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

June 30, 1994

WARTAN BOZOGHLANIAN, Complainant,	)	
v.	)	8 U.S.C. 1324b Proceeding
	)	OCAHO Case No. 94B00069
RAYTHEON CO., ELECTROMAGNETIC SYSTEMS DIVISION, Respondent.	)	

ORDER TO SHOW CAUSE WHY MOTION TO DISMISS SHOULD NOT BE GRANTED

On September 15, 1993, Wartan Bozoghlanian (complainant) commenced this action by filing a charge with the Office of Special Counsel for Unfair Immigration-Related Employment Practices (OSC). Complainant alleged that on Monday, November 2, 1987, Raytheon Company, Electromagnetic Systems Division (Raytheon or respondent) had practiced immigration-related employment discrimination against him based upon his citizenship status, a practice prohibited under the pertinent provisions of the Immigration Reform and Control Act of 1986, as amended (IRCA), 8 U.S.C. § 1324b.

More specifically, complainant alleged that on that date, he had attended an on-campus recruitment interview at California State University, Los Angeles. At the conclusion of that interview, respondent's representative inquired of complainant when he had become a naturalized United States citizen. He replied that he had become a naturalized citizen in late 1985, prompting respondent's representative to advise him that the position for which complainant had applied required a security clearance, and that in order to be eligible for that clearance an individual was required to have been a citizen for a period of five (5) to 10 years. He concluded that that statement by respon-

dent's representative was tantamount to his having been denied employment with Raytheon solely because of his citizenship status.

On March 16, 1994, following its review of complainant's charge, OSC informed him by letter that it had determined that there was no reason to believe that citizenship status discrimination had occurred as a result of the so-called "5/10 year rule," at issue in Huynh v. Cheney, 87-3436 TFH (D.D.C.). In addition, OSC advised complainant that he had failed to timely file his alleged citizenship status discrimination charge.

For those reasons, OSC advised complainant that it would not file a complaint with this Office on his behalf and informed him that in the event that he wished to do so, he was entitled to file a private action directly with an administrative law judge assigned to this office.

On April 8, 1994, complainant did so by filing the Complaint at issue, again alleging that on November 2, 1987, respondent had refused to hire him for a position for which he was qualified and for which respondent was then seeking applicants and did so based solely upon his citizenship status and his Lebanese national origin.

On May 9, 1994, respondent filed its Answer, in which it denied that it had discriminated against complainant because of his national origin and citizenship status, and also asserted that it had failed or refused to offer complainant a job since its representatives had never met with or interviewed complainant on the date in question, November 2, 1987, or at any other time. Respondent also asserted five (5) affirmative defenses in that responsive pleading.

As its first affirmative defense, respondent asserted that complainant has failed to state a claim for which relief may be granted.

In its second affirmative defense, respondent argued that complainant is time-barred from raising his claim, whether by laches or by the applicable statute of limitations.

For its third affirmative defense, respondent maintained that complainant is estopped from and/or has waived his claim by his acts or omissions.

Respondent's fourth affirmative defense urged that complainant is not a qualified "protected individual" as that term is defined in 8 U.S.C. § 1324b.

As a fifth affirmative defense, respondent asserted that complainant has suffered no damages.

On May 9, 1994, respondent also filed a Motion to Dismiss for Failure to State a Claim, asserting therein that complainant has failed to establish a prima facie case of disparate treatment discrimination because complainant never met with, nor was interviewed by, respondent for employment purposes. Furthermore, respondent asserts, complainant's claim is time-barred on its face.

Attached to that motion were Points and Authorities in Support thereof and a collection of documentary exhibits.

Under the applicable procedural regulations, complainant had 15 days in which to respond to respondent's motion. 28 C.F.R. §§ 68.8(c)(2), 68.11(b). To date, complainant has not replied, and for that reason, only respondent's motion is under consideration.

