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

JUAN J. SALCIDO, Complainant,	)	
v.	)	8 U.S.C. 1324b Proceeding
	)	Case No. 91200155
NEW-WAY PORK COMPANY, Respondent.	)	

Appearances:

Val Varley, Esquire For the Complainant

Vicki Wilmarth, Esquire For the Respondent

Before: ROBERT B. SCHNEIDER
Administrative Law Judge

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

I. *Statutory and Regulatory Background*

A. Generally

The Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359, enacted a prohibition against unfair immigration-related employment practices at section 102, by amending the Immigration and Nationality Act of 1952 (INA section B), codified at 8 U.S.C. § 1101, et seq. Section 274B, codified at 8 U.S.C. § 1324b, provides that 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 hiring, recruitment, referral for a fee, or discharge from employment because of that individual's national origin or citizenship status. Discrimina-

tion arising either out of an individual's national origin or citizenship status extends to an individual who is a United States citizen or a protected individual as defined by U.S.C. § 1324b(a)(3), as amended by the Immigration act of 1990 (IA 90), Pub. L. No. 101-649, 104 Stat. 4978 (No. 29, 1990).

B. Procedural Summary

Complainant, Juan J. Salcido, filed charges with the Office of Special Counsel (OSC or Special Counsel) alleging unfair immigration related employment practices by Respondent, New-Way Pork Company. OSC accepted the charges on February 6, 1991. OSC advised Complainant by a determination letter dated June 5, 1991, that OSC would not file a complaint on Mr. Salcido's behalf because it had determined, through its investigation, that there was no reasonable cause to believe that he was discriminated against based upon his national origin or citizenship. OSC further stated in its letter that Mr. Salcido could file his own complaint with the Office of the Chief Administrative Hearing Office at any time within 90 days after receipt of this notification. The notification letter was received by Mr. Salcido on June 11, 1991.

On September 10, 1991, Mr. Salcido filed a Complaint with the Office of the Chief Administrative Hearing Officer against New-Way Pork Company alleging that he was an alien of Mexican national origin authorized to be employed in the United States; who was employed by New-Way Pork on January 19, 1985, in the position of processing pig bellies in Dumas, Texas; and that he was qualified for the position. The Complaint further alleges that on November 2, 1990, New-Way Pork knowingly and intentionally fired him because of his Mexican national origin and citizenship in violation of 8 U.S.C. § 1324b; and, that similarly situated individuals of a different citizenship or national origin were not fired.

The Office of the Chief Administrative Hearing Officer issued a Notice of Hearing dated September 11, 1991, which transmitted the Complaint to Respondent. On October 11, 1991, Respondent filed its Answer, which was amended on November 22, 1991. On November 29, 1991, Respondent filed its Motion for Summary Decision. On January 13, 1992, Complainant filed a Response to the Motion for Summary Decision. On January 23, 1992, Respondent replied to Complainant's Response. On February 3, 1992, complainant filed a Counter Response to Respondent's Reply.

On March 16, 1992, I issued an order directing the parties to file additional factual information by responding to a number of court interrogatories. Both parties filed timely responses to this order.

Respondent's Motion for Summary Decision is now pending. For the reasons discussed below, I grant Respondent's Motion and dismiss the Complaint in its entirety.

II. *Legal Analysis*

A. General Standards for a Motion for Summary Decision

Under the rules of practice and procedure of this Office, an administrative law judge may "enter a summary decision for either party if the pleadings, affidavits, material obtained by discovery or otherwise, . . . show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." 28 C.F.R. § 68.36(c).* See also Fed. R. Civ. P. 56 (to the extent contemplated by 28 C.F.R. § 68.1). "When a party fails to comply with the procedural filing requirements of the forum, there is no genuine issue of material fact to be decided, and the complaint may be dismissed on that basis alone." Grodzki v. OOCL (USA), Inc., 1 OCAHO 295 (2/13/91). Here, where affidavits, letters, and other documents have been presented, it is appropriate to consider the request for dismissal in a motion for summary decision. See 28 C.F.R. § 68.36(a) and Fed. R. Civ. P. 12(c).

