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

January 23, 1997

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| SARA CASPI, | ) | |
| Complainant, | ) | |
| | ) | |
| v. | ) | 8 U.S.C. §1324b Proceeding |
| | ) | OCAHO Case No. 95B00159 |
| TRIGILD CORPORATION, | ) | |
| Respondent. | ) | |
| | ) | |

**REQUEST TO OFFICE OF SPECIAL COUNSEL TO PROVIDE INFORMATION AND COMMENT**

*Procedural Background*

This is an action arising under the provisions of the Immigration Reform and Control Act of 1986 (IRCA), an amendment to the Immigration and Nationality Act, as amended, 8 U.S.C. §1324b (INA), in which Sara (Dina) Caspi is the complainant and the Trigild Corporation is the respondent. Caspi filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) alleging that respondent discriminated against her on the basis of her citizenship and national origin by terminating her employment at the Huntington Hotel, and that respondent also engaged in acts of retaliation and document abuse. Respondent filed an answer denying the material allegations of the complaint and raising a timeliness defense. Presently pending is respondent's motion to dismiss on the ground that neither the complaint nor the underlying OSC charge was timely filed. Complainant has made no response to this motion and it is ripe for ruling.

On September 4, 1996, based on the responses to an initial order of inquiry, I issued an order of partial dismissal directed to that portion of the complaint alleging citizenship status discrimination on

the grounds that Caspi was not a protected individual within the meaning of 8 U.S.C. §1324b(a)(3)(B). Thereafter, I also issued a second order of inquiry directed to clarifying responses made by the parties to the first inquiry about the number of Trigild's employees at the Huntington Hotel. Caspi had previously represented in a sex discrimination charge filed with the Equal Employment Opportunity Commission (EEOC)[1] that Trigild had 15 employees, and in a charge filed with OSC that Trigild had 14 employees. In another document which is dated January 13, 1995 and is attached to her complaint, Caspi had stated, "In the Huntington Hotel alone, they reduced the number of employees from about 25 to 14 *now*." (emphasis supplied). Trigild had asserted that it had 400 employees.

The second order of inquiry was directed specifically to the number of Trigild's employees at the Huntington Hotel for each calendar month during 1994 and 1993. Both parties were requested to elaborate upon their previous responses and to provide additional information and/or documentary evidence.

*Responses to the Second Order of Inquiry*

Trigild responded to the second order of inquiry stating that from the time it took over the operations of the Huntington Hotel on November 3, 1993, and through the date of complainant's termination in May of 1994, it had at least 15 employees at the hotel in each calendar month. Trigild further indicated that its records relating to the hotel were in storage but would be obtained if needed. It was otherwise silent as to the number of employees prior to November 3, 1993 when it took over the hotel, or after May 1994, when Caspi's employment ended. Trigild sold the hotel to a third party in May 1995.

Thus Trigild furnished no information about the number of hotel employees either before its own involvement with the hotel or after the termination of Caspi's employment there. Caspi did not respond at all to the second order of inquiry.

[1] The referenced charge was initially filed with the California Department of Fair Employment and Housing and is dated March 7, 1995. Caspi's response to the first order of inquiry included, *inter alia*, a letter she sent to OSC on March 10, 1995 informing OSC that the California agency had referred her charge to EEOC.

*Questions Presented*

At issue is whether OCAHO jurisdiction over the claim of national origin discrimination can be established at all where Caspi's own submissions make contradictory statements about the number of Trigild's employees and also demonstrate that EEOC assumed jurisdiction over her allegations of sex discrimination premised upon her representation to that agency that respondent had 15 employees, but for reasons which are nowhere clear, EEOC did not include her national origin claims in that charge. The information currently of record, including respondent's reply to the second inquiry, is insufficient to resolve definitively the question I asked. It is sufficient, however, to pose substantial doubts as to whether, with one narrow exception,[2] OCAHO has jurisdiction over the claims of national origin discrimination.

