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

EPHRAIN MANUEL BERLANGA, Complainant,	)	
v.	)	8 U.S.C. § 1324b Proceeding
	)	Case No. 94B00016
BUTTERBALL COMPANY, Respondent.	)	

FINAL DECISION AND ORDER
(July 25, 1994)

MARVIN H. MORSE, Administrative Law Judge

Appearances: Mima C. Wallace, Esq., for Complainant.
David L. Wing, Esq., for Respondent.

I. *Background and Procedural History*

Manuel Berlanga (Complainant or Berlanga), a permanent resident alien of Mexican citizenship, complains that he was unlawfully discharged, unlawfully denied rehire, and retaliated against by Butterball Company (Respondent or Butterball). On September 23, 1993, Berlanga filed a charge against Butterball in the Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC). Charging national origin discrimination and retaliation for asserting rights protected under 8 U.S.C. § 1324b, he alleged that on July 19, 1993 at Butterball's plant at Huntsville, Arkansas, he:

> was fired after reporting illegal documentation processing and verification practices. Then, when referred to Butterball by Arkansas Employment Security Division, claimant was prevented from coming on plant property to reapply for a job.

By letter dated January 5, 1994, OSC advised Berlanga that upon investigation it "determined that insufficient evidence of reasonable cause exists to believe you were subjected to an unfair employment practice prohibited by 8 U.S.C. §1324b." OSC's letter advised Berlanga he could file a private action with the Office of the Chief Administrative Hearing Officer [OCAHO] within 90 days after your receipt of this letter."

On January 31, 1994, a letter dated January 25, 1994 was filed in OCAHO on the letterhead of The Niblock Law Firm, Fayetteville, Arkansas, by Mima C. Wallace, Esq. (Wallace). Wallace asked that the letter be allowed "to serve as notice that Mr. Berlanga wishes to file a Complaint against Butterball Company," and concluded, "[P]lease send any specific forms or regulations regarding the filing of these complaints." According to a March 21, 1994 memorandum to file by Counsel to the CAHO,

> This letter was accepted as a complaint and given an OCAHO case number. Ms. Wallace was sent a letter telling her that her letter was being accepted as a complaint on behalf of her client, but in order for us to process it she must complete and return the questionnaire/complaint. . . .
>
> It has been over 30 days since Ms. Wallace has received the information we sent her and we have not heard nor received anything further from her. Since there has not been any further communication from the law firm representing Mr. Berlanga in this matter or from Mr. Berlanga himself, we are administratively dismissing OCAHO Case No. 94B00016.

On April 28, 1994, Berlanga filed an executed questionnaire/ complaint, pro se, dated April 22, 1994. He alleges discrimination on both national origin and citizenship grounds, reciting that on July 19, 1993 he "applied for or worked at" Butterball's turkey processing line and was not hired because of his national origin. He describes the reason he was not hired:

> I was not allowed back on the property to reapply. I can only assume it is because of my national origin or to retaliate against me for reporting incorrect hiring practices of alien workers.

Also, Berlanga alleges also that he was fired previously on February 2, 1993 on the basis of his national origin, citing as the reason the statement quoted above.

On the complaint/questionnaire, Berlanga checks affirmatively the preprinted statement that:

> I was intimidated, threatened, coerced or retaliated against because I filed or planned to file a complaint, or to keep me from assisting someone else to file a complaint.

His explanation:

> I reported incorrect hiring procedures of aliens at work to plant manager. On the same day I was transferred to another dept & 2 weeks later I was fired.

Berlanga also responds affirmatively to the inquiry on the questionnaire/complaint as to whether the employer "refused to accept the documents that I presented to show I can work in the United States."

He identifies the document the employer refused to accept as an "employment referral." He requests back pay from February 2, 1993.

On May 4, 1994, OCAHO issued its Notice of Hearing (NOH), which, inter alia, recited that a complaint was filed on January 31, 1994.[1] The NOH transmitted to Respondent a copy of Berlanga's April 22, 1994 questionnaire/complaint. By letter of May 18, 1994 to the Acting CAHO, Respondent, by counsel, noting that Butterball did not receive the NOH and complaint until May 9, 1994, commented:

> This is worthy of note because of irregularities in the dating of the documents. The irregularities include an apparent backdating. Respondent will file its answer within thirty days after actual receipt [of the NOH] and the Complaint on May 9. It will address the apparent irregularities at that time.

