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

May 4, 1994

ROMAN UDALA, Complainant,	)	
v.	)	8 U.S.C. 1324b Proceeding
	)	OCAHO Case No. 94B00020
NEW YORK STATE DEPARTMENT OF EDUCATION, Respondent.	)	

ORDER GRANTING MOTION TO DISMISS COMPLAINT

On September 23, 1994, Roman Udala (complainant) commenced this action by filing a charge against the New York State Department of Education (respondent) with the Office of Special Counsel for Unfair Immigration-Related Employment Practices (OSC). In that charge, complainant alleged that on July 7, 1993, respondent disqualified his Master's degree and refused to grant him a permanent mathematics teacher's certificate, solely on the basis of his national origin and citizenship status, in violation of section 102 of the Immigration Reform and Control Act of 1986, as amended (IRCA), codified at 8 U.S.C. § 1324b. In addition, complainant alleged that respondent had retaliated against him for asserting rights protected under 8 U.S.C. § 1324b.

After having reviewed complainant's charge, OSC informed complainant by letter dated January 16, 1994 that it had determined that there was insufficient evidence of reasonable cause to believe that respondent had discriminated against him because of his citizenship status. In addition, OSC stated that it had found that complainant had failed to file that charge within the required 180-day period from the date of the alleged discriminatory act. OSC also advised complainant in that correspondence that his charge of national origin discrimination

had been referred to the New York City office of the Equal Employment Opportunity Commission.

For those reasons, OSC decided not to file a complaint with this Office on complainant's behalf and informed complainant that he was entitled to file a private action directly with an administrative law judge assigned to this Office.

On February 4, 1994, complainant did so by having filed the Complaint at issue, alleging therein that on September 5, 1984, he had applied for a position with respondent, but that he was not hired for that position because of his citizenship status and Polish national origin.

In particular, complainant alleged that respondent has constantly refused to issue complainant a permanent teaching certificate because respondent does not recognize the equivalency of his Polish master's degree. Complainant asserted that although he was not hired, the position remained open, and respondent continued taking applications from other individuals with his qualifications.

Complainant also alleged that on August 31, 1992, he was discharged by respondent because of his citizenship status and Polish national origin. He specifically alleged that he had worked for respondent in New York City under a provisional teaching certificate which had expired, leaving complainant unable to work. He also contended that although he was fired, other workers in his situation, but of different national origin and citizenship status had not been terminated.

In addition, complainant alleged that respondent had refused to accept a "Diploma of Teacher College, Szczecin, Poland; Diploma of Adam Mickiewicz University, Poznan, Poland; Report of Evaluation of Educational Credentials, World Education Services, New York; and Letter of Evaluation of Educational Credentials, Columbia University." Complainant avers that he had presented these in order to show that he was authorized for employment in the United States.

On March 3, 1994, this matter was assigned to the undersigned by the Acting Chief Administrative Hearing Officer.

On April 12, 1994, respondent filed its Answer, denying therein the allegations of discrimination contained in the Complaint, and asserting four (4) affirmative defenses.

As a first affirmative defense, respondent asserted that the Complaint had been untimely filed, because complainant failed to file a charge within 180 days of the alleged unfair immigration- related employment practice on which this action is based.

In support of this affirmative defense, respondent alleged that complainant was terminated on August 31, 1992, upon the expiration of his provisional teaching certificate. Respondent asserted that it informed complainant by letter dated September 3, 1992, that he had been given the maximum time extension available on his provisional certificate, and that in order to receive a permanent teaching certificate, it was necessary to complete a master's degree from a regionally accredited college or university.

Asserting that any subsequent contact between complainant and respondent were merely attempts by complainant to reopen the issue already decided in the September 3, 1992 letter, respondent concluded that because complainant did not file a charge with OSC until September 23, 1993, or well in excess of the 180-day period for filing a charge under IRCA, his charge had not been timely filed.

As a second affirmative defense, respondent asserted that although the Complaint contains numerous allegations concerning actions taken by the New York City Board of Education, and appears to name the board as a party, complainant had failed to join the board as a party to this proceeding, and therefore the Complaint should be dismissed.

As a third affirmative defense, respondent asserted that because it did not hire, recruit or refer complainant for employment for a fee, and because it had not participated in the discharge of complainant from employment, but had merely determined that complainant had failed to meet the New York State requirements for issuance of a permanent teaching certificate, complainant had failed to state a claim upon which relief may be granted.

As a fourth affirmative defense, respondent alleged that complainant has failed to establish that respondent had violated the provisions of 8 U.S.C. § 1324b.

On April 12, 1994, also, respondent filed a Motion to Dismiss Complaint, citing four (4) grounds upon which the Complaint should be dismissed.