*Applicable Standards for Decision*

Ordinarily, a motion to dismiss for failure to state a claim should be granted only in the very limited circumstances where it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations of the complaint. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984). Thus in evaluating a motion to dismiss for failure to state a claim, the allegations in the complaint must be viewed in the light most favorable to the complainant, with all the well-pleaded factual allegations accepted as true, with all reasonable inferences drawn in the complainant's favor, and with all doubts resolved in favor of the nonmoving party.

With respect to the claims of national origin discrimination, however, I can reach the merits of the timeliness issue only if I first find that I have subject matter jurisdiction to do so. A motion to dismiss for failure to state a claim may be decided only after finding jurisdiction over the subject matter, because to rule on the validity of a claim is, in itself, an exercise of jurisdiction. *Bell v. Hood*, 327 U.S. 678, 683 (1946). Because it is apparent from documents in the record that the factual predicate for jurisdiction over the allegations of national origin discrimination may be lacking, I am obliged before act-

[2] The exception results because allegations of document abuse under §1324b(a)(6) pose no issues cognizable by EEOC. OCAHO jurisdiction over these issues therefore is not subject to the numerical limitation on the number of employees.

ing further on this portion of the claim to ascertain whether or not I have any authority to do so.

OCAHO rules[3] make specific provision in 28 C.F.R. §68.10 for dealing with a motion to dismiss for failure to state a claim upon which relief may be granted. This rule is similar to and based upon Rule 12(b)(6) of the federal rules of civil procedure which provides for the dismissal of cases in the federal courts. While there is no specific provision in OCAHO rules expressly providing for a dismissal for lack of subject matter jurisdiction (the equivalent of Rule 12(b)(1) of the federal rules), the instruction of 28 C.F.R. §68.1 is that the federal rules may be used as a general guideline in any situation not provided for or controlled by OCAHO rules. Accordingly, I look to the guidance of the federal cases applying both Rule 12(b)(1) and Rule 12(h)(3), which directs that "[w]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court should dismiss the action." One commentator has observed that

> Courts occasionally will blur the distinction between a Rule 12(b)(1) motion and a Rule 12(b)(6) motion to dismiss for failure to state a claim, applying the standard articulated in *Conley v. Gibson* (citation omitted) that a complaint should not be dismissed unless it appears beyond doubt that plaintiffs can prove no set of facts that would entitle them to a claim for relief (citation omitted). However, this is inappropriate in that the purpose of Rule 12(b)(6) is to conserve judicial resources by screening out those actions in which it can readily be determined that the plaintiff has no chance of prevailing. By contrast subject matter jurisdiction deals with the power of the court to hear the plaintiff's claims in the first place, and therefore imposes upon courts an affirmative obligation to ensure that they are acting within the scope of their jurisdictional power.
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> 5A Charles A. Wright and Arthur R. Miller, Federal Practice and Procedure §1350, (2d ed. Supp. 1995).

For purposes of the jurisdictional inquiry, no presumptive truthfulness applies to controverted assertions where the issue is not a mere facial attack on the pleadings but a challenge to the factual basis for jurisdiction on the first instance. *Cedars-Sinai Medical Ctr. v. Watkins*, 11 F.3d 1573, 1583 (Fed. Cir. 1993), *cert. denied sub nom.*

[3] Rules of Practice and Procedure for Administrative Hearings, 28 C.F.R. pt. 68 (1996).

*Cedars Sinai Medical Ctr. v. O'Leary*, ___U.S. ___, 114 S.Ct. 7738 (1994). As elaborated by one court:

> Rule 12(b)(1) motions to dismiss based upon subject matter jurisdiction generally come in two varieties. A facial attack on the subject matter jurisdiction alleged by the complaint merely questions the sufficiency of the pleading. In reviewing such a facial attack, a trial court takes the allegations in the complaint as true, which is a similar safeguard employed under 12(b)(6) motions to dismiss. On the other hand, when a court reviews a complaint under a factual attack, as here, no presumptive truthfulness applies to the factual allegations.