The procedural regulations provide that a respondent may move for dismissal of a complaint alleging unfair immigration-related employment practices on the ground that the complainant has failed to state a claim upon which relief may be granted. 28 C.F.R. § 68.10. If the administrative law judge determines that the complainant has failed to state such a claim, the administrative law judge may dismiss the complaint. Id.

This provision is similar to and based upon Rule 12(b)(6) of the Federal Rules of Civil Procedure. For this reason, federal court decisions interpreting Rule 12(b)(6) are utilized in deciding motions brought pursuant to 28 C.F.R. section 68.10. See Mengarpuan v. Asbury Methodist Village, 4 OCAHO 612, at 3 (2/22/94).

In support of its Motion to Dismiss, respondent has presented supporting material evidence, and therefore it is appropriate to consider respondent's Motion to Dismiss as a motion for summary decision. See Udala v. New York State Dep't of Educ., OCAHO Case No. 94B00020 (Order Granting Motion to Dismiss Complaint), at 6 (5/4/94); Grodzki v. OOCL (USA), Inc., 1 OCAHO 295, at 3 (2/13/91); 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).

Because this rule is similar to and based upon Rule 56(c) of the Federal Rules of Civil Procedure, which provides for the entry of summary judgment in Federal court cases, those precedents interpreting Rule 56(c) aid in determining whether summary decision under section 68.38 is appropriate in proceedings before this Office. Alvarez v. Interstate Highway Construction, 3 OCAHO 430, at 7 (6/1/92).

An issue of material fact is genuine only if it has a real basis in the record. Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 586-87, 106 S. Ct. 1348, 1356 (1986); Hensel v. Oklahoma City Veterans Affairs Medical Ctr., 3 OCAHO 532, at 7 (6/25/93).

A genuine issue of fact is material if, under the governing law, it might affect the outcome of the suit. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986). Hensel, 3 OCAHO 532, at 7. In determining whether there is a genuine issue of material fact, all facts and reasonable inferences to be derived therefrom are to be viewed in the light most favorable to the non-moving party. Matsushita, 475 U.S. at 587, 106 S. Ct. at 1356 (1986); Sepahpour v. Unisys, Inc., 3 OCAHO 500, at 3 (3/23/93); U.S. v. Lamont St. Grill, 3 OCAHO 441, at 3 (7/21/92); Egal v. Sears Roebuck & Co., 3 OCAHO 442, at 9 (6/23/90).

Regardless of which party would have the burden of persuasion at trial, the movant assumes the initial responsibility of informing the court of the basis of its motion and of identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any," the movant believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553 (1986).

Once the movant has carried its burden, the party opposing the motion must come forward with "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). See Anderson, 477 U.S. at 250, 106 S. Ct. at 2511; Matsushita, 475 U.S. at 587, 106 S. Ct. at 1356; Hensel, 3 OCAHO 532, at 8; Morales v. Cromwell's Tavern Restaurant, 3 OCAHO 524, at 4 (6/10/93); Sepahpour, 3 OCAHO 500, at 3.

Respondent asserts that granting a summary decision in its favor is appropriate because complainant cannot establish the required prima facie case of disparate treatment discrimination. In particular, respondent contends that complainant had not been interviewed by, or had met with, any representative of respondent firm.

The unfair immigration-related employment practices provisions of IRCA, 8 U.S.C. § 1324b, are similar to the provisions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, et seq. (Title VII). In particular, the anti-discrimination provision of IRCA, 8 U.S.C. § 1324b(a)(1), is similar to sections 703(a)(1) and 703(b) of Title VII, 42 U.S.C. §§ 2000e-2(a)(1) and 2000e-2(b), respectively.

For this reason, federal court decisions in actions brought under Title VII provide guidance for use in determining the respective burdens of producing evidence in cases brought under the anti-discrimination provisions of IRCA, 8 U.S.C. § 1324b. Hensel, 3 OCAHO 532, at 9; Ortega v. Vermont Bread, 3 OCAHO 475, at 7 (11/18/92); Tovar v. A.P. Esteve Sales, Inc., 3 OCAHO 458, at 5 (9/21/92).