B. Material Facts in Dispute as to Alleged Discrimination

New-Way Pork Company is a Texas corporation which is engaged in the business of raising hogs for sale to the market. Juan J. Salcido, a resident alien of Mexican national origin, was employed by New-Way Pork Company from January 19, 1985 to November 2, 1990, as a general laborer, but his primary job at the time he was fired was in the "farrowing" barn. Both parties agree that Mr. Salcido was authorized to be employed in the United States during the time he was employed by Respondent. The parties also agree that Mr. Salcido was fired from his job on November 2, 1990, and on that date Respondent employed thirteen (13) employees, including Complainant. The parties, however, have significant factual differences as to Respondent's reasons for firing Mr. Salcido.

* Rules of Practice and procedure for Administrative Hearings __Fed. Reg. ___(19--) (to be codified at 28 C.F.R. Part 68 (hereinafter cited as 28 C.F.R. § 68).

The Complaint filed with the Office of the Chief Administrative Hearing Officer alleges that Mr. Salcido, an alien authorized to be employed in the United States, was fired from his job on November 2, 1990, because of his Mexican national origin, and similarly situated individuals of a different citizenship were not fired. In his response to the Motion for Summary Decision, Complainant elaborated on the reasons why he was fired, stating "that he was displaced from his job as an employee of the Respondent and replaced with a person who is an illegal alien who would work more cheaply."[1]

Complainant further asserts in his response to the Motion for Summary Decision that the person who replaced him in his job was Rafael Lopez, who is an illegal alien and uses the name and identity of Miguel Bustamante, Jr. Complainant also asserts that both Miguel Bustamante, Jr., and Rafael Lopez are known by the nickname "La Jira."[2]

Mr. Salcido attempts to support these factual allegations through his affidavit, the affidavit of Liberto Lopez, the employment records of Miguel Bustamante, Jr., and Respondent's answer to interrogatories and the Findings of the Texas Employment Commission.

Respondent's Motion for Summary Decision, with supporting affidavits, asserts that Mr. Salcido was fired on November 2, 1990, because of poor work performance. More specifically, in July 1989, Mr. Salcido did not show up for work on three consecutive Sundays; in June 1990, he violated instructions to breed animals only after 4 p.m. in hot weather; on July 18, 1990, he failed to report to work at 6:00 a.m. as agreed; he failed on October, 5, 1990, to change lights which was one of his job requirements; he showed up for work on October 6, 1990, one hour and ten minutes later than anyone else; he failed on October 26, 1990, to assist with a remodeling project as agreed; he

[1] Complainant was a permanent resident alien authorized for employment in the United States at the time he was fired. Since Mr. Salcido states he was replaced by an illegal alien and the statute defines a permanent resident alien as a "protected individual," I view his Complaint as alleging both national origin and citizenship discrimination. See 8 U.S.C. § 1324b(a)(3)(B).

[2] This same argument is stated in the initial Complaint Mr. Salcido filed with OSC on February 6, 1991. In that Complaint, he alleges that he was fired from his job because Respondent wanted to replace him with an illegal alien, Rafael Lopez, whom Respondent could pay a lower wage and because Mr. Lopez was the brother of Manuel Lopez, one of Respondent's foremen. Moreover, he alleges that Mr. Lopez had been using his sister-in-law's papers to work for Respondent.

failed on October 29, 1990, to follow specific instructions regarding feeding of the animals; and he violated specific instructions on October 30, 1990, to move out of one building and into another.

Respondent also disputes Complainant's assertions that it hired Miguel Bustamante, Jr., to replace Mr. Salcido, knowing that Mr. Bustamante was an illegal alien in order to pay him lower wages. In its Motion for Summary Decision, Respondent points out that at the time it hired Mr. Bustamante, the company completed a Employment Eligibility Verification Form I-9, as required by law, and Mr. Bustamante swore in section 1 of the form that he was a U.S. citizen and presented documentation evidencing his employment authorization and identity.

