is extraterritorial, the prohibitions of § 1324b apply. See, e.g., Compls.' Opp. to Mot. to Dismiss at 20-21.

b. OSC's Determination Is Not Entitled to Deference

Respondent argues that "[OSC]'s determination that IRCA does not apply [to Complainants' claim] and its determination that Complainants are seeking extraterritorial application of [IRCA] are both entitled to great deference." Respondent's Reply at 16; Respondent's Opp. to Compls.' Mot. to Lift at 3, 9 n.6. For support, Respondent cites to Udall v. Tallman, 380 U.S. 1, 16, reh'g denied, 380 U.S. 989 (1965)), in which the Supreme Court asserted that "[w]hen faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration." 380 U.S. at 16. Respondent relies on Roginsky v. Department of Defense, 3 OCAHO 426 at 13 (May 5, 1992), in which the administrative law judge ("ALJ") stated that "as the government agency tagged with initial responsibility for program development, investigation and prosecution of discrimination cases, OSC's [statutory] interpretations are . . . entitled to deference." In addition, asserting that OSC fully investigated whether the Department of Justice has jurisdiction over Complainants' claims and that the issue was briefed at length before OSC, Respondent argues that "[t]he level of deference given to an initial administrative determination depends on the extent to which the agency investigated the matter and the extent to which its decision is well-reasoned. Respondent's Reply at 15 (citing Chevron, 467 U.S. at 843). Respondent further contends that the Special Counsel's statement should be accorded deference because "[t]here is more than ample support" for the Special Counsel's position on this issue and his position "was, at the very least reasonable." Respondent's Reply at 17; see id. at 16 (asserting that OSC's position "is, at the very least, 'a permissible construction of the statute'").

---

[24](...continued)
contract, or which the Attorney General determines to be essential for an employer to do business with an agency or department of the Federal, State, or local government." 8 U.S.C. § 1324b(a)(2)(C). That section is broad enough to encompass a conflict with another country's law regarding an employee's citizenship status.

Respondent's reliance on these cases, however, is misplaced. In Roginsky, the ALJ, in deciding whether Congress waived sovereign immunity under section 1324b, accorded deference to "OSC's position, as reflected in its amicus filings, . . . that the government is subject to 8 U.S.C. § 1324b." Roginsky, 3 OCAHO 426 at 13. In addition to OSC's filings, the ALJ relied on the fact that "even prior to [the Roginsky] litigation, OSC had investigated charges implicating government agencies and had negotiated settlements with them." Roginsky, 3 OCAHO 426 at 13. The instant case is clearly distinguishable as Respondent contends that I should accord "great deference" to a mere statement made in OSC's determination letter that "[b]ased on its investigation, [OSC] has determined that [it] has no jurisdiction over [Complainants'] allegation of citizenship status discrimination." See Complaint, Ex. 2 [OSC's determination letter to Complainants]. In contrast to the written briefs and established policy in Roginsky, OSC has stated no facts or law upon which it based its assertion regarding jurisdiction and therefore there is an insufficient basis for Respondent's assertion that the Special Counsel believes that IRCA does not apply extraterritorially or that this case requires IRCA's extraterritorial application. Therefore, the Special Counsel's assertion regarding jurisdiction is too vague to constitute a position or an interpretation.

In addition, Respondent's reliance on Chevron is misplaced as Chevron addressed whether particular agency regulations permissibly construed the statute which they were promulgated to implement, and set forth a test regarding the weight to give an administrative regulation depending on whether Congress has spoken on the question at issue. 467 U.S. at 842-43. In contrast, in the instant case, Respondent urges that I give deference to a vague unsupported statement regarding jurisdiction. As that statement is not an interpretation, it is neither a permissible construction under Chevron, nor a reasonable position as Respondent has argued.

In support of my conclusion are the clearly delineated roles of the Special Counsel and the ALJ. The Special Counsel is authorized to "determine whether . . . there is reasonable cause to believe [a] charge is true and whether . . . to bring a complaint with respect to the charge before an [ALJ]." 8 U.S.C. § 1324b(d)(1). If the Special Counsel decides not to prosecute a complaint, he or she must notify the charging party of the determination within 120 days of the date the charge is filed. 8 U.S.C. § 1324b(d)(2). The charging party then has 90 days from the receipt of the determination letter to bring a private action. Id. The determination letter thus serves as notice to charging parties whose claims OSC decides not to bring before an ALJ.

It is the ALJ, however, who is authorized to make findings of fact and conclusions of law regarding alleged unfair immigration-related employment practices. 8 U.S.C. § 1324b(g)(2). Whether OSC conducted a full investigation and considered all the arguments raised by the parties on the issue of jurisdiction is irrelevant to my findings of fact and conclusions of law. Neither IRCA nor the regulations promulgated to effectuate 8 U.S.C. § 1324b require the ALJ to give any weight or deference to OSC's determination. To give any deference to OSC's determination would, in fact, take away from my own independent fact-finding and legal conclusions, which are required by statute. Based on the above, I find that OSC's statement regarding jurisdiction is to be accorded no weight, but may serve as a tool to provide me with information, either factual or legal, for use in making my own independent determinations.

c. Complainants Did Not File Overlapping Charges With the EEOC

Respondent argues that I lack jurisdiction in this case because Complainants have filed national origin claims with the EEOC and various other charges based on age, sex, and disability, with other federal, state and British agencies.[25] To support its argument, Respondent relies on 8 U.S.C. § 1324b(b)(2), which states that:

> No charge may be filed respecting an unfair immigration-related employment practice described in subsection (a)(1)(A) of this section if a charge with respect to that practice based on the same set of facts has been filed with the [EEOC] under [Title VII], unless the charge is dismissed as being outside the scope of such title. No charge respecting any employment practice may be filed with the [EEOC] under such title if a charge with respect to such practice based on the same set of facts has been filed under this subsection, unless the charge is dismissed under this section as being outside the scope of this section.