The Supreme Court established the order and allocation of proof to be used in disparate treatment cases under Title VII in McDonnell Douglas Corp. v. Green, 411 U.S. 192 (1973). The Court held that an individual alleging discrimination in employment must first establish a prima facie case of discrimination by showing:

> "(i) that he belongs to a racial minority;
>
> (ii) that he applied and was qualified for a job which the employer was seeking applicants;
>
> (iii) that, despite his qualifications, he was rejected; and
>
> (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications."

Id. at 802.

A prima facie case of discrimination creates a presumption of unlawful discrimination. St. Mary's Honor Center v. Hicks, _ U.S. __, 113 S. Ct. 2742, 2747 (1993). Once an individual alleging discrimination establishes a prima facie case, the burden of production shifts to the employer to assert legitimate, nondiscriminatory reasons for its employment decision. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254-255 (1981).

As the Court noted in Hicks:

> (T)he McDonnell Douglas presumption places upon the defendant the burden of producing an explanation to rebut the prima facie case, i.e., the burden of "producing evidence" that the adverse employment actions were taken "for a legitimate, nondiscriminatory reason."

Hicks, 113 S. Ct. at 2747.

Because the ultimate burden of persuasion rests with the employee, the employer does not need to prove that the reasons it offered actually motivated it, but rather only needs to introduce evidence of those nondiscriminatory reasons which, if taken as true, would permit the conclusion that there was a nondiscriminatory reason for the adverse employment action. Id., at 2748.

Once the employer has met this burden, the McDonnell Douglas framework, with its presumptions and burdens, is no longer relevant. Id. at 2749. At this point, the party alleging discrimination must prove by a preponderance of the evidence that the employer's articulated reason was not the real reason, but rather was a pretext for discrimination. Id.; McDonnell Douglas, 411 U.S. at 804.

To show that the reason asserted was a pretext for discrimination, the individual alleging discrimination must prove both that the reason asserted was false, and that discrimination was the real reason for the employment decision. Hicks, 113 S. Ct. at 2752.

The Supreme Court has held that summary judgment is mandated:

> "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. (emphasis added)

Celotex, 477 U.S. at 322-323, 106 S. Ct. at 2552 (quoting Anderson, 477 U.S. at 242, 106 S. Ct. at 2511). Accord Lujan v. National Wildlife Fed'n, 479 U.S. 871, 110 S.Ct. 3177, 3186 (1990).

Accordingly, an employer may prove that it is entitled to summary decision by showing the absence of an element of complainant's prima facie case, "an element essential to that party's case." See Hensel, 3 OCAHO 532.

In order to prevail in this action, complainant must show:

1. That he belongs to a protected class;
2. That he applied and was qualified for a job for which respondent was seeking applicants;
3. That, despite his qualifications, he was rejected; and

4. That, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

McDonnell Douglas, 411 U.S. at 802; Hensel, 3 OCAHO 532 at 12.

In his charge, complainant indicates that he is a naturalized United States citizen, a fact that respondent does not dispute. As a naturalized citizen, complainant is a member of the protected class for purposes of citizenship status and national origin discrimination. See Jones v. Dewitt Nursing Home, 1 OCAHO 189, at 8 (6/29/90); 8 U.S.C. § 1324b(a)(3)(A).

Concerning complainant's assertion that he applied for employment, respondent has replied that while it conducted interviews at Cal State Los Angeles on November 2, 1987, the date that complainant alleged that the unfair immigration-related employment practice occurred, it did not interview complainant on that or on any other date, and therefore complainant did not in fact apply for a position with respondent.

In order to establish that it did not interview complainant on that date, respondent submitted an interview schedule as an attachment to its motion. Respondent asserts that that schedule has an inscription appended thereto by a university representative showing that complainant's scheduled interview had been canceled.

A review of that document, tabbed Respondent's Exhibit 8, reveals that complainant had been scheduled for an interview with Raytheon on November 2, 1987 at 10:45 a.m. but handwritten over the computer-printed date and time is the word "Canceled."