Respondent also points out that it has no records relating to the employment of anyone named Rafael Lopez. Moreover, the affidavits of the manager and the bookkeeper show that they did not have any knowledge of an employee named Rafael Lopez. Respondent further asserts that at the time Mr. Salcido was fired, Respondent did not fire any other workers, regardless of national origin or citizenship status. Respondent also asserts there were other persons of the same national origin and citizenship status as Juan Salcido retained by it when Juan Salcido was fired, including Manuel Lopez, a registered alien of Mexican national origin who was making $.35 more per hour than Complainant on November 1, 1990.

Clearly, the parties have significant differences and disputes over the reasons why Complainant was fired from his job and who was the individual that replaced him. These disputes involve material facts which would require an evidentiary hearing to resolve, but for the untimely filing of the Complaint in this case.

C. The Complaint is Time-Barred

Title 8 U.S.C. § 1324b(d) requires that a "private" complaint alleging unfair immigration-related employment practices against an employer must be filed by the complaining party within ninety (90) days after the receipt of the notice from OSC that it will not file a complaint before an administrative law judge (ALJ).

Respondent argues that its Motion for Summary Decision should be granted because Complainant failed to file his private right of action for unfair immigration-related employment practice within the ninety (90) day period. Although Complainant argues that he has complied with the filing requirements for private actions under the Immigration

Reform and Control Act (IRCA) and, even if not, equitable tolling is applicable, his arguments are not supported by the facts or the law.

Complainant's admissions in his responses to the Motion for Summary Decision and the exhibits attached thereto show that the following dates of notice and filings regarding the charges in this case have been established:

1. On February 6, 1991, Complainant filed a Complaint with OSC.

2. On June 5, 1991, OSC mailed the right-to-sue notice to Complainant by certified mail.

3. On June 11, 1991, the right-to-sue notice was personally received by Juan J. Salcido.

4. The statute of limitations expired for filing suit on September 9, 1991.

5. Complainant filed his Complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) on September 10, 1991.

Although the ninety (90) days from the date after service was received by Complainant would be September 9, 1991, Complainant argues that the ninety-day deadline is modified by 28 C.F.R. § 68.7, which applies to "computation of time for service by mail." 28 C.F.R. § 68.7(c). More specifically, Complainant argues that regulations relating to time computations extend the ninety-day deadline by several days when the right-to-sue letter was served by mail. He claims the provision in 28 C.F.R. § 68.7(c)(2), allowing five additional days for a response to a pleading that is mailed, would extend the statute of limitations in this case to September 14, 1991, resulting in a timely filing by Complainant. Respondent argues that Complainant missed the deadline by one day. Complainant's argument is not supported by this Office's regulations applicable to the time limitations for filing of complaints and prior ALJ and OCAHO decisions.

At the time the Complaint was filed in this case, time computations for filing by mail was set forth at 28 C.F.R. § 68.7(a) through (c)(2). Section 68.7(b) reads: "Pleadings are not deemed filed until received by the Office of the Chief Administrative Hearing Officer or Administrative Law Judge assigned to the case."

Section 68.7(c)(1) and (2) reads:

(1) Service of all pleadings other than complaints is deemed effective at the time of mailing; and

(2) Whenever a party has the right or is required to take some action within a prescribed period after the service of a pleading, notice, or other document upon said party, and the pleading, notice, or document is served upon said party by mail, five (5) days shall be added to the prescribed period.

Although the Interim regulations, 28 C.F.R. § 68.8(c)(2), currently in effect, but not applicable to the case at bar, clearly shows that the five (5) day rule does not apply to the filing of a complaint, prior decisions of this Office interpreting 28 C.F.R. § 68.7 have clearly held that a complaint is not deemed filed until received by OCAHO and the benefits of the five-day rule for mailing does not apply to OCAHO.[3] See Grodzki, 1 OCAHO 295; and United States v. Nu Look Cleaners of Pembroke Pines, Inc., 2 OCAHO 308 (Denial of Respondent's Request for Administrative Review (3/25/91)).

In Grodzki, OSC notified the Complainant, by a determination letter dated December 7, 1989, that he had "within 90 days from the end of the OSC 120-day investigative period, i.e. before March 7, 1990" to file a Complaint before an Administrative Law Judge. Mr. Grodzki filed his Complaint with the Office of the Chief Administrative Hearing Officer on March 8, 1990. Respondent argued that Mr. Grodzki's Com-
plaint was time-barred because it was filed one day late and, therefore, the Complaint should be dismissed. Mr. Grodzki argued that he mailed the Complaint on March 6, 1991, which should be considered the filing date.