8 U.S.C. § 1324b(b)(2).

Respondent concedes that "a charging party in certain circum- stances could have both a national origin discrimination charge under Title VII and a citizenship discrimination claim under IRCA based on the same set of facts." Respondent's Reply at 29 (citing Lundy v. OOCL (USA), Inc., 1 OCAHO 215 (August 8, 1990). Respondent asserts that "[s]o

[25] In addition to their charges of citizenship discrimination alleged in this case, Complainants Lardy & Gantchar filed charges with the EEOC, arising out of United's refusal to transfer or hire Complainants following its purchase of Pan Am's London routes, air services and operations. See supra note 9.

long as the person has evidence to support those two different theories, the two theories can coexist in the same case." Respondent's Reply at 29. Respondent contends, however, that "[b]y their very terms, the Complainants' IRCA charges are . . . the identical national origin charges that they filed with the EEOC." Id. at 30. More specifically, United asserts that:

> [i]n both their EEOC charges and in their charges here, Complainants argue that they were denied employment because they were "American workers," claiming that United was looking to hire European flight attendants to staff the London domicile. . . . [T]hey urge that "American worker" means national origin discrimination before the EEOC and that the identical words mean citizenship discrimination under IRCA. . . . To allow Complainants' claims to proceed here, when Complainants are already pursuing these identical "American worker" claims before the EEOC, would gut [Congress' intent to preclude simultaneous and duplicative litigation of the identical claim before two different federal agencies and to preclude the possibility of inconsistent results by two federal agencies on the identical underlying claim] and would fly in the face of an express Congressional mandate.

Respondent's Reply at 30-31.

Respondent's argument is unpersuasive for several reasons. First, Respondent's assertion is factually incorrect as Complainants' charge forms do not even mention the words "American" or "worker." Rather, each form indicates the date the Complainant began employment with Pan Am, states that the date of termination was April 3, 1991, and concludes: "She was terminated upon transfer of Pan Am route sale to United Airlines. Her position was replaced by a D-1 applicant." Complaint, Ex. 2 [Complainants' charge forms].[26]

---

[26] Complainants' theory of discrimination appears to be that United's failure to prefer U.S. citizens (or "protected individuals" as defined by 8 U.S.C. § 1324b(a)(3)) over D-1 visa holders violates § 1324b's prohibition of citizenship status discrimination. Complainants should note that in General Dynamics, 3 OCAHO 517, at 57, I held that IRCA does not require an employer to hire recruit or refer a U.S. citizen or other "protected individual" over a temporary visa holder.

Complainants have also alleged another theory of discrimination in their complaint:

> [b]y hiring alien flight attendants while refusing to retain, transfer and/or hire Complainants and other former Pan Am flight attendants similarly situated, United has created a disparate impact upon certain former Pan Am flight attendants, including Complainants, who are United States citizens or green card holders fully qualified for employment as United flight attendants.

Compl. ¶ 28.

Respondent's argument is also legally incorrect. Even if Complainants had asserted in their charge forms that they were denied employment because they were "American workers," Complainants could prevail on a citizenship claim if they could show, for example, that United established this alleged policy for the purpose of discriminating against U.S. citizens. See Kamal-Griffin v. Cahill Gordon & Reindel, 3 OCAHO 568, 20-21 (October 19, 1993), appeal docketed, No. 93-4239 (2d Cir. Nov. 10, 1993). In addition, Respondent has misconstrued § 1324b(b)(2) as it does not prohibit separate and distinct claims of discrimination arising out of the same facts. United States v. Marcel Watch Corp., 1 OCAHO 143 (March 22, 1990) at 12 ("Congress did not enact the overlap provision to bar dual claims based on differentiated rationale, i.e., national origin and citizenship."); amended, 1 OCAHO 169 (May 10, 1990); Lundy, 1 OCAHO 215 at 8. Rather, this section only proscribes the filing of national origin claims with both the EEOC (under Title VII) and OSC (under IRCA), as it explicitly addresses the filing of charges based on "subsection (a)(1)(A)," IRCA's prohibition of national origin discrimination. Marcel Watch at 12. Furthermore, as Congress created a new cause of action in enacting IRCA's prohibition against citizenship status discrimination, "there is nothing in the law with which to overlap." Id. at 11-12.

Moreover, while United argues that "the provisions of IRCA express Congress' intent to avoid . . . subjecting a defendant to multiple litigation in different forums," there is no evidence that Congress intended to prohibit an individual from filing a complaint alleging citizenship status discrimination under IRCA when the individual has filed charges of discrimination based on sex, age, disability or any other basis with any other federal or state agency. I therefore reject Respondent's analysis and hold that Lardy and Gantchar's EEOC and IRCA charges may be brought simultaneously as their citizenship discrimination claims are not barred under § 1324b(b)(2).

d. Conclusion

Based on the above, Respondent's motion to dismiss for lack of subject matter jurisdiction is denied.