Respondent also offers a memorandum prepared by William Tideback, its employment manager on the date in question, to establish that complainant had not been interviewed by respondent. In that memorandum, Tideback noted that respondent did not interview complainant on the date in question, nor did it interview him on February 11, 1988, the date upon which respondent had scheduled interviews at Cal State and which were later canceled. See Respondent's Exhibit 8.

Alternatively, respondent asserts, even assuming that in the event complainant had presented a meritorious claim, he failed to do so in a timely manner.

In particular, respondent asserts that the actions and events on which complainant bases his Complaint allegedly occurred in November, 1987, or almost seven years ago, but that complainant did not file a

charge with OSC until September 15, 1993, some five years and eight months later.

OCAHO rulings have clearly established that a 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).

As noted previously, complainant alleged in his initial OSC charge, as well as in the resulting Complaint, that the unfair immigration-related employment practice on which he based his claim, that of respondent's alleged wrongful failure to hire him because of his citizen-ship status and national origin, had occurred on November 2, 1987. This record clearly discloses that OSC did not accept complainant's charge as complete until September 15, 1993, more than five (5) years, 10 months and 13 days later, and thus well in excess of the 180-day statute of limitations provided for in IRCA. Even accepting complainant's assertion in the Complaint that he filed his charge with OSC on April 15, 1993, as opposed to September 15, 1993, that charge would still have been filed some 1811 days after the 180-day filing deadline of April 30, 1988.

Complainant's failure to comply with this 180-day filing deadline is not necessarily dispositive because the deadline in question is subject to equitable modification on a case-by-case basis. See United States v. Mesa Airlines, 1 OCAHO 74, at 26 (7/24/89).

Specifically, the filing period is generally extended for periods during which: (1) the employer held out hope of employment or the applicant was not informed that he was not being considered; (2) the charging party timely filed his charge in the wrong forum; or (3) the employer lulled the applicant into inaction during the filing period by misconduct or otherwise. United States v. Weld County School Dist., 2 OCAHO 326, at 17 (5/14/91). The charging party bears the burden of demonstrating the appropriateness of equitable modification. Becker v. Greenwood Police Dep't, OCAHO Case No. 92B00228 (Order Granting Respondent's Motion for Dismissal) (4/19/93).

Moreover, complainant has alleged facts implicating the "5/10 year rule," and the explicit waiver of timeliness as an affirmative defense to causes of action under IRCA, 8 U.S.C. § 1324b resulting therefrom

under the Settlement Stipulation in Huynh v. Cheney, 87-3436 (D.D.C. March 14, 1991). If applicable, that waiver could possibly preserve complainant's claim in this forum.

For the following reasons, however, complainant has failed to demonstrate that either equitable relief or the application of the waiver of timeliness to claims resulting from application of the "5/10 year rule" is appropriate.

A review of the record in this matter reveals no facts which would indicate the presence of any of the circumstances leading to equitable modification of the filing deadline. In particular, complainant has failed to assert that he filed his charge in a timely manner in the wrong forum, or that respondent held out hope of employment, or that he was not informed that he was not being hired for the position for which he applied for the intervening five (5) years, or that respondent lulled complainant into inaction throughout that period by way of misconduct or otherwise.

Nor is there anything in the record to indicate that the "5/10 year rule" was applied adversely to complainant, or that the waiver of the affirmative defense of timeliness to charges brought under IRCA, 8 U.S.C. § 1324b, resulting from application of that rule under the Settlement Stipulation in Huynh, should be applied in this situation.

A brief examination of the "5/10 year rule" and its history would be helpful in determining whether the rule was adversely applied to complainant.

On January 2, 1987, the Department of Defense (DoD) implemented its Personnel Security Program (Security Program). Huynh v. Carlucci, 679 F. Supp. 61, 62 (D.D.C. 1988). The Security Program created policies and procedures governing personnel "security clearance" for classified defense-related information. Id.