The ALJ rejected this argument stating that "the rules of practice and procedure of this Office provide at 28 C.F.R. § 68.7(b) that pleadings filed by mail are not deemed filed until received by the Office of Chief Administrative Hearing Officer (OCAHO) or the administrative law judge." In a footnote, the ALJ further pointed out that section 68.7(b) states that "pleadings are not deemed filed until received by the Chief Administrative Hearing Officer or administrative law judge assigned to the case," which is further clarified by

[3] Subsequent to the filing of the Complaint in this case, 28 C.F.R. § 68.7 was amended and re-designated § 68.8, effective October 3, 1991. See Interim Rules, Federal Register, Volume 56. No. 192, Thursday, October 3, 1991, at 50049-50058. The agency's comments regarding the amendments to the time computation regulations state that "Section 68.8(c)(2) was amended to indicate that the rule allowing five additional days for responding to pleadings or documents mailed to the parties does not apply to complaints or subpoenas. Since a complaint or subpoena is deemed served only when it is received, it is unnecessary to take into account any mailing days."

subsection (c) that "service of all pleadings other than complaints is deemed effective at the time of mailing." Thus, the ALJ concluded that the mailing of the Complaint on March 6 was not sufficient under the regulations to effectuate filing with OCAHO; and therefore, Mr. Grodzki's filing was not timely.

In the case of Nu Look Cleaners, 2 OCAHO 308, an unlawful employment case (8 U.S.C. § 1324a), the Respondent attempted to appeal a prehearing order of the ALJ issued on March 8, 1991. OCAHO did not receive Respondent's request for administrative review until March 22, 1991. In its opinion, denying Respondent's request for administrative review, OCAHO pointed out that 28 C.F.R. § 68.51(a) provides that a party has five days from the date of the ALJ's order to request an administration review. Moreover, the regulations at § 68.7(a) grant Respondent an additional five days because he has been served by mail. OCAHO further stated in its opinion that the regulations also exclude weekends and holidays from the tabulation during the first five days; and, therefore, Respondent had until March 20, 1991, to file a request for administrative review. In its decision, OCAHO stated that under Section 68.7(b), pleadings are not deemed filed until received by OCAHO and because Respondent's request for administrative review was filed with OCAHO after March 20, 1991, it was not considered timely and Respondent's request for administrative review was denied.

Subsequent to OCAHO denial, Respondent filed a request with OCAHO for "reconsideration of the denial" arguing, inter alia, that a party receives an extra five days for OCAHO to receive the request for review under 28 C.F.R. § 68.7(c), thereby giving the party a total of fifteen days to file its request for administrative review. OCAHO denied the Respondent's Motion for Reconsideration, stating in a one-page decision that:

The benefits of the 5 day rule for mailing under Section 68.7(c)(2) do not apply to OCAHO. Section 68.7(c)(2) clearly applies to parties. The OCAHO is not a party. Furthermore, the 5 day mailing rule is unnecessary and does not apply to the OCAHO because pleadings are not deemed filed until they are received by the OCAHO or the ALJ. See 28 C.F.R. 68.7(b). Therefore, because a party has only 5 days to request an administrative review [under Section 68.51(a)] plus an additional 5 days for mailing [under section 68.7(c)(2)], the respondent's initial request for review was untimely . . . .

United States v. Nu Look Cleaners of Pembroke Pines, Inc., 2 OCAHO 312 (Denial of Respondent's Motion for Reconsideration (4/2/91)).

The federal courts have applied similar reasoning in denying that Rule 6(e) of the Federal Rules of Civil Procedure extends the statutory ninety-day period within which a complaint must be filed until Title VII. See Peete v. American Standard Graphic, 885 F.2d 331 (6th Cir. 1989); Mosell v. Hills Department Stores, Inc., 789 F.2d 251 (3rd Cir. 1986).