The answer, timely filed on June 6, 1994, denied liability and asserted in effect that the charge was filed with OSC out of time, and, therefore, is time barred in OCAHO by 8 U.S.C. § 1324b(d)(3), and is out of time as a private action filed more than 90 days after receipt of OSC's notice of determination not to file a complaint with an administrative law judge. 8 U.S.C. § 1324b(d)(2). The answer also contends in effect that an administrative law judge cannot hear a national origin discrimination claim against it because the number of Butterball employees exceeds OCAHO jurisdiction. 8 U.S.C. § 1324b(a)(2)(B). It is noteworthy that at the appropriate checkpoint on OSC's preprinted charge sheet, Berlanga checked that Butterball has "15 or more employees."

Respondent concurrently filed a motion for summary decision, which recounts its understanding of the procedural posture of the case and expands on its jurisdictional contentions. Complainant has not responded to the motion. Instead, by facsimile transmittal on June 27, 1994, Wallace filed three pleadings, (1) an entry of appearance, (2) a

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[1] An April 29, 1994 memorandum to the OCAHO Case Management Staff from counsel to the CAHO is informative concerning procedural history:

> This case was administratively dismissed with a memo to the file by me on March 21, 1994.
>
> After an unduly long delay, we received a completed complaint/questionnaire from complainant's attorney. Due to the fact that I neglected to notify the attorney that we were administratively dismissing the case due to her delay and because the questionnaire cover letter I forwarded did not have a time period within which to respond to our office, this case should be reopened based on the letter from the attorney of January 25, 1994 which was given a case number.

motion for continuance to the end of that day to respond to Butterball's motion, and, (3) a motion to dismiss without prejudice. Respondent has not responded to the motion.[2] Copies of the documents were filed July 5, 1994 as enclosures to a transmittal letter dated June 29, 1994.

II. *Discussion*

Complainant's motion, by counsel, to dismiss the complaint without prejudice is unexplained. Efficient utilization of judicial resources, the societal need for litigation to come to closure, and respect for the notion that potential respondents need not remain apprehensive lest old litigation resurface, require rejection of Berlanga's request.

A. National Origin Discrimination Claim Dismissed

Generally stated, a national origin claim cognizable under Title VII cannot also be the subject of an OCAHO national origin discrimination claim. 8 U.S.C. § 1324b(a)(2)(B). As has been held in a number of cases:

> jurisdiction of administrative law judges over claims of national origin discrimination in violation of 8 U.S.C. § 1324b(a)(1)(A) is necessarily limited to claims against employers employing between four (4) and fourteen (14) employees.

Hernandez v. City of Santa Ana, OCAHO Case No. 94B00114 (7/15/94) at 2; Cardona v. Cosmetics Plus, OCAHO Case No. 93B00169 (12/30/93) at 3-4; Pioterek v. Anderson Cleaning Systems, Inc., 3 OCAHO 590 (12/29/93) at 2-3; DeGuzman v. First American Bank Corporation, 3 OCAHO 585 (12/13/93) at 3; Holguin v. Dona Ana Fashions, 3 OCAHO 582 (12/1/93) (Order) at 3-4; Zolotarevsky v. U.S. Nuclear Regulatory Commission, OCAHO Case No. 93B00078 (9/24/93) at 4; Cortes v. Seminole County School Board, OCAHO Case No. 93B00038 (6/23/93); Monjaras v. Blue Ribbon Cleaners, 3 OCAHO 526 (6/15/93) quoting Williamson v. Autorama, 1 OCAHO 174 (5/16/90) at 4, quoting U.S. v. Marcel Watch Co., 1 OCAHO 143 (3/22/90) at 11. See also U.S. v. Huang, 3 OCAHO 313 (4/4/91), aff'd, Huang v. U.S. Dept. of Justice, 962 F.2d 1 (list) (2d Cir. 1992); Pioterek v. Scott Worldwide Food

[2] The judge's file shows that Wallace telephoned the judge's office on June 24, 1994, and talked to the law clerk. Upon inquiry by Wallace about obtaining a continuance, Wallace was told that any forthcoming motion should confirm that she had initiated the request for extension orally through telephone communication with the judge's law clerk, and should confirm that she undertook that Respondent's counsel had no objection. The motion for continuance reflects that understanding in part.