By its terms, the Security Program applies to "DoD civilian personnel, members of the Armed Forces, excluding the Coast Guard in peacetime, contractor personnel and other personnel who are affiliated with" DoD. 32 C.F.R. § 154.2(b) (1987). Under the Security Program, security clearance would be granted to a United States citizen who satisfied a "personal security standard" requiring that:

> based on all available information, the person's loyalty, reliability, and trustworthiness are such that entrusting the person with classified information or assigning that person to sensitive duties is clearly consistent with the interests of national security.

32 C.F.R. § 154.6(b)(1987).

The "5/10 year rule", however, denied certain naturalized United States citizens security clearance even if they satisfied the aforementioned "personal security standard." Huynh, 679 F. Supp. at 63. In particular, the "5/10 year rule", formerly codified at 32 C.F.R. § 154.16(c)(1987), provided:

> (1) Naturalized U.S. citizens, whose country of origin has been determined to have interests adverse to the United States..., or who have resided in such countries for a significant period of their life, shall be eligible for a security clearance... only if they have:
> (i) Been a U.S. citizen for five years or longer, or
> (ii) If a citizen for less than five years, must have resided in the U.S. for the past 10 years....

See generally Roginsky v. Department of Defense, 3 OCAHO 426 (5/5/92).

This regulation was successfully challenged by two DoD employees who were naturalized citizens originally from Vietnam, one of the "designated" countries. See Carlucci, 679 F. Supp. at 62. The regulation was declared unconstitutional in a decision dated March 14, 1991.

On December 31, 1991, DoD and the plaintiffs in Huynh entered into a settlement stipulation, under the terms of which DoD agreed to post notices publicizing the decision; to permit individuals adversely affected by the regulation to file charges under IRCA, 8 U.S.C. § 1324b, with OSC; and to waive the defense of untimely filing as to those claims. Huynh v. Cheney, No. 87-3436, Settlement Stipulation at 5-6 (D.D.C. Dec. 31, 1991).

For the following two reasons, the application of that waiver of timeliness as an affirmative defense to the matter at issue is not appropriate.

First, complainant was not adversely affected by the application of the "5/10 year rule." In his Complaint, complainant asserted that he obtained his permanent resident status in July 1977. On November 2, 1987, the date upon which complainant was allegedly wrongfully refused employment by respondent, complainant had been a resident of the United States for more than 10 years, and therefore eligible for a security clearance under the pertinent regulation. See 32 C.F.R. § 154.16(c)(1)(ii)(1987).

Accordingly, complainant could not have been adversely affected by the "5/10 year rule", since it did not apply to him, and therefore application of the waiver of the timeliness defense is not in order. See Gimein v. Department of Defense, 3 OCAHO 503, at 7 (3/30/93).

Moreover, even if it had been shown that complainant was adversely affected by application of the "5/10 year rule", it is not clear that the waiver of timeliness in the Huynh Settlement Stipulation, entered into by DoD and its employees, applies to respondent, whose status is that of an independent contractor. See Tiplea v. Reynolds Elec. & Eng'g Co., 3 OCAHO 548 (8/4/93).

Respondent has presented evidence indicating that complainant did not interview for a position with respondent, either on the date alleged by complainant, November 2, 1987, or at any other date, a fact essential to complainant's claim, and proof of which complainant would bear the burden at hearing. As noted previously, complainant has failed to respond to respondent's Motion to Dismiss, and has therefore failed to come forward with specific facts showing that there is a genuine issue for trial.

Secondly, respondent has demonstrated that complainant failed to file his charge within 180 days of the alleged unfair immigration-related employment practice on which complainant bases his Complaint, and has failed to offer an explanation for the delay in such filing which would justify or excuse his failure to comply with the statutory limits for filing a charge provided for in IRCA, 8 U.S.C. § 1324b(d)(3).

Accordingly, complainant is ordered to show cause, within 15 days of his acknowledged receipt of this Order, why respondent's motion should not be granted. In the event complainant fails to do so, summary decision will be entered in respondent's favor.

JOSEPH E. MCGUIRE
Administrative Law Judge