As a first ground for dismissal, respondent asserts that the Complaint is time-barred pursuant to 8 U.S.C. § 1324b(d)(2) and (3), in that the unfair immigration-related employment practices alleged therein occurred more that 180 days prior to the date of the filing of complainant's charge with OSC.

Respondent further asserts that the Complaint should be dismissed because complainant has failed to join the New York City Board of Education as a necessary party to this proceeding.

As its third basis, respondent asserts that the Complaint should be dismissed because the complainant fails to state a claim upon which relief may be granted.

Finally, respondent asserts that dismissal is in order because the Complaint fails to establish that respondent violated the provisions of 8 U.S.C. § 1324b.

Complainant had 10 days from the date of service, or until April 22, 1994, to have responded to respondent's motion. 28 C.F.R. § 68.11(b). Because no response has been received, only respondent's motion is under consideration.

The procedural regulations governing administrative hearings in cases involving allegations of unfair immigration-related employment practices provide for the dismissal of a complaint where the administrative law judge determines, upon motion by respondent, that complainant has failed to state a claim upon which relief can be granted. 28 C.F.R. § 68.10.

This provision is similar to Rule 12(b)(6) of the Federal Rules of Civil Procedure, which provides for motions to dismiss for failure to state a claim upon which relief can be granted. For this reason, federal caselaw interpreting Rule 12(b)(6) provides guidance in ruling on motions to dismiss under 28 C.F.R. § 68.10. George v. Bridgeport Jai-Alai, 3 OCAHO 537, at 5 (7/12/93).

Motions to dismiss are generally viewed with disfavor, and should be granted only sparingly. United States v. Norfolk Shipbuilding and Drydock Corp., (Order Denying Respondent MP Indus. Motion to Dismiss and Order Denying Respondent Norfolk Shipbuilding and Drydock Corp.'s Motion for Summary Judgment), at 3 (12/16/92).

The court's function in deciding a motion to dismiss for failure to state a claim is not to weigh the evidence that might be presented at a trial, but instead to determine whether the complaint itself is legally sufficient. Festa v. Local 3 Int'l Bhd. of Elec. Workers, 905 F.2d 35, 37 (2d Cir. 1990); Pompano-Windy City Partners v. Bear-Stearns & Co., 794 F. Supp. 1265, 1280 (S.D.N.Y. 1992).

For this reason, a motion to dismiss must be denied "unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S. Ct. 1683, 1686 (1974) (quoting Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102 (1957)); Easton v. Sundram, 947 F.2d 1011, 1015 (2d Cir. 1991); K. Bell & Assocs., Inc. v. Lloyd's Underwriters, 827 F. Supp. 985, 989 (S.D.N.Y. 1993); Fulani v. Brady, 809 F. Supp. 1112, 1123 (S.D.N.Y. 1993). This is especially true where, as here, the complainant is pro se. Easton, 947 F.2d 1015.

In considering a motion to dismiss, the court must limit its analysis to the four corners of the complaint. Kopec v. Coughlin, 922 F.2d 152, 154-55 (2d Cir. 1991); Pomano-Windy City Partners, 794 F. Supp. at 1281. See also LaBounty v. Adler, 933 F.2d 121, at 123 (2d Cir. 1991)(Rule 12(b)(6) does not give the court authority to consider matters outside the pleadings; it simply delineates the procedures which must be followed in testing the legal sufficiency a complaint). The court may, however, consider documents incorporated into the complaint by reference and materials subject to judicial notice. Pompano-Windy City Partners, 794 F. Supp. at 1281.

The court must also accept the complainant's allegations of fact as true, along with such reasonable inferences as may be drawn in the complainant's favor, in considering a motion to dismiss. See LaBounty, 933 F.2d at 123; K. Bell & Assocs., 827 F. Supp. at 989; In re Integrated Resources Real Estate Sec. Litig., 815 F. Supp. 620, 667 (S.D.N.Y. 1993); Cuillo v. Shupnick, 815 F. Supp. 133, 134 (S.D.N.Y. 1993); Fulani, 809 F. Supp. at 1123.

Respondent urges initially that the Complaint in this matter should be dismissed on the ground that it is time-barred, based upon the following facts.

On November 24, 1984, respondent advised complainant that his Magister degree from Adam Mickiewicz University in Poland was not equivalent to a master's degree for purposes of meeting the New York State requirements for permanent certification. Complainant was told

at that time that in order to meet those requirements, he would be required to complete a master's degree from a regionally accredited college or university.