2. The Complaint was Timely Filed

Respondent argues that the complaint in this case should be dismissed because the Complainants' charges with OSC were not timely filed. Under IRCA, "[n]o complaint may be filed respecting any unfair immigration-related employment practice occurring more than

180 days prior to the date of the filing of the charge with the Special Counsel." 8 U.S.C. § 1324b(d)(3); 28 C.F.R. § 44.300 (b). This statutory filing period is treated as a statute of limitations subject to equitable tolling. Halim v. Accu-Labs, 3 OCAHO 474 at 12 (November 16, 1992); Lewis v. McDonald's Corp., 2 OCAHO 383 at 4 (October 4, 1991); Lundy v. OOCL (USA), Inc., 1 OCAHO 215 at 8-9 (August 8, 1990); United States v. Mesa Airlines, 1 OCAHO 74 at 22 (July 24, 1989), appeal dismissed as untimely, 951 F.2d 1186 (10th Cir. 1991).

Respondent argues that the limitations period for filing a charge with OSC began running when the rejection letters at issue were dated and mailed to Respondent. Next, Respondent argues that even if I adopt the "date of receipt of notice" standard, that Complainants' claimed dates of receipt of their rejection letters are not credible. Finally, Respondent argues that even if I find that Complainants received their rejection letters on March 29 or March 30, 1991, their claimed dates of receipt, the record in this case indicates that Complainants knew of United's decision not to hire them as early as March 20, 1991, and therefore that date began the running of the filing period.

Complainants, on the other hand, contend that April 3, 1991, the date Pan Am terminated them from employment, is the date of the discriminatory act. See Reply Mem. in Supp. of Compls.' Mot. to Lift 5 n.8. Complainants contend that on that date, they received unequivocal notice that they had not been transferred to or hired by United. Id. Complainants argue in the alternative that the benchmark for determining the discriminatory act is the date each received the letter announcing United's decision not to hire her. In addition, Complainants argue that the complaint was timely filed because United continues to discriminate against qualified Pan Am flight attendants on the basis of citizenship and, therefore, United's allegedly discriminatory act is a "continuing violation," thus tolling the statute of limitations. Furthermore, Complainant argue that if the complaint is timely as to any one of the Complainants, it is timely as to all three Complainants.

For the reasons stated below, I conclude that the 180-day limitations period began to run from the date each Complainant received the rejection letter United sent her notifying her of United's decision not to hire her. I therefore rule that the complaint was timely filed.

a. The Dates Complainants Received Their Rejection Letters Triggered the Filing Limitations Period

United initially argues that "it is the date of the letter notifying [Complainants] that they were not selected as flight attendants, [March 13, 1991,] . . . which commences the limitations period." Respondent's Opp. to Compls.' Br. at 16; Respondent's Opp. to Compls.' Mot. to Lift at 4 n.1. Respondent then focuses its arguments on the date of mailing (which it asserts was the date of the letter) asserting that the date of mailing triggers the filing limitations period.[27] Respondent thus asserts that the 180-day period began to run on March 13, 1991 and that because Complainants filed their charges with OSC on September 25, 1991, 196 days later, their complaint was time-barred under 8 U.S.C. § 1324b(d)(3).

To support its theory as to when the filing limitations period accrues, Respondent relies on Delaware State College v. Ricks, 449 U.S. 250, 258 (1980). In Ricks, the plaintiff, a professor, filed suit alleging that a state college's decision to deny him tenure deprived him of his rights under Title VII and 41 U.S.C. § 1981. The question before the Court was whether these causes of action for discrimination accrued when the plaintiff was denied tenure, allegedly on discriminatory grounds or when his employment contractexpired a year later. The Court held that it was the former, when the President of the Board of Trustees officially notified Ricks that he would be offered a one-year "terminal" contract.

I conclude that Respondent's reliance on Ricks is misplaced as the Court stated that "the only alleged discrimination occurred--and the filing limitations periods therefore commenced--at the time the tenure decision was made and communicated to Ricks. That is so even though one of the effects of the denial of tenure--the eventual loss of a teaching position--did not occur until later." 449 U.S. at 258 (footnote omitted). Respondent's apparent assertion that United's decision was made and communicated to Complainants on the date United mailed the rejection letters to Complainants is not persuasive as in order for the decisions to have been communicated, Complainants must have received the rejection letters.

---

[27] Respondent's counsel have stated that they would be willing to submit supplemental affidavits showing that the letters were mailed on March 13, 1991 or, at the very latest, March 14, 1991. See "Respondent's Response to Compls.' Sur-Reply in Connection with Respondent's Mot. to Dismiss at 7. Based upon counsel's representation, and Complainants' failure to produce any evidence to dispute the March 13 date of mailing, I find that the March 13, 1991 letters were mailed to Complainants on March 14.

Respondent points to several other cases which are equally unavailing. Some directly support Ricks. See Cada v. Baxter Healthcare Corp., 920 F.2d 446, 453 (7th Cir.), cert. denied, 111 S.Ct. 2916 (1990) (the court of appeals affirmed the district court's dismissal of plaintiff's suit brought under the Age Discrimination in Employment Act ("ADEA") as time-barred, and, following Ricks, held that "it is the date of firing or other adverse personnel action, not the date on which the action takes effect and the plaintiff is terminated, that--provided it is communicated to the employee . . . --is the date of accrual."); Zebodeo v. Martin E. Segal Co., Inc., 582 F. Supp. 1394 (D.Conn. 1984) (court held that under the ADEA, 29 U.S.C. § 626(d)(2), which requires a charging party in a "deferral state" (a state which has enacted its own age discrimination laws) to file an administrative charge of unlawful discrimination within 300 days after the allegedly unlawful practice occurred, begins to run when the decision is "made and communicated to" the charging party) (quoting Ricks).

