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

PRADO-ROSALES,	)	
Complainant,	)	
	)	
v.	)	8 U.S.C. §1324b Proceeding
	)	Case No. 92B00024
MONTGOMERY DONUTS,	)	
Respondent.	)	
	)	

DECISION AND ORDER
(June 26, 1992)

MARVIN H. MORSE, Administrative Law Judge

Appearances:

Lorenzo W. Tijerina, Esq. for Complainant.
William C. Hansen, Esq. for Respondent.

I. *Statutory and Regulatory Background*

This case arises under Section 102 of the Immigration and Reform and Control Act of 1986 (IRCA), as amended, 8 U.S.C. §1324b. Section 1324b provides that it is an "unfair immigration-related employment practice" to discriminate against any individual other than an unauthorized alien with respect to hiring, recruitment, referral for a fee, or a discharge from employment because of that individual's national origin or citizenship status. . . ." The statute covers a "protected individual," defined at Section 1324b(a)(3) as one who is a citizen or national of the United States, an alien lawfully admitted for either permanent or temporary residence, an individual admitted as a refugee or granted asylum.

Congress established the new cause of action out of concern that the employer sanctions program, codified at 8 U.S.C. §1324a, might lead to employment discrimination against those who appear "foreign,"

including those who, although not citizens of the United States, are lawfully present in this country.[1] Protected individuals alleging discriminatory treatment on the basis of national origin or citizenship must file their charges with the Office of Special Counsel for Immigration-Related Unfair Employment Practices (Special Counsel or OSC). The OSC is authorized to file complaints before administrative law judges designated by the Attorney General. 8 U.S.C. §1324b(e)(2).

IRCA permits private actions in the event that OSC does not file a complaint before an administrative law judge within a 120-day period. The person making the charge may file a complaint directly before an administrative law judge within 90 days of receipt of notice from OSC that it will not prosecute the case. 8 U.S.C. §1324b(d)(2).

II. *Procedural History*

Maria Ofelia Prado-Rosales (Complainant or Rosales) filed citizenship and national origin discrimination charges with OSC against Montgomery Donuts (Respondent or Donuts). On October 18, 1991, OSC issued a determination letter addressed to counsel for Rosales. In its letter, OSC advised that it

> has determined that Ms. Rosales is not a protected person under 8 U.S.C. §1324b. We, therefore, are dismissing the citizenship status discrimination allegations on this basis. We are referring the national origin portion of the charge to the EEOC because the employer has more than 14 employees.

The complaint in this case was filed as a private action by Lorenzo W. Tijerina, counsel for Complainant, on January 30, 1992. An Answer in letter form was filed by Respondent on February 11, 1992. A prehearing conference was held in Falls Church on April 3, 1992. Following the conference I issued a report and order which discussed, inter alia, a challenge raised by Donuts at the conference to the timeliness of the complaint. Addressing the timeliness issue, the order noted that Rosales' counsel had no record of the date on which he received OSC's determination letter, and described a procedure for inquiry to OSC to confirm the date of delivery. The order advised that resolution of the timeliness question in Rosales' favor would still leave several fundamental questions unanswered, including,

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[1] "Joint Explanatory Statement of the Committee of Conference," Conference Report, H.R. Rep. No. 99-1000, 99th Cong., 2d Sess. 87 (1986).

Is Complainant a protected person under 8 U.S.C. §1324b?

First Prehearing Conference Report and Order (April 6, 1992) at 2

Summarizing the prehearing conference, the report also noted that I had "encouraged the parties to negotiate a settlement." I commented that

> [S]ince Montgomery Donuts, Inc., has already offered to rehire Rosales, only an accommodation regarding the terms of that offer remains. . . . Absent a settlement or dismissal on other grounds, the evidentiary hearing will be held on July 29 and 30, 1992, as agreed.

On April 6, 1992 I addressed an on-the-record inquiry to OSC. The inquiry asked what date Mr. Tijerina received the OSC determination letter according to its certified mail records. OSC filed its response on April 10.

My Order to Show Cause dated April 14, 1992 is self-explanatory:

> On April 10, 1992 OSC filed a response to my inquiry, indicating delivery of copies to the parties. OSC reported and enclosed a copy of the return receipt, showing October 29 as the date of Complainant's receipt by counsel of the determination letter. In that light, it appears that the complaint was filed two days late, i.e., more than ninety days after receipt of OSC's determination letter, and therefore did not comply with the statutory filing deadline. 8 U.S.C.§1324b(d)(2).
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> This Order to Show Cause invites Complainant to show such cause as she may have to demonstrate why her complaint should not be dismissed as untimely filed. Such a pleading will be timely, if filed not later than May 1, 1992.

In response to the Show Cause, Rosales filed a May 1 motion (with memorandum in support) to dismiss Donuts' April 3 oral motion to dismiss. On May 14, Donuts filed a reply to the May 1 response and an amended answer to the complaint, to which Rosales filed objections on May 26. The May 26 filing is supported by a 13 page Memorandum of Points and Authorities.[2] On June 10, Donuts filed an Opposition to Rosales' May 26 filings.

[2] Complainant's May 1 and May 26 memoranda both erroneously state that during the prehearing conference I had held that she is a protected person under 8 U.S.C. §1324b. Not only did I not so state but instead asked the basis for OSC's conclusion that she is not a protected individual. See First Prehearing Conference Report and Order (April 6, 1992) at 2, asking the question quoted above; Transcript of Prehearing Conference at 16-20.

On June 11, 1992 I issued an Order of Inquiry to the parties in which I altered course, advising that I would focus first on the protected status issue as "potentially dispositive of the whole case." Id. at 2. On June 19, the parties filed responses to the particular