At that time, also, respondent advised complainant that if he were admitted to a doctoral degree program with a master's degree equivalency at a regionally accredited United States college or university, it would reconsider crediting him with a master's degree based on that institution's evaluation of complainant's program. Respondent asserts that while complainant was a matriculated student in a doctoral degree program at New York University from September 1986 to June 1987, New York University considered his degree to be equivalent to a Bachelor of Science degree, as opposed to a master's degree.

Consequently, respondent informed complainant by letter dated September 3, 1992, that he had been granted the maximum extension on his provisional certificate, and would be required to obtain a master's degree from a regionally accredited college or university in order to receive a permanent certificate. Respondent submitted a copy of that letter as an attachment to its Answer.

Respondent asserts that the only contacts that it had with complainant subsequent to complainant's receipt of the respondent's September 3, 1992 letter consisted of attempts by complainant to reopen the issues which had been decided in that correspondence. Respondent concludes that because complainant failed to file a charge within 180 days of his receipt of that letter, the Complaint must be dismissed as not having been timely filed.

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

Respondent has presented an affidavit and additional materials to support its argument that the complaint is time-barred. In this situation, it is appropriate to consider respondent's request for dismissal as a motion for summary decision. See Grodzki, 1 OCAHO 295, at 3; Fed. R. Civ. P. 12(b).

The rules of practice and procedure governing these proceedings provide for the entry of summary decision if the pleadings, affidavits, and material obtained by discovery or otherwise show that there is no genuine issue as to any material fact. 28 C.F.R. § 68.38(c).

If a party fails to comply with the procedural filing deadlines of the forum, there is no genuine issue of material fact, and the complaint may be dismissed on that basis alone. Salcido v. New-Way Pork Co., 3 OCAHO 425, at 3 (4/28/92) (quoting Grodzki v. OOCL (USA), Inc., 1 OCAHO 295, at 3 (2/13/91)).

The movant bears the initial responsibility of demonstrating the absence of any issues of material fact. Hensel v. Oklahoma City Veterans Affairs Medical Ctr., 3 OCAHO 532, at 7 (6/25/93); Sepahpour v. Unisys, Inc., 3 OCAHO 500, at 3 (3/23/93); Morales v. Cromwell's Tavern Restaurant, 3 OCAHO 524, at 4 (6/4/91). Once the movant has carried its burden, the burden shifts to the party opposing the motion to come forward with "specific facts showing that there is a genuine issue for trial." Hensel, 3 OCAHO 532, at 8; Morales, 3 OCAHO 524, at 4; Sepahpour, 3 OCAHO 500, at 3.

In his Complaint, complainant asserted that respondent discharged him on August 31, 1992. Complaint, ¶¶ 11 and 14(c). Complainant filed his charge with OSC on September 23, 1993. Accepting complainant's assertions as true, complainant filed his charge with OSC some 388 days after he was allegedly discharged by respondent, and well in excess of the 180-day filing deadline set forth in IRCA and in the implementing and procedural regulations, respectively. 8 U.S.C. § 1324b(d)(3); 28 C.F.R. § 44.300(b); 28 C.F.R. § 68.4(a).

The 180-day filing deadline, however, is not a jurisdictional bar to filing of the action, and is subject to equitable tolling, equitable estoppel, and waiver, where appropriate. See United States v. Mesa Airlines, 1 OCAHO 74 (7/24/89).

Under the doctrine of equitable tolling, the running of the filing period is tolled when the subject of discrimination is unaware that he or she has a claim for, or even has been the victim of, discrimination. Seedman v. Alexander's, Inc., 683 F. Supp. 924, 926 (S.D.N.Y. 1987).

Equitable tolling may be invoked in situations where, for example, the subject of discrimination asserted his or her rights in the wrong forum, was actively misled by the employer, or was prevented in some extraordinary way from exercising his or her rights. See Miller v.

International Tel. & Tel. Corp., 755 F.2d 20, 24 (2d Cir. 1985); Seedman, 683 F. Supp. at 926; Labeach v. Nestle Co., 658 F. Supp. 676, 686 (S.D.N.Y. 1987); United States v. Auburn Univ., OCAHO Case No. 93B00109 (Order), at 8 (3/10/94); Becker v. Greenwood Police Dep't, OCAHO Case No. 92B00228 (Order Granting Respondent's Motion for Dismissal), at 2 (4/19/93); United States v. Weld County School Dist., 2 OCAHO 326, at 17 (5/14/91).

Equitable estoppel, on the other hand, is applied when the subject of discrimination is aware of the basis for his or her claim, but fails to commence an action within the filing period because of actions on the part of the employer, which later work to estop the employer from seeking dismissal of the claim on timeliness grounds. Seedman, 683 F. Supp. at 926.

There is no evidence to indicate that respondent has waived the defense of untimely filing with respect to complainant's claims that he was not hired and was discharged because of his national origin and citizenship status. To the contrary, respondent asserted that defense in its Answer, as well as in its contemporaneously filed Motion to Dismiss, which is also presently under consideration.