Service, 3 OCAHO 530; Parkin-Forrest v. Veterans Administration, 3 OCAHO 516 (4/30/93) at 3-4 (additional OCAHO precedents cited).

It is undisputed that Respondent employs more than 15 individuals. Accordingly, so much of Complainant's case as alleges national origin discrimination is dismissed.

B. Citizenship and Retaliation Claims Dismissed

Respondent's motion addresses timeliness and national origin but not the retaliation allegation, and overlooks Complainant's reference to citizenship status discrimination.

(1) The charge was filed out of time

Complainant, represented by counsel, having failed to respond to Butterball's motion except to seek dismissal without prejudice, there is no basis on which to adjudge relief from untimeliness, viz, by a finding of equitable tolling.

Berlanga's OSC charge alleges that the unfair immigration related employment practice occurred on July 19, 1993. Apparent inconsistencies as to material dates set out in the OCAHO complaint are reconciled once the complaint is understood to allege that Berlanga was fired on February 2, 1993, and not hired when he unsuccessfully attempted to reapply for work on July 19, 1993. Whatever he may have alleged before OSC, his principal effort on the OCAHO complaint is for redress with respect to the February 1993 firing, as evidenced by his demand for back pay to that date.

OSC's determination of legal insufficiency to maintain a cause of action does not explain whether it views the February firing and July failure to rehire as a continuing action. If the February discharge was a complete act, and the July failure to allow Berlanga to reapply was a separate and distinct act, the filing of the OSC charge as to the February 1993 discharge is clearly out of time. Because OSC's determination letter lacks specificity, it sheds no light on that agency's judgment as to timeliness. OSC customarily explains that it rejects a charge as out of time when that is its determination. Its silence on that score in this case provides no insight, however, because it may reasonably have interpreted the charge as turning only on events of July 19, 1993, the only date for which Berlanga's charge alleges an unfair immigration related employment practice.

That an employee's discharge and subsequent preclusion from the work site are interrelated, and not coincidental, does not establish a

continuing course of conduct. Compare U.S. v. Mesa Airlines, 1 OCAHO 74 (7/24/89) (§ 1324b filing deadlines are limitations, subject to exception, and not jurisdictional), appeal dismissed, 951 F.2d 1186 (10th Cir. 1991). Even assuming the facts as alleged by Complainant, on the pleadings before me I find that the February 2, 1993 discharge is not revived for purposes of avoiding the 180 day limitations period of § 1324b(d)(3) by an effort at rehire per se. A rule of law which would render the mere act of reapplication sufficient to revive causes of action for unlawful discharge or failure to hire would nullify statutes of limitation. Accordingly, more than 180 days having elapsed between the February discharge and the September 23, 1993 date which OSC's determination letter of January 5, 1994 recites as the filing date of the charge, Respondent's motion for summary decision is granted. Berlanga's OSC charge sheet is dated at the signature line as 8-11-93. Even as of August 11, 1993, he was out of time in relation to February 2, 1993.

(2) Other issues discussed

The charge having been filed out of time, other issues become moot. It is instructive, however, to address other aspects of the filings in this case.

First, had the filing of the charge been timely, the complaint, being timely filed in OCAHO, would have been effective. The quotations above from Respondent's May 18, 1994 letter to the Acting CAHO, and the memoranda by counsel to the CAHO, evidence uncertainty which sometimes arises when initial submissions and other inchoate filings are superseded by complaints drawn on OCAHO's questionnaire/ complaint format.

The initial filing of Berlanga's complaint on January 31, 1994 did not meet the minimal standards for a complaint set forth in OCAHO rules of practice and procedure, i.e., 28 C.F.R. § 68.7. Nevertheless, it has become customary as a principle of OCAHO administration, and this final decision and order so confirms, for such initial filings to be accepted as complaints, effective as of the date filed, provided the complainant satisfies a condition subsequent, i.e., filing of a complaint on OCAHO's questionnaire/complaint format. In this case, for example, the NOH advised Butterball that the complaint was filed January 31, 1994. From its motion, it appears that Respondent received a copy of the January 1994 filing but it is obscure whether that filing was distributed with the NOH.

While certain internal OCAHO communications may deserve confidentiality, administrative determinations prior to case assignment to the judge which reasonably may affect the understanding of the parties and the bench as to timeliness, deserve to be part of the public record as a matter of routine. In the future, I suggest adoption by regulation of prescribed time frames for compliance by putative complainants. Such a provision should contemplate relating-back questionnaire/complaints if, but only if, they are filed by dates specified by OCAHO, all such communications to be identified in and transmitted by the NOH.

Second, although Berlanga's complaint at paragraphs 8 and 9 checks off that he was discriminated against on both national origin and citizenship status grounds, his entries to the more particularized inquiries which indict reasons for not being hired (para. 13), and for being fired (para. 14), specify only national origin. Berlanga's OSC charge does not specify citizenship status discrimination.

An appropriate case may require a determination as to whether identification of one § 1324b claim to the exclusion of another on the OSC charge sheet, limits administrative law judge jurisdiction to the claim specified before OSC. However, this final decision and order only addresses omission of OSC citizenship status discrimination charge as providing some insight as to the intention of a complainant whose OCAHO filing is otherwise ambiguous. In the circumstances, I find that Berlanga's OCAHO discrimination allegation sounds only in national origin, and not in citizenship status discrimination. See Huang v. U.S. Postal Service, 2 OCAHO 313 (5/7/91), aff'd, Huang v. USDJ/Exec. Off. Imm. Rv., 962 F.2d 1 (2d Cir. 1992).

Third, even were this a timely case before me, Complainant has failed to allege a prima facie or any cause of action pursuant to 8 U.S.C. § 1324b. As noted, the complaint contends that he "can only assume" that he was fired and not permitted to apply for rehire because of his national origin "or to retaliate for reporting incorrect hiring practices of alien workers." Berlanga perhaps deserves kudos for candor, but not for describing causes of action on which relief can be granted. An "assumption" of unlawful conduct is not a sufficient allegation of a violation of unlawful conduct to justify a lawsuit. Nor does the retaliation allegation describe conduct on the basis of which relief may be granted. It does not appear to be within the parameters of the prohibition against interference with rights conferred by § 1324b, that an employee may simply have reported to management the hiring of other persons.

Fourth, to the extent that the complaint is understood to allege document abuse in violation of § 1324b(a)(6), Berlanga specifies that the document Butterball refused to accept (when he applied for rehire), was "unemployment referral." That documentation, provided by public authorities to assist in matching up prospective employers and employees, is not a document within the scope of § 1324b(a)(6), namely, it is not a document presented or required in order to satisfy the employment eligibility verification requirements of § 1324a(b).

III. *Ultimate Findings, Conclusion and Order*

I have considered the complaint, including the questionnaire/ complaint, the pleadings filed by Complainant, and the pleadings and supporting documents filed by Respondent. Except as discussed above, all motions and other requests are denied. Accordingly, and in addition to the findings and conclusions already stated, I find and conclude that:

1. Respondent's motion for summary decision is granted.
2. Complainant's motion for dismissal without prejudice is denied.
3. Complainant's discrimination, retaliation and all other claims reasonably comprehended by his complaint are dismissed with prejudice.
4. I find and conclude that Respondent has not engaged and is not engaging with respect to Complainant in unfair immigration related employment practices alleged and within the jurisdiction of this Office. Accordingly, the complaint is dismissed.

Pursuant to 8 U.S.C. § 1324b(g)(1), this Final Decision and Order is the final administrative adjudication in this proceeding and "shall be final unless appealed" within 60 days to a United States court of appeals in accordance with 8 U.S.C. § 1324b(i).

SO ORDERED.

Dated and entered this 25th day of July, 1994.

MARVIN H. MORSE
Administrative Law Judge