In Peete, the Sixth Circuit held that summary judgment was proper when a Title VII complainant allowed ninety-one days to elapse between his receipt of the right-to-sue letter and the filing of his complaint. Plaintiff argued that Rule 6(e) of the Federal Rules of Civil Procedure extends the statutory ninety-day period within which suit must be brought under Title VII by three days where, as is the usual practice, the right-to-sue letter is mailed to the plaintiff. Rule 6(e) provides that service by mail adds three days to a prescribed period for action by a party when a party must respond to the mailed pleading or motion. As the Sixth Circuit explained, however, Rule 6(e) was inapplicable.

> [I]t is impossible to understand the purpose of Rule 6(e) without reference to Fed. R. Civ. P. 5(b), which provides that service by mail is complete upon mailing. When taken together with Rule 5(b), it is easy to perceive the purpose of Rule 6(e) -- 'to protect parties who are served notice by mail from suffering a systematic diminution of their time to respond through the application of Rule 5(b). . . ."

In contrast with rule 5(b), 2000e-5(f)(1) [a discrimination provision of Title VII] requires that a complaint be filed within ninety days after the right-to-sue notice is actually received. The mailing time from the Equal Employment Opportunity Commission (EEOC) works absolutely no hardship; therefore, no discernable purpose is served by applying Rule 6(e). Id. at 331-32 (citations omitted).

In Mosell, 789 F.2d 331, the court reviewed a similar case where the complainant filed his complaint ninety-one days after receiving the right-to-sue letter. The court found it relevant that the plaintiff was represented by counsel at every stage of the proceeding and had no excuse for the delay in filing. The plaintiff argued that Rule 6(e) extended his time to file a complaint. Id at 252-53. The court rejected this argument stating that "an additional period to compensate for mailing time is irrelevant and inappropriate" in a Title VII proceeding. Id at 253. Because the plaintiff's complaint was untimely, the court affirmed the dismissal of this complaint, stating that "while the ninety-day rule is not a jurisdictional predicate, 'in the absence of a recognized equitable consideration, the court cannot extend the limitations period by even one day.'" Id (emphasis added) (quoting

Johnson v. Al Tech Speciality Steel Corp., 731 F.2d 143, 146 (2d Cir. 1984).

Based upon these prior decisions, it is clear that 28 C.F.R. § 68.7(c)(2), which allows five additional days for a response to a pleading that is mailed, does not apply to the filing of the Complaint with OCAHO. The purpose of this regulation is to help parties who are served notice by mail by a party from losing valuable time to comply with time limitations in responding to pleadings of the opposing party. I, therefore, find that the filing of the Complaint in this case on September 10, 1991, was not timely because it was filed with OCAHO ninety-one (91) days after Mr. Salcido received OSC's notice. Complainant's claim is time-barred unless equity steps in to toll the limitations period.

D. Equitable Tolling

A careful review of the pleadings and affidavits filed in this case show that there is no genuine issue of material fact with respect to equitable tolling in this case and I, therefore, can decide whether or not, as a matter of law, the late filing of the Complaint in this case should be tolled.

Complainant argues that the court should consider the equitable nature of the circumstances and find that the Complainant did not receive actual notice from OSC of the ninety-day filing rule until he had the "notice letter" translated for him from English to Spanish on June 12, 1991; and because his lawyer did not receive the "Notice of the Right to Sue" until June 13, 1991. Neither argument is supported by the law.

Complainant's attorney first became involved in representing Mr. Salcido in this case during February 1991. Complainant, who does not read or speak English, admits that he received the notice letter from the Office of Special Counsel on June 11, 1991, but could not understand what it said because the letter was written entirely in English.[4]

After Complainant received the letter on June 11th, he mailed it to his attorney. The "notice" letter which had been sent to Mr. Salcido was received at his attorney's office on June 13, 1991. Complainant's

[4] Although respondent disputes whether or not Mr. Salcido does not understand or is unable to read English, I do not find that this is a dispute involving a material fact to my determining the applicability of tolling.

attorney mailed the Complaint to OCAHO on September 5, 1991. Although the "notice" letter was mailed by Mr. Salcido to his attorney on or about June 11th, his attorney believed that the "notice" letter received at his office and stamped dated June 13, 1991, was mailed to him by OSC because OSC knew through the course of their investigation that he represented Mr. Salcido. He, therefore, assumed that the deadline for filing a Complaint with OCAHO was September 12, 1991. Sometime after June 13, 1991, Complainant's counsel explained the contents of the "notice" letter to him.[5]

In determining whether or not equitable tolling is applicable to the late filing in this case, I will rely on prior federal cases involving analogous provisions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5(e), and the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621, et seq., and OCAHO ALJ decisions.