Complainant bears the burden of establishing that equitable modification of the filing period is appropriate. See Becker, at 2. However, complainant has failed to respond to respondent's Motion to Dismiss, and has failed to offer any evidence indicating that equitable modification is appropriate in this situation.

Respondent has demonstrated that complainant filed his Complaint some 208 days after the filing deadline specified in IRCA and in the pertinent regulations. Because complainant has failed to offer any evidence to indicate that equitable modification of the filing period is appropriate, and because there is nothing in the pleadings nor in any evidence submitted by either of the parties to indicate that equitable modification of the filing period would be appropriate under these facts, I find that complainant's claims that he was not hired and that he was discharged by respondent because of his national origin and citizenship status to have been untimely filed, and therefore, those claims must be dismissed.

For this reason, respondent's motion is granted as it pertains to complainant's claims that respondent refused to hire him and discharged him on the basis of his national origin and citizenship status.

In addition to his discrimination claims, complainant also alleged that respondent refused to accept documents that complainant presented to show that he was authorized for employment in the United States, and requested more or different documents than required to prove authorization for employment in the United States. No date was given for those alleged violations.

With respect to complainant's claim that respondent refused to accept documents demonstrating his employment eligibility, complainant asserted that respondent had refused to accept diplomas from the Teacher's College in Szczecin, Poland and from Adam Mickiewicz University in Poznan, Poland, that it had refused to accept a Report of Evaluation of Educational Credentials from World Education Services in New York, and that respondent had also refused to accept a letter of evaluation of educational credentials from Columbia University.

With respect to his claim that respondent requested more or different documents than required to prove that he was authorized for employment, complainant alleged that respondent required that he show that he had been admitted to a Ph.D. program with a status equivalent to a master's degree.

The document abuse provisions of IRCA, 8 U.S.C. § 1324b(a)(6), provides that it is an unfair immigration-related employment practice for an employer to request more or different documents, or to refuse to honor documents tendered that on their face reasonably appear to be genuine, for purposes of satisfying the requirements of the employment verification system, 8 U.S.C. § 1324a(b).

The documents which may be utilized by an employer for the purpose of verifying identity and employment eligibility under 8 U.S.C. § 1324a(b) are enumerated in the regulations implementing the employer sanctions provisions of IRCA, at 8 C.F.R. section 274a.2(b). The documents listed in paragraph 16(a) of the Complaint, which, complainant contended, respondent refused to accept for the purpose of employment eligibility, do not appear on that list.

Furthermore, it is apparent from the instant pleadings that the document which complainant has alleged had been requested by respondent, showing admission to a Ph.D. program with a status equivalent to a master's degree, had not been requested for purposes of verifying complainant's authorization for employment in the United States under 8 U.S.C. § 1324a(b), but rather, as respondent notes in its Answer, had been requested instead for the express purpose of

assessing complainant's qualification for employment under New York State regulations.

In particular, the official Compilation of Codes, Rules & Regulations of the State of New York, title 8, section 80.16(b) provides, in pertinent part:

> Permanent certificate. The requirements for the permanent certificate shall be those in effect at the time the certificate of qualification certificate is issued.
>
> 1. In addition to satisfying the requirements for provisional certification, the candidate shall have satisfied the following requirements:
>
> * * * *
>
> (iv) All candidates shall have earned a master's degree functionally related to the field of teaching service as defined by the commissioner.

Because those documents which respondent allegedly refused to accept for the purpose of demonstrating employment authorization are not valid documents for that purpose, and because the document which he has alleged was requested by respondent was not requested for the purpose of verifying complainant's employment authorization under 8 U.S.C. § 1324a(b), complainant fails to state a claim for which relief may be granted under the document abuse provision of IRCA, 8 U.S.C. § 1324b(a)(6).

For this reason, respondent's motion is granted as it pertains to complainant's document abuse claims, also, and those allegations are hereby ordered to be and are dismissed, with prejudice to refiling.

In summary, respondent's motion is granted as it pertains to complainant's claims that he was not hired and was discharged by respondent because of his national origin and citizenship status, in violation of the anti-discrimination provisions of IRCA, 8 U.S.C. § 1324b(a)(1)(A) and (B), because those claims were not timely filed within the required 180-day statutory filing period.

Respondent's motion is also being granted as it pertains to those portions of the Complaint alleging document abuse in violation of

IRCA, 8 U.S.C. § 1324b(a)(6), on the ground that complainant has failed therein to state a claim upon which relief can be granted.

JOSEPH E. MCGUIRE
Administrative Law Judge

Appeal Information

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