*Ohio National Life Ins.. Co. v. United States*, 922 F.2d 320, 325 (6th Cir. 1990).

Neither am I limited in considering extra-pleading material for purposes of this inquiry. *McCarthy v. United States*, 850 F.2d 558 (9th Cir. 1988), *cert. denied*, 489 U.S. 1052 (1989). 5A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure §1350 n. 32. The burden of demonstrating the existence of jurisdiction is on the party invoking it. *Farmers Ins. Exchange v. Potage La Prairie Mut. Ins. Co.*, 907 F.2d 911, 912 (9th Cir. 1990), *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 748 (Fed. Cir. 1988).

*The Factual Record*

Materials submitted in response to the first order of inquiry, together with the documents attached to the complaint, undermine the factual basis for OCAHO jurisdiction in several respects. As noted, Caspi's EEOC charge dated March 7, 1995 states that respondent had 15 employees, while her OSC charge dated April 17, 1995 states there were 14. In addition, she stated on January 13, 1995 that respondent had reduced the number of employees from "about 25" to "14 now." Her EEOC dismissal and notice of rights dated September 29, 1995, demonstrates that EEOC exercised jurisdiction over and processed her charge No. 340954536 under both Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. §2000e et seq., and the Age Discrimination in Employment Act, as amended, 29 U.S.C. §623 et seq. (ADEA).

Although Caspi's OSC charge is dated April 17, 1995, her complaint states that she filed it on January 14, 1995. This statement is further elaborated by a note stating that she attempted to send the charge by UPS but that it was returned to her because it had no street address and UPS does not deliver to a post office box address. She subsequently sent it by U.S. mail. OCAHO regulations provide

that a charge mailed to OSC shall be deemed filed on the date it is postmarked. 28 C.F.R. §44.300(b). *See Jian Xian Pan v. Jude Eng'g, Inc.*, 4 OCAHO 648, at 12 (1994). Included in Caspi's response to the first order of inquiry were, *inter alia*, copies of a letter from OSC dated March 8, 1995 stating it had received her letter on February 14, 1995, but that "your charge is incomplete"; and her letter to OSC dated March 10, 1995 informing OSC that she had also filed a charge with the California Fair Housing and Employment Department which had transferred the charge to EEOC, but that the California agency had refused to include her allegations of national origin discrimination in the charge. Why the California agency declined to include these allegations is unelaborated.

OSC's letter of March 8, 1995 requested that Caspi provide additional information within forty five days, which she evidently did. OSC thereafter accepted Caspi's charge, but dated it April 17, and subsequently dismissed as untimely filed, not for lack of jurisdiction. The record does not disclose whether the provisions of 28 C.F.R.§44.301(c)(1) and (2) (which provide that under some circumstances a submission may be deemed to be a charge on the date of its receipt even though it may lack some of the necessary information) were utilized in this case to give her the benefit of the earlier filing date. Had her submission been "deemed" to be a charge, Caspi's OSC charge might actually have preceded the EEOC charge, depending upon when it was so deemed.

*Jurisdictional Problems Presented by the Record*

1. The number of Trigild's employees at the Huntington Hotel during the relevant period

Whether Trigild actually did have 15 employees on January 13, 1995, March 7, 1995, or April 17, 1995 has no bearing on the jurisdictional inquiry for either agency. Because Caspi's employment at the hotel ended on May 18, 1994, the number of employees in 1995 is simply not relevant. EEOC's governing statute confers jurisdiction over employers with fifteen or more employees for each working day in each of twenty or more calendar weeks,[4] and specifically directs

[4] The Seventh and Eighth Circuits formerly read this language to require that part-time and temporary workers be excluded from the count while EEOC and other circuits utilized the payroll method of counting, as does OSC. 52 Fed. Reg. 37, 402 (1987). The Supreme Court has recently resolved the conflict in favor of the payroll method of counting. *Walters v. Metro. Educ. Enter., Inc.*, Nos. 95–259, 95–779, 1997 WL 9783, at * 4 (U.S. Jan. 14, 1997).