Prior federal cases hold that agency filing periods are parallel to statute of limitations and distinct from jurisdictional bars. Zipes v. Trans World Airlines, 455 U.S. 385, 393 (1982); Pruet Production Co. v. Ayles, 784 F.2d 1275, 1279 (5th Cir. 1986); and Coke v. General Adjustment Bureau, Inc., 640 F.2d 584, 595 (5th Cir. 1981). In Zipes, the Supreme Court determined that the 90-day period for filing a Title VII claim against a private employer with the EEOC was not jurisdictional but, like a statute of limitations, subject to equitable tolling.

Prior decisions by OCAHO administrative law judges, relying on these federal cases have also held that the filing periods required under 8 U.S.C. § 1324b(d)(2) and (3) are parallel to statute of limitations and distinct from jurisdictional bars and are subject to equitable tolling. See Lundy v. OOCL (USA), 1 OCAHO 215 (8/8/90); Grodzki v. OOCL, 1 295 (2/13/91); United States v. Mesa Airlines, 1 OCAHO 74 (7/24/89), appeal dismissed, Mesa Airlines v. United States, No. 89-9552 (10th Cir. Dec. 17, 1991), 1991 U.S. App. Lexis 29357; Williams v. Deloitte and Touche, 1 OCAHO 258 (11/1/90). I see no reason to change this view. Therefore, I find, as the administrative law judge did in Lundy, that "time limits on agency filings, like

[5] There is some inconsistency in the pleadings and affidavits presented by Complainant as to the actual date when Mr. Salcido learned from his lawyer what the contents of the notice letter stated. Complainant's "Response to the Motion for Summary Decision" states that the "notice" letter was translated for him on June 12, 1991. I do not, however, consider this discrepancy in the evidence significant or material because in either case I would deny the application of equitable tolling.

statutes of limitations, are subject to waiver, estoppel and equitable tolling."

Since I agree with the overwhelming weight of authority that the fil-ing period contained in 8 U.S.C. § 1324b(d)(c)(2) is subject to equitable modification, it is important to determine what factors I need to weigh when considering whether to allow equitable tolling in a given case.

The factors most commonly asserted as a basis for equitable tolling in ADEA decisions is that of plaintiff's "excusable ignorance." See Kale v. Combined Ins. Co. of America, 861 F.2d 746, 752 (1st Cir. 1988). The court in Kale, stated that the "courts have often cited to five equitable factors that should be weighed when considering whether to allow equitable tolling in a given case. These factors are: (1) lack of actual notice of filing requirements; (2) lack of constructive knowledge of the filing requirement; (3) diligence in pursuing one's rights; (4) absence of prejudice to the defendant; and (5) a plaintiff's reasonableness in remaining ignorant of the notice requirement. (Citations omitted)."

The Kale decision also pointed out that the Supreme Court in a case involving equitable tolling under Title VII "modified one aspect of this approach by holding that 'absence of prejudice is a factor to be considered in determining whether the doctrine of equitable tolling should apply once a factor that might justify tolling is identified, it is not an independent basis for invoking the doctrine,'" Baldwin County Welcome Center v. Brown, 466 U.S. 147, 152 (1984) (per curiam).

In Lundy v. OOCL, 1 OCAHO 215, the ALJ was confronted with the issue of whether or not the 180-day time period authorized by the IRCA for filing charges respecting unfair immigration related employment practices with OSC, 8 U.S.C. § 1324b(d)(3), represented by an attorney. Lundy filed his charge of citizenship based employment discrimination with OSC on March 8, 1989, 370 days after his discharge from OOCL, which was beyond the 180-day statutory limit in such charges [8 U.S.C. § 1324b(d)(3)]. He as represented by counsel during the relevant filing period for filing with OSC.