Other cases on which Respondent relies clearly indicate that the date of receipt of a letter indicating the adverse employment decision begins the running of the limitations period. See Wilson v. Westinghouse EEC. Corp., 838 F.2d 286, 287 (Th Cir. 1988) (the limitations period for filing suit under the ADEA, accrued for purposes of the 180-day limitations period, 29 U.S.C. § 626(d)(1), on the date the plaintiff received a termination letter). Hale v. New York State Depot of Mental Health, 621 F. Supp. 941, 942 (S.D.N.Y. 1985) (a Title VII case in which the court held that the "date on which the alleged discriminatory act occurred . . . was . . . when Hale received a letter from the Director of the Center, notifying him that he would be terminated from his position . . . .")

Respondent also points to G.D. v. Westmoreland School Dist., 783 F. Supp. 1532 (D.N.H. 1992), to support its theory that the date of mailing triggers the limitations period. In G.D., the plaintiffs appealed a decision of a New Hampshire Department of Education Hearing Officer under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400, et seq. The defendant filed a motion to dismiss this count as untimely filed. The court, in deciding that motion, followed I.D. v. Westmoreland School Dist., 788 F. Supp. 632 (D.N.H. 1991), which held that the 30-day statute of limitations for appealing such a decision, established in Bow School Dist. v. Quentin W., 750 F. Supp 546 (D.N.H. 1990), accrues from the date the hearing officer's decision is issued, rather than the date such decision is received. 783 F. Supp. at 1534 (footnote omitted).

United apparently attempts to analogize the mailing of its decisions not to hire Complainants and corresponding time limitations on filing a charge of discrimination with OSC to the issuance of a hearing officer's decision under the IDEA and corresponding time limitations on filing an appeal. I find United's argument unpersuasive as Complainants compare two completely unrelated types of provisions in two completely unrelated statutes.[28]

Respondent further asserts that Congress' intent that the statute of limitations should begin to run on the date of the alleged discriminatory conduct--which it equates with the "date of mailing"--is demonstrated by the fact that Congress chose a different standard, the date of receipt of notice standard urged by Complainants, as the triggering date for the statute of limitations on private actions under IRCA, 8 U.S.C. § 1324b(d)(2). Under § 1324b(d)(2), if OSC, after investigating a charge, decides not to file a complaint, it sends the charging party a determination letter, providing notice that the charging party may file a complaint directly before an administrative law judge "within 90 days after the date of receipt of the notice" from OSC that it will not file a complaint."); see also 28 C.F.R. § 44.303. In contrast, 8 U.S.C. § 1324b(d)(3) provides that "[n]o complaint may be filed respecting any unfair immigration-related employment practice occurring more than 180 days prior to the date of the filing of the charge with the Special Counsel." Respondent argues that congressional intent that the statute of limitations under § 1324b(d)(3) begins to run on the date of mailing is shown by the use of the word "occurring" in the statute.

Respondent's argument is unpersuasive, however, as Title VII and the ADEA contain language similar to that of IRCA. See 42 U.S.C. § 2000e-5(e) (Title VII's requirement that aggrieved individuals file a charge with the EEOC "within one hundred and eighty days after the alleged unlawful employment practice occurred"); 29 U.S.C. § 626(d)(1) (the ADEA's requirement that aggrieved individuals file a charge with the EEOC "within 180 days after the alleged unlawful practice occurred"). Furthermore, as demonstrated above, cases decided under Title VII and the ADEA clearly support a "date of receipt" standard. See also Clark v. Resistoflex, 854 F.2d 762, 765 (5th Cir. 1988) (effective date commences when "notice has been communicated").

---

[28] This agency looks for guidance to Title VII and ADEA case law where the statutory language is similar. See generally Kamal-Griffin v. Cahill Gordon & Reindel, 3 OCAHO 568, at 15 (and cases cited therein).

In addition, Respondent's argument ignores IRCA precedent which holds that the date of "occurrence" is the date that the applicant was informed of the decision. See, e.g., Lewis, 2 OCAHO 383 at 4 (ALJ held that the limitations period runs from the date the applicant is "unequivocally informed" of the decision and thus began when the respondent's store manager informed the complainant by telephone of the adverse employment decision); Mesa, 1 OCAHO 74 at 21 (where the parties had communicated over several months without the employer disclosing its decision not to hire the complainant, the ALJ held that the cause of action accrued as of the date when the employer clearly communicated its decision so that the complainant "understood he was being told he would not be hired.").

Based upon the case law cited above and my interpretation of IRCA, I find that Congress intended that the § 1324b(d)(3) 180-day period begin to run on the date that the adverse employment decision is "made and communicated to the charging party." Ricks at 258 (emphasis added). Thus, in the instant case, the filing period commenced when United decided and communicated to each Complainant its decision not to hire her. Because these decisions must have been received by Complainants in order for them to have been communicated, I conclude that the dates Complainants received their rejection letters triggered the 180-day limitations period for filing an OCAHO complaint under 8 U.S.C. § 1324b(d)(3).

b. Complainants' Claimed Dates of Receipt of Their Rejection Letters is Supported By the Record

Respondent argues that even if I adopt a "date of receipt of notice" standard, I should not accept Complainants' claimed date of receipt at face value because their statements as to when they received the rejection letters are not credible. More specifically, Respondent asserts that Complainants' claims that they received United's rejection letter 16 or 17 days after they were mailed is highly suspicious, given that Complainant Lardy's April 1, 1991 letter to United took only seven days to get from England to United's headquarters in Illinois. Respondent also notes that Complainant Moore alleged in an earlier filing with the New York State Division of Human Rights that March 13, 1991 was the date of the alleged discriminatory conduct.

