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

MICHAEL K. WOCKENFUSS, Complainant, v. BUREAU OF PRISONS Respondent.	)))))))	8 U.S.C. §1324b Proceeding Case No. 95B00063

FINAL DECISION AND ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION
(June 5, 1995)

MARVIN H. MORSE, Administrative Law Judge

Appearances: Michael Wockenfuss, pro se
Kelly Tirik, Esq.
for Respondent

I. *Procedural History*

On February 22, 1995, Michael K. Wockenfuss (Wockenfuss or Complainant) filed a charge alleging that the Bureau of Prisons (Bureau or Respondent) discriminated against him 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), 8 U.S.C. § 1324b. In addition, he alleged that the Bureau retaliated against him for asserting rights protected under § 1324b and committed document abuse by refusing to accept a valid document or demanded more or different documents than are required for establishing employment authorization under 8 U.S.C. § 1324a. Wockenfuss filed his charge in the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC).

Wockenfuss, a United States citizen of Japanese descent, alleges that he applied for work as a drug counseling specialist with the Bureau in March, 1992. During his interview with Respondent, Wockenfuss

states that he was asked for his "green card" and "received discriminatory statements about my ethnic status, as well as specific questions about my biological parents and adoptive parents." Letter attached to Complaint addressed to OSC and dated December 8, 1994. Wockenfuss alleges that he was not hired because of his ethnic status as a Japanese-American.

By a determination letter dated February 23, 1995, OSC informed Wockenfuss that it would not file a complaint on his behalf on the grounds it "does not have jurisdiction of your charge under the law because it does not have jurisdiction over another government agency." OSC also informed Wockenfuss that he was entitled to file his own complaint directly with the Office of the Chief Administrative Hearing Officer (OCAHO) within 90 days of receipt of the determination letter.

On April 3, 1995, Wockenfuss filed the Complaint at issue in which he reasserted the allegations in his OSC charge. On April 14, 1995, Complainant supplemented his Complaint with "additional information" which he requested be attached to the Complaint. Because this supplemental pleading was not served on Respondent, I issued an Order on April 26, 1995 cautioning Complainant that any documents filed with this Office must be served on the other party in accordance with OCAHO rules of practice and procedure.[1] The Order also forwarded a copy of Complainant's pleading/letter to Respondent.

On May 3, 1995, Respondent timely filed an Answer to the Complaint which denied that it had discriminated against Wockenfuss. In addition, Respondent filed a Motion for Summary Judgment in which it argued (1) that Complainant failed to file his charge within 180 days of the alleged unfair immigration-related employment discrimination as required under § 1324b(d)(3); (2) that OCAHO lacks jurisdiction over Complainant's national origin allegation because Respondent employs more than 14 individuals; (3) and that Complainant is barred from filing an IRCA complaint because he already obtained a judgment from

[1] Rules of Practice and Procedure for Administrative Hearings, 28 C.F.R. pt. 68 (1994), as amended by 59 Fed. Reg. 41,243 (1994) (to be codified at 28 C.F.R. § 68.2(i), (k)) [hereinafter cited as 28 C.F.R. pt. 68].

the Equal Employment Opportunity Commission (EEOC).[2] No response was filed to this Motion by Complainant.

II. *Discussion*

OCAHO rules of practice and procedure authorize the Administrative Law Judge (ALJ) to dispose of cases, as appropriate upon motions for summary decision. 28 C.F.R. § 68.38(c). An ALJ "may enter a summary decision for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed . . ." show that there is "no genuine issue as to any material fact." Id. A fact is material if it might affect the outcome of the case. Anderson v. Liberty Lobby, 477 U.S. 242, 248 (1986). In determining whether a fact is material, any uncertainty must be considered in a light most favorable to the non-moving party. Matsushita Elec. Indus. v. Zenith Radio, 475 U.S. 574, 587 (1986). The burden of proving that there is no genuine issue of material fact rests on the moving party. Once the movant meets its initial burden, however, the burden of proof shifts to the non-moving party to prove that there is a genuine issue of fact for trial. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Matsushita, 475 U.S. at 587.

A. 180 Day Statute of Limitations

The parties agree that the application process and interview at which Complainant claims he was discriminated against occurred in 1992. There is no evidence of a continuing violation. Unequivocally, Complainant concedes that the alleged wrongful activity occurred in 1992. Complainant states that "[a]lthough the discrimination (statement) took place in 1992, Bureau of Prisons and Department of Justice personnel had ample opportunity to investigate the statements made regarding my naturalization status and the discriminatory statements made at a federal facility." Attachment to Complaint. Complainant's EEO agency complaint against Respondent, filed in 1992, was limited to his national origin discrimination claim. EEOC, not OSC, was the appropriate forum for a national origin claim against an employer of more than 14 individuals such as the Bureau. 8 U.S.C. § 1324b(a)(2)(B). Since Complainant did not file his charge with OSC

[2] See 8 U.S.C. § 1324b(b)(2) (barring § 1324b national origin discrimination jurisdiction where "a charge with respect to that practice based on the same set of facts has been filed with the Equal Employment Opportunity Commission under title VII of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000e et seq.], unless the charge is dismissed as being outside the scope of such title.")

until 1995 and there is no question of a basis for equitable tolling, OCAHO does not have jurisdiction over any cause of action in this case. See United States v. Auburn University, 4 OCAHO 617 (1994) (Order).

B. No Overlap with EEOC Complaints

Title 8, § 1324b(b)(2) prohibits charges of unfair immigration-related employment discrimination based on national origin where the charging party has previously filed and obtained a merits determination on an EEOC charge. Exhibit 1 to Respondent's Motion is a copy of a national origin discrimination complaint filed by Complainant with the Department of Justice (DOJ) Complaint Adjudication Office. The DOJ Complaint Adjudication Officer found that "[t]he record does not support complainant's claim that he was discriminated against based on his Japanese-American national origin when he was not selected for a Drug Treatment Specialist position...." Dept. of Justice Decision at 15. In addition, Respondent attaches a copy of the appeal filed by Complainant to the EEOC in which the Commission affirmed the final agency decision finding no national origin discrimination against Complainant.

The EEO complaint and appeal were based on the same set of facts as the Complaint at hand. Accordingly, even if his charge were timely filed with OSC, I would lack jurisdiction over the national origin discrimination allegation.

III. *Ultimate Findings, Conclusions and Order*

I have considered the Complaint, the Answer and the pleadings filed by the parties. All motions and other requests not previously ruled upon are denied.

For the reasons more fully discussed above, I find and conclude as follows:

1. OCAHO lacks jurisdiction over the Complaint under 8 U.S.C. §§ 1324b(a)(2)(B), (b)(2) and (d)(3);

2. Respondent's Motion for Summary Decision is granted.

Pursuant to 8 U.S.C. § 1324b(g)(1), this Final Decision and Order Granting Respondent's Motion for Summary Decision is the final administrative adjudication in this proceeding and "shall be final unless appealed" within 60 days to a 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. § 1324b(i).

SO ORDERED.

Dated and entered this 5th day of June, 1995.

MARVIN H. MORSE
Administrative Law Judge