that the number of employees be assessed in the current or preceding calendar year, with the "current" year being defined in the caselaw as the year in which the alleged act of discrimination occurred,[5] while OSC counts the number of employees on the day of the alleged discrimination. Preamble, Final Rule promulgating 28 C.F.R. Part 44, 52 Fed. Reg. 37402 (1987), *see also* 28 C.F.R. §44.101(a)(9). For purposes of the jurisdictional inquiry therefore, the operative period for assessing coverage under Title VII would be calendar years 1994 and 1993, while for OSC jurisdiction the date would be May 18, 1994.

Whether or not a charge was ever filed with EEOC, OCAHO would lack jurisdiction if there were 15 or more employees during the period and EEOC had jurisdiction under Title VII. Jurisdiction of OCAHO's administrative law judges over claims of national origin discrimination is generally limited to cases involving employers of more than three but fewer than fifteen employees, 8 U.S.C §1324b(a)(2), and as is pointed out in *Adame v. Dunkin' Donuts*, 4 OCAHO 691, at 4 (1994) (citing cases), OCAHO cases dismissing national origin claims because more than fourteen employees were on the employer's payroll are legion.

2. Whether the EEOC or OSC was the correct agency to process Caspi's charge of national origin discrimination

The record here discloses, moreover, that EEOC assumed jurisdiction over complainant's allegations of *sex* discrimination based on the same set of facts as are alleged here, and made a determination on the merits. Although the national origin allegations were not included in that charge, EEOC jurisdiction for purposes of a sex discrimination charge necessarily requires that an employee have 15 or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year: if an employer satisfies this definition for purposes of other allegations covered by Title VII, it would necessarily satisfy the definition for allegations of national origin discrimination as well.

[5] *Norman v. Levy*, 756 F. Supp. 1060, 1062 n.3 (N.D. Ill. 1990). *Dumas v. Town of Mount Vernon,* 612 F.2d 974, 979 n.4 (5th Cir. 1980) *abrogated on other grounds, Larkin v. Pullman-Standard Div., Pullman, Inc.,* 854 F.2d 1549, 1569 (11th Cir. 1988). *See* B. Schlei &P. Grossman, Employment Discrimination Law 837 (1976).

8 U.S.C. §1324b(a)(2)(B) provides that the prohibitions against national origin discrimination do not apply to

> a person's or entity's discrimination because of an individual's national origin if the discrimination with respect to that person or entity and that individual is covered under section 2000e–2 of Title 42. . . .

Accordingly, it should not be possible for the same alleged acts of national origin discrimination to be within the jurisdiction of both agencies, although it is, of course, theoretically possible for an employer to have had fifteen or more employees for each working day for twenty weeks in a given calendar year, but also to have had only fourteen employees on the date of the alleged discrimination. In such an instance, 28 C.F.R. §44.200(b)(ii) suggests that EEOC jurisdiction would take precedence. This result is consistent with the premise that the enactment of IRCA was not intended to disturb jurisdiction over national origin discrimination claims already established under Title VII. OCAHO jurisprudence has consistently followed this premise. *See, e.g., Romo v. Todd Corp.,* 1 OCAHO 25, 122 (1988), *aff'd sub. nom. United States v. Todd Corp.,* 900 F.2d 164 (9th Cir. 1990); *Adatsi v. Citizens & S. Nat'l Bank of Georgia,* 1 OCAHO 203 (1990), *appeal dismissed, Adatsi v. Department of Justice,* No. 90–8943 (11th Cir. 1991).