Respondent argues that because Complainants' claimed receipt date is highly suspicious and because it is refuted by conclusive evidence from "Complainants' own hand," I should follow the approach applied by the district court in Scheerer v. Rose State College, 774 F. Supp. 620

(W.D. Okl.), aff'd, 950 F.2d 661 (10th Cir. 1991), cert. denied, 112 S.Ct. 2995 (1992). I disagree, however, as the facts in Scheerer are distinguishable from those in the instant case.

In Scheerer, the plaintiff filed a complaint for discriminatory failure to hire under Title VII, as well as other federal laws. Defendant filed a motion for summary judgment and argued, inter alia, that the complaint should be dismissed because plaintiff's Title VII claim was barred by the statute of limitations--or, more specifically, because plaintiff's charge of discrimination was filed outside the statutory 300-day period for filing under 42 U.S.C. § 2000e-5(e).[29]

In finding that the complaint was timely filed, the court stated that "the limitations period for filing a claim with the EEOC begins to run on the date plaintiff receives notice of the alleged discriminatory act, not the date the decision actually takes effect." 774 F. Supp. at 624 (citing Tadros v. Coleman, 717 F. Supp. 996 (S.D.N.Y. 1989), affirmed, 898 F.2d 10 (2d Cir.), cert. denied, 498 U.S. 869 (1990)). The court also stated that "[i]f there is some question concerning when plaintiff received notice, the limitations period begins to run from the time the plaintiff knows or reasonably should know that the act occurred." 774 F. Supp. at 624 (citing McWilliams v. Escambia County School Board, 658 F.2d 326 (5th Cir. 1981)).

The evidence in the record showed that notice was sent to the plaintiff on June 24, 1975. Scheerer, 774 F. Supp. at 625. The plaintiff, however, denied ever having received such notification, although it was sent to her correct address. Id. The plaintiff admitted that even though she did not recall seeing the rejection letter, she was told by telephone that the position had been filled. Id. She did not remember, however, when this conversation took place. Id. The court, holding that June 24, 1985 was the only date that could be fixed, allowed three days for time in the mail and started the 300-day period on June 27, 1985. Id.

I find that the rationale of Scheerer does not apply to the instant case as each Complainant recalls receiving her rejection letter and the date she received it. Thus, unlike Scheerer, there are fixed dates from which the filing period can accrue. I further find that the evidence submitted

---

[29] If a complainant initially institutes proceedings with a state or local agency with authority to grant or seek relief from the practice charged, the 180-day time limit for filing with the EEOC is extended to 300 days. 42 U.S.C. § 2000e-5(e).

by Complainants in attempt to prove the date that they received the rejection letters is credible as: (l) Complainants have each submitted a sworn declaration, each corroborating the other as to the date of delivery;[30] (2) Moore's sworn declaration as to the date she received her rejection letter is corroborated by her notations on the mailing envelope attached to her declaration (see Moore Decl. at Ex. B [a copy of the envelope, with "March 29, 1991" written on it); (3) Gantchar's sworn declaration as to the date she received her rejection letter is corroborated by the notation in her diary that she had received it on March 30, 1991 (see Gantchar Decl. at Ex. B); and (4) the time it allegedly took for the March 13, 1991 letter to reach Complainants is not unreasonable considering the fact that all of the mailings were from the continental United States to Europe. Furthermore, the evidence is unrefuted.

Moreover, Scheerer is inapplicable to the instant case as United mailed the rejection letters at issue from the United States to London, England, not to another city within the continental United States. Therefore, the presumption in Scheerer that the letter was received three days after it was sent does not apply. Complainants' claimed dates of receipt of their rejection letters is supported by the record.

c. Each Complainant Did Not Know Unequivocally That United Had Not Hired Her Until She Received Her Rejection Letter

Respondent also argues that even if I find that Complainants received their rejection letters on March 29 or March 30, 1991, the record in this case actually shows that Complainants knew of United's decision not to hire them as early as March 20, 1991. The only evidence in the record which Respondent points to is an entry that Complainant Gantchar wrote in her diary for March 20, 1991, stating: "spoke to Judith. Shock about the 93!! Must furlough . . . ." Respondent argues that this entry refers to the 93 former Pan Am flight attendants who were refused employment by United. Respondent thus apparently argues that March 20, 1991, began the running of the filing period for all three Complainants.

I find Respondent's argument unpersuasive as this entry does not indicate that Complainants were included in the 93 former Pan Am flight attendants whom United refused to hire. Furthermore, whether

---

[30] Moore asserts that she received her rejection letter March 29, 1991. Moore Decl. ¶ 3. Lardy and Gantchar assert that they received their rejection letters on March 30, 1991. Lardy Decl. ¶ 5; Gantchar Decl. ¶ 3.

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

In summary, based upon the case law discussed above, I conclude that the 180-day period for filing complaints under § 1324b(d)(3) begins to run on the date that the complainant receives notice of the adverse employment decision at issue. Thus, the 180-day period in the instant case began on March 29, 1991 for Complainant Moore and March 30, 1991 for Complainants Lardy and Gantchar, the dates each Complainant received a rejection letter indicating that United did not select her for a flight attendant positions. As Complainants filed their complaints with OSC on September 25, 1991, 179 or 180 days later, I conclude that the complaint in this case was timely filed.[31]

d. Conclusion

Based on the above, Respondent's motion to dismiss for lack of timeliness is denied.

B. Respondent's Motion to Dismiss Certain Claims & Allegations in the Complaint For Failure to State a Claim Upon Which Relief Can Be Granted is Denied in Part & Granted in Part

Respondent asserts that three allegations which Complainants have made in their complaint must be dismissed for failure to state a claim upon which relief can be granted, Respondent's Mem. in Supp. of Mot. to Dismiss at 14, and because none was raised in Complainants' charge and thus was not the subject of the Special Counsel's investigation. Id. at 13; Answer, ¶ 41. These allegations are: (1) that United unlawfully employed alien flight attendants on U.S. domestic segments of international flights, in violation of IRCA's sanctions provisions (Compl. ¶¶ 25-26); (2) that United retaliated against Complainants by settling English law claims brought by former Heathrow-based Pan Am

[31] In view of this finding, I need not reach Complainants' other arguments regarding timeliness.

flight attendants hired by United, without including Complainants in the settlement negotiations; and (3) that in addition to alleged independent violations of § 1324b, United is liable as the successor to Pan Am under the Railway Labor Act ("R.A."). Compl.¶ 22).

1. Respondent's Motion to Dismiss Complainants' Retaliation Allegation is Denied

Complainants asserted in their amended complaint that:

> United . . . has retaliated against Complainants, and others similarly situated, in violation of 8 U.S.C. § 1324b(a)(5) by (a) refusing to include Complainants in any settlement negotiations regarding all claims asserted by certain former Pan Am flight attendants, including, but not limited to, their claims before the High Court and the Industrial Tribunal in the United Kingdom regarding United's refusal to comply with the [British] Transfer of Undertakings (Protection of Employment) Regulations 1981, and (b) treating them less favorably in the employment and settlement process than those who did not engage in protected legal activity under . . . [IRCA].

Compl. ¶ 35.[32]

Respondent has moved to dismiss Complainants' retaliation allegation under 28 C.F.R. § 68.10, for failure to state a claim upon which relief can be granted. Respondent's Mem. in Supp. of Mot. to Dismiss at 15-16. The rules of practice and procedure governing these proceedings provide that:

> [t]he respondent, without waiving the right to offer evidence in the event that the motion is not granted, may move for a dismissal of the complaint on the ground that the complainant has failed to state a claim upon which relief can be granted. If the [ALJ] determines that the complainant has failed to state such a claim, the [ALJ] may dismiss the complaint.

28 C.F.R. § 68.10.

---

[32] Section 1324b(a)(5) of Title 8 of the U.S. Code provides that:

> It is . . . an unfair immigration-related employment practice for a person or other entity to intimidate, threaten, coerce, or retaliate against any individual for the purpose of interfering with any right or privilege secured under this section or because the individual intends to file or has filed a charge or a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this section. An individual so intimidated, threatened, coerced, or retaliated against shall be considered, for purposes of subsections (d) and (g) of this section, to have been discriminated against.

Respondent's motion to dismiss Complainant's allegation of retaliation is akin to a motion under Rule 12(b)(6) of the Federal Rules of Civil Procedure. As I have previously noted, "[m]otions to dismiss a complaint for failure to state a claim upon which relief can be granted are disfavored by the courts." United States v. Capitol Arts and Frames, Inc., 1 OCAHO 229 at 3 (Sept. 10, 1990) (quoting United States v. Azteca Restaurant, Northgate, 1 OCAHO 33, at 1 (Nov. 8, 1988)). "It is well established in the federal courts that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Capitol Leasing Co. v. Federal Deposit Ins. Corp., 999 F.2d 188, 191 (7th Cir. 1993) (citing Hishon v. King & Spalding, 467 U.S. 69, 73; Conley v. Gibson, 355 U.S. 41, 45-46 (1957)).

Complainants could prevail on their retaliation claim if they establish (1) that United's refusal to include Complainants in settlement negotiations regarding the claims asserted by former Pan Am flight attendants that United hired was in retaliation for Complainant's filing of their IRCA charges or (2) that United treated Complainants less favorably in the employment and settlement process than they treated those individuals who did not engage in protected legal activity under IRCA. I therefore conclude that Complainants have stated a retaliation claim under 8 U.S.C. § 1324b(a)(5).

Respondent has presented several arguments asserting that the Complainants have failed to support their retaliation claim. As I have previously stated, however, "[n]either the regulations nor the Federal Rules of Civil Procedure require[s] the complaint to relate the basis of every factual detail and its evidentiary foundation. This information is properly reserved for the discovery stage of litigation." Capitol Arts and Frames at 4. As discovery was stayed early in this case, Complainants will have the opportunity to obtain additional discovery they might need to support their retaliation claim, as this order will lift the discovery stay. See infra section IV(F). If Complainants are unable to support their retaliation claim following discovery on the issue, United then may file a summary decision motion to dismiss the retaliation claim.

In addition, I find that Complainants failure to have alleged retaliation in their charges is not fatal to their inclusion of the claim in their complaint. It is well settled under Title VII case law that incidents of discrimination not included in an administrative charge may not be considered in a subsequent proceeding unless the new

claims are "like or reasonably related to the allegations contained in the . . . charge." Green v. Los Angeles County Superintendant of Schools, 883 F.2d 1472, 1475-76 (9th Cir. 1989); see also Ong v. Cleland, 642 F.2d 316, 319-20 (9th Cir. 1981). Whether a new claim is "like or reasonably related" to the claims included in the charge depends on whether the original investigation would have encompassed the new claim. Green, 883 F.2d at 1476.

I conclude that Complainants' retaliation claim is reasonably related to their claim that United's decision not to hire them was based on their citizenship status. Complainants' inclusion of the retaliation claim in their complaint is therefore appropriate and Respondent's motion to dismiss it is denied.

2. Respondent's Motion to Dismiss the Allegation of Unlawful Employment of Aliens is Denied

Respondent also asserts that Complainants' claim that United unlawfully employed aliens on U.S. domestic flight segments in violation of IRCA's sanctions provisions cannot be included in their complaint because it was not raised in Complainants' charge and because it fails to state a claim upon which relief can be granted. Respondent asserts that because "a claim for unlawful employment of aliens arises under 8 U.S.C. § 1324a[,] the Complainants cannot pursue such allegations in this proceeding because the underlying charges are for citizenship discrimination under 8 U.S.C. § 1324b. Respondent's Mot. to Dismiss at 14 (citing § 1324b(d)(1) and Green, 883 F.2d at 1476). Respondent further asserts that "the complaint fail[s] to allege any details." Respondent's Mem. in Supp. of Mot. to Dismiss at 14.

Complainants have not filed a complaint against United to enforce IRCA's sanctions provisions, as they are authorized to do. See 8 C.F.R. § 274a.9 ("Any person or entity having knowledge of a violation of section 274A of the Act may submit a signed, written complaint in person or by mail to the [INS] office having jurisdiction over the business or residence of the potential violator."). I find, therefore that Complainants have not filed an additional claim of discrimination, but have made this allegation in order to show behavior that would support their § 1324b claim.[33]

[33] I agree with Complainants that proof of a preference for unqualified, unauthorized alien workers over qualified U.S. citizens may be evidence of discriminatory animus in refusing to transfer or hire U.S. citizens. See Compls.' Mot. to Strike at 4-5. As (continued...)

As Complainants have not alleged a separate and distinct claim of discrimination, Respondent's motion to dismiss this allegation for failure to state a claim is inappropriate as is its assertion that Complainants may not make this allegation in their complaint because it was not raised in their charges. Respondent's motion to dismiss this allegation from the complaint therefore is denied.[34]

3. Respondent's Motion to Dismiss Complainants' Successorship Claim is Granted

Respondent further asserts that Complainants' claim of successorship liability must be dismissed for failure to state a claim and as unrelated to the issues raised in their charges filed with OSC. Complainants' theory is that United is liable under § 1324b not only because of its independent violations of IRCA's antidiscrimination provisions, but also because United is a successor to Pan Am for purposes of applying the antidiscrimination provisions." Compls.' Opp. to Mot. to Dismiss at 36; see Compl. ¶ 22 (asserting that "Pan Am and United, jointly and severally, refused to implement the successorship provisions in the IUFA-Pan Am Agreement with respect to Complainants and others similarly situated because of their citizenship status, in violation of 8 U.S.C. § 1324b"). Complainants contend that "Pam Am actively participated in the actions whereby the Complainants were discriminated against on the basis of citizenship." Compls.' Opp. to Mot. to Dismiss at 36. Complainants further argue that "Pan Am was ultimately not in a position to provide relief, and United was, and because of the continuity between the Pan Am and United operations in London, United is liable as a successor to Pan Am under § 1324b." Id.

---

[33](...continued)
discussed supra, however, at note 22 and the accompanying text, the INS definition of "employment" covered by IRCA's sanctions provisions explicitly excludes "duties performed by nonimmigrant crewmen defined in §§ 101(a)(10) and (a)(15)(D) of the Act." 8 C.F.R. § 274A.1(h) (1990). Thus, United does not need to comply with IRCA's sanctions provisions when hiring D-1 visa holders. United's D-1 visa holder flight attendants are authorized to enter the United States as long as they "intend[] to land temporarily and solely in pursuit of [their] calling as . . . crewm[e]n and to depart from the United States with the vessel or aircraft on which [they] arrived or some other vessel or aircraft." 8 U.S.C. § 1101(a)(15)(D)(i).

[34] Even if Complainants had filed a separate complaint, Respondent's assertion that the complaint lacks detail regarding this allegation is meritless as Complainants asserted that United unlawfully employed alien flight attendants on U.S. domestic segments of international flights, in violation of IRCA's sanctions provisions. Compl. ¶¶ 25-26.

Respondent asserts that it is improper for an ALJ to decide a successorship issue under IRCA as "whether an air carrier such as United is bound by the substantive terms of a collective bargaining agreement of another air carrier whose overseas route (sic) are acquired is governed by the R.A. and subject to the jurisdiction of an appropriate board of adjustment or the federal courts." Respondent's Mot. to Dismiss at 14 (citing R.A., 45 U.S.C. §§ 153, 184). Respondent asserts that "the federal law is clear that the substantive terms of a predecessor's bargaining agreement cannot be imposed on a successor. Id. at 14-15 (citations omitted).

Complainants, however, dispute that they have requested that I resolve issues of successorship under the Railway Labor Act. Compls.' Mot. to Strike at 5. Rather, Complainants point to cases which have held that a successor employer is bound by the legal obligation of a predecessor employer as a result of claims brought against the predecessor under federal antidiscrimination laws. See, e.g., Criswell v. Delta Air Lines, Inc., 868 F.2d 1093 (9th Cir.), cert. denied, 109 S.Ct. 1342 (1989) (Delta, which had acquired Western Air Lines, was bound by an injunction entered against Western in an age discrimination action, as a successor to Western); see also Bates v. Pacific Maritime Ass'n, 744 F.2d 705, 709-10 (9th Cir. 1984) (imposing liability for a Title VII consent decree on successor employer).

There are three principal factors relating to successor liability in an employment discrimination action: (1) continuity in operations and work force of the successor and predecessor employers; (2) notice to the successor employer of its predecessor's legal obligation; and (3) ability of the predecessor to provide adequate relief directly. Criswell, 868 F.2d at 1094. A § 1324b complainant therefore could prevail on a successorship claim where the predecessor had a legal obligation under IRCA.[35] As no legal obligation was ever imposed against Pan Am (as no IRCA complaint was even filed), it is impossible for Complainants to prevail on the successorship theory. Therefore, Respondent's motion to dismiss Complainants' allegation of successorship liability is granted.

C. Complainants' Motion to Strike Certain Affirmative Defenses is Denied in Part and Moot in Part

---

[35] Successor employers have been held liable under IRCA's employer sanctions provisions for failing to comply with the employment eligibility verification requirements of § 101 of IRCA, 8 U.S.C. § 1324a, regarding employees hired by the predecessor employer. United States v. Nevada Lifestyles, Inc., 3 OCAHO 518 (May 19, 1993); United States v. Ulysses, 3 OCAHO 409 (March 9, 1992).

Complainants have moved to strike as insufficient, immaterial or impertinent the fifth, seventh and eighth affirmative defenses set forth in United's Answer to the Complaint.

1. Fifth Affirmative Defense is Stricken

In its fifth affirmative defense, United asserts that the Complaint "must be dismissed because similar complaints have been filed in multiple forums based on the same set of facts, and when Congress enacted IRCA, it did not intend to permit such piecemeal litigation." Answer at 10-11. Complainants assert that "[t]his affirmative defense should be stricken because it is insufficient as a matter of law. Compls.' Mot. to Strike at 2 (citing Federal Deposit Ins. Corp. v. Eckert Seamans Cherin & Mellott, 754 F. Supp. 22 (E.D.N.Y. 1990) (defense which is insufficient as a matter of law should be stricken to eliminate delay and unnecessary expense of litigating invalid defense); Federal Deposit Ins. Corp., 774 F. Supp. 584 (W.D. Wash. 1991) (affirmative defense may be stricken as insufficient as a matter of law if it cannot succeed under any circumstances); United States v. Tuttle's Design Build, Inc., 2 OCAHO 370 (Aug. 30, 1991) (granting motion to strike an affirmative defense where defense insufficient as a matter of law).

As discussed supra at section IV(A)(1)(c), there is no evidence that Congress intended to prohibit an individual from filing a complaint alleging citizenship status discrimination under IRCA when the individual has filed charges of discrimination based on sex, age, disability or any other basis with another federal or state agency or, for that matter, in a foreign forum. Thus, Respondent's fifth affirmative defense is insufficient as a matter of law, and Complainants' motion to strike it is granted.

2. Seventh Affirmative Defense is Stricken

In its seventh affirmative defense, United asserts that "Complainants do not have standing in this proceeding under 8 U.S.C. § 1324b to raise a claim for unlawful employment of aliens under 8 U.S.C. § 1324a." Answer at 11. Complainants contend that this affirmative defense "should be stricken as immaterial or impertinent" because it is not raised in the Complaint. Compls.' Mot. to Strike at 5 (citing Compl. at 11-12; Salem Engineering Co. v. National Supply Co., 75 F.Supp. 993 (W.D. Pa. 1948) (matters which have no bearing upon a controversy, are irrelevant or immaterial, are properly subject to a motion to strike)). As discussed above at § IV(B)(2), I conclude that Complainants made this allegation to provide evidence of United's discriminatory actions in

refusing to hire Complainants, not as a charge of unlawful employment under § 1324a. Therefore, as Complainants have not raised a § 1324a claim, United's seventh affirmative defense is inappropriate and Complainants' motion to strike it is granted.

3. Eighth Affirmative Defense is Moot

In its eighth affirmative defense, United alleges that "this agency lacks jurisdiction to consider Complainants' successorship allegations under the R.A.." Answer at 11. As Respondent's motion to dismiss Complainants' claim of successorship has been granted, Complainants' motion to dismiss this affirmative defense is moot.

D. Complainants' Request For Sanctions is Denied

Complainants request that sanctions be assessed against United for allegedly seeking to mislead me. Compls.' Mot. For Leave at 11. Complainants contend that "United has blatantly lied to this court regarding the investigation of [OSC] and Complainants' actions before, during and after the settlement negotiations." Compls.' Mot. For Leave at 11. I disagree with Complainants and therefore deny their request for sanctions.

E. Respondent's Request For Attorney Fees Will Be Decided Later

It is premature to decide Respondent's request for attorney fees. I will address attorney fees in a final decision on the merits of this case.

F. The Discovery Stay Is Lifted

The discovery stay is hereby lifted and Respondent, the Association of Flight Attendants, the Independent Union of Flight Attendants ("IUFA"), and Brian Moreau, president of the IUFA are directed to submit to this office by January 31, 1994, any motions to quash, limit or object to the outstanding discovery requests.

SO ORDERED this 11th day of January, 1994.

ROBERT B. SCHNEIDER
Administrative Law Judge