The ALJ's decision sets forth the doctrine of equitable tolling and lists numerous federal court decisions which hold that "equitable tolling is almost always denied where counsel is available to a party . . . even when an attorney's advice is inadequate . . . ." (citations omitted) Lundy, at 11-12. Although there was a dispute whether or not complainant's counsel abandoned him during the relevant filing period, the ALJ held that he was represented by counsel during the

period when he had to file a complaint with OSC and based upon his review of the federal court decisions, equitable tolling was denied.

As to the case at bar, even if Mr. Salcido did not understand the con-tents of the "notice" letter sent him by OSC on the date he received the notice because he could not read or understand English, he consulted with his attorney shortly thereafter (on or about June 14th) and was advised as to its contents. He, therefore, knew or should have known from his conversation with his attorney that he had ninety days from June 11th, the date he actually received the notice letter, to file his complaint with OCAHO.[6]

The fact that Mr. Salcido was continuously represented by counsel, both before and after the notice from OSC was received, prevents any tolling. While some courts have held that a single meeting with counsel may not preclude equitable tolling,[7] continued representation does end the tolling period. See, generally, Jacobson v. Pitman-Moore, Inc., 573 F. Supp. 565, 569-70 (D. Minn. 1983). The operative principle is that continued representation by an attorney "extinguishes the equitable reasons for tolling the [time] period" for initiating a claim of employment discrimination with the agency. Morse v. Daily Press, Inc., 826 F.2d 1351, 1353 (4th Cir.) cert. denied, 108 U.S. 455 (1987) (discussing equitable estoppel). The rationale for this principle is that a federal or private employee who obtains counsel:

> ha[s] the 'means of knowledge' of his [employment discrimination] rights, for the very purpose of consulting an attorney is to ascertain what legal redress arises out of a factual situation encompassing a supposed wrong. While it may be inequitable to allow an employer to benefit from his own wrong, it would be at least equally unfair to then hold that the employer is estopped from raising the 180 day bar where the injured employee consulted an attorney who either slept on his client's rights or did not believe he had any under the statute.

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[6] It is important to point out that the regulations require all documents presented by a party to be written in English; and if in a foreign language, accompanied by a certified translation. There is no provision in the regulations requiring notices from OSC in English to be accompanied by a certified translation in Spanish. See 28 CFR § 68.7(d). Cf. Cruz v. Triangle Affiliates, Inc., 571 F. Supp. 1218 (E.D. of New York, 1983) (Court held that Statute of Limitations for filing EEOC charges is not equitably tolled merely because of plaintiff's status as layman and fact that he speaks English as second language).

[7] See Thornhill v. Marsh, 866 F.2d 1182 (9th Cir. 1989); Ettinger v. Johnson, 556 F.2d 692, 698 (3rd. Cir. 1977) (dicta); Dartt v. Shell Oil Co., 539 F.2d 1256 (10th Cir. 1976), aff'd by an equally divided court, 434 U.S. 99 (1977); Volk v. Multi-Media, Inc., 516 F. Supp. 157, 162 (S.D. Ohio, 1981).

Edwards v. Kaiser Aluminum and Chemical Sales, Inc., 515 F.2d 1195, 1200 n. 8 (5th Circuit. 1975).

Although Complainant's attorney states that he calculated the time for filing a Complaint based upon the date when his office received the notice letter, rather than from the date Mr. Salcido received the notice, I cannot find that counsel's inadvertence or mistake, as to the date for filing the Complaint, is grounds for tolling. Counsel for the Com-plainant knew or should have known, on or about June 14th when he met with Mr. Salcido, that actual notice had been received by his client on June 11th. I have difficulty in understanding how Mr. Salcido's lawyer could have believed that the filing date was based upon the date when his office received the notice letter and not when Mr. Salcido received the notice, because the notice letter indicates it was mailed by certified mail and is addressed to Juan Jose Salcido, Rt. 2, Box 18, Dumas, Texas.