In order to prevent any loss of rights arising from the operation of a filing deadline against an individual who mistakenly files with the wrong agency, OSC and EEOC have entered into a Memorandum of Understanding, 54 Fed. Reg. 32499 (1989), which, *inter alia,* makes each agency the agent of the other for the sole purpose of receiving charges so that a filing with the wrong agency will, under appropriate circumstances, be deemed to be a contemporaneous filing with the correct agency. The agreement also provides that national origin charges filed with OSC should be referred to EEOC where 1) the charge is outside the jurisdiction of OSC, 2) the charge alleges discrimination with respect to hiring, discharge, compensation, terms, conditions, or privileges of employment, and 3) the employer may have had fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year. Memorandum of Understanding, Guidelines for Attorneys in the Office of Special Counsel, I.A.(1)–(3), 54 Fed. Reg. at 32501. The agreement further provides that allegations of retaliation based on a transferred charge shall be transferred as well. *Id.,* I.B.(1)–(2). Corresponding provisions set out the circumstances under which

EEOC staff will transfer a charge to OSC. It does not appear that either agency made a referral to the other in this case.

3. Whether EEOC or OSC was the first agency to act upon Caspi's charge

OCAHO precedent also establishes that once jurisdiction attaches in one agency, the other agency is ordinarily deprived of any authority to act. *Wockenfuss v. Bureau of Prisons*, 5 OCAHO 767 at 2 (1995), *Adame v. Dunkin' Donuts*, 5 OCAHO 722, at 3 (1995). *Adame* holds that this is true even if the first agency to assume jurisdiction did so erroneously, because 8 U.S.C. §1324b(b)(2) provides that

> No charge may be filed respecting an unfair immigration-related employment practice described in subsection (a)(1)(A) of this section if 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. No charge respecting an employment practice may be filed with the Equal Employment Opportunity Commission under such title if a charge with respect to such practice based on the same set of facts has been filed under this subsection unless the charge is dismissed as being outside the scope of this section.

Caselaw does not specifically address the situation where EEOC actually takes jurisdiction under Title VII but the charge it takes does not include the claim of national origin discrimination. In *Curuta v. U.S. Water Conservation Lab*, 3 OCAHO 459, at 9 (1992), *aff'd.,* 19 F.3d 26 (9th Cir. 1994)(table), however, a related issue was raised where both OSC and the complainant had attempted to file national origin allegations with EEOC, but EEOC rebuffed these efforts because the respondent was a federal agency and charges therefore had to be initiated with the agency's EEO Counselor. The allegations were not barred by the no overlap provision, but EEOC's refusal to accept the charge did not preclude dismissal of the national origin claim where the number of employees exceeded OCAHO jurisdiction.

It is not entirely clear on this record, moreover, that OSC was not the first agency to assume jurisdiction because it is not clear whether the letter it received on February 14, 1995 was deemed to be a charge, and, if so, when it was so deemed. (The earlier filing date would, of course, provide no help if the number of employees is found to have exceeded the OSC jurisdictional limit.)

*Request to Office of the Special Counsel*

The record does not reveal whether OSC's investigation of Caspi's charge encompassed any of the factual questions posed here. To the extent that OSC's investigatory files contain information which would clarify these issues, OSC is requested to provide that information.

The views of OSC as to the jurisdictional issues would be helpful as well. Before proceeding further, I therefore solicit OSC's views and comments, including, but not limited to,

1) whether Caspi's February 14, 1995 letter was deemed by OSC to be a charge pursuant to 38 C.F.R. §301(c), and, if so, on what date;

2) when Caspi's charge was actually "accepted" by OSC if that date is different from the date shown on the face of the charge;

3) whether OSC's investigation included information about the number of employees on the date of the alleged discrimination or for each working day in 20 or more calendar weeks in 1994 or 1993;

4) whether OSC's investigation included a determination of precisely when the various alleged discriminatory acts occurred;

5) whether OSC's file reflects any communication with EEOC regarding the subject charges; and

6) any other information which would be helpful in resolving the questions posed.

A response would be most helpful if it could be provided prior to February 24, 1997.

**SO ORDERED.**

Dated and entered this 23rd day of January, 1997.

ELLEN K. THOMAS
Administrative Law Judge