In view of the fact that Mr. Salcido had actual notice of the filing date requirements within five days after receiving the notice letter from OSC, and consulted with his attorney about the matter months before the filing date deadline, I cannot find any reason to equitably toll the filing date of September 11, 1991, even by one day. Although the results of this determination may appear unfair, "in the absence of a recognized equitable consideration, the court cannot extend the limitations period by even one day." See Johnson v. Al Tech Specialities Steel Corp., 731 F.2d 143, 146 (2nd Cir. 1984), citing Rice v. New England College, 676 F.2d 9, 11 (1st Cir. 1982).

Complainant has failed to sustain his burden of showing that the ninety-day limitation period for filing his complaint with OCAHO should be equitably extended. The present action is therefore time-barred.

E. Attorney Fees Denied

Respondent asks for recovery for its attorney's fees under 8 U.S.C. § 1324b(h) as a prevailing party within the meaning of that provision. Subsection (h) confers discretion on the administrative law judge to "allow a prevailing party, other than the United States, a reasonable attorney's fee, if the losing party's argument is without reasonable foundation in law and fact." I find Respondent to be the prevailing party. I do not grant fee shifting, however, because I do not find Complainant's case to lack reasonable foundation in law and fact as those terms are used in IRCA.

> The affidavit and other documents submitted by Complainant in response to the Motion for Summary Decision arguably could support a prima facie case of discrimination. Moreover, the findings and conclusions of the Texas Employment Commission Appeal Tribunal that Claimant, Salcido, was not guilty of any misconduct connected with his work; and was, therefore, not disqualified from receiving benefits under Subsection 5(b) of the Texas Unemployment Act, provides support for his belief that he was not fired because of his poor work performance, but rather for discriminatory reasons.

Finally, the fact that Complainant did not comply with the statutory 90-day deadline for filing his Complaint, after receiving his notice from OSC, does not support a finding that his pursuit of his Complaint lacked reasonable foundation by law and fact. Complainant's argument that the filing date was extended by five days pursuant to 28 CFR § 68.7 is not unreasonable in view of the fact that the regulation was amended to clarify that the five-day mailing rule did not apply to filing Complaints with the OCAHO. Moreover, as stated by the ALJ in Grodzki v. OOCL, 1 OCAHO 295, at 10 (2/13/91), in denying fee shifting:

> It is not frivolous to bring a suit which is tardy by one day, and therefore held to be time-barred. The statute of limitations is an affirmative defense which may be waived if not pleaded or otherwise properly raised.

(citations omitted)

Accordingly, in the exercise of my discretionary authority, Respondent's request for fee shifting is denied.

III. *Ultimate Findings, Conclusions and Order*

I have considered the pleadings, affidavits, memoranda, documents and arguments submitted by the parties. Accordingly, and in addition to the findings and conclusions already specified, I make the following determinations, findings of fact and conclusions of law:

1. That Complainant was notified on June 11, 1991, by a determination letter from the Office of Special Counsel, dated June 5, 1991, that a complaint would be timely if filed before the expiration of the 90-day period, i.e. before September 10, 1991.

2. That Complainant has been continuously represented by counsel in connection with the allegations of discrimination in this case against Respondent since February 1991.

3. That Complainant mailed the Complaint in this case to OCAHO on September 5, 1991.

4. That Complainant filed the Complaint in this case with OCAHO September 10, 1991.

5. That the Complaint was filed one day after the expiration of the statutory 90-day filing period.

6. That equitable tolling of the filing period is not granted.

7. That I dismiss as untimely Complainant's filing of the Complaint alleging both national origin and citizenship status.

8. That Respondent's Motion for Summary Decision is granted.

9. That Respondent's request for attorney's fees is denied.

This proceeding is now concluded. This Decision and Order granting summary decision in favor of Respondent is the final administrative order in this case pursuant to 8 U.S.C. § 1324(b) (g) (1). An appeal of this Decision and Order may be made not later than 60 days after entry "in the United States court of Appeals for the circuit in which the violation is alleged to have occurred or in which the employer resides or transacts business." 8 U.S.C. § 1324(b)(i).

SO ORDERED.

ROBERT B. SCHNEIDER
Administrative Law Judge

DATED: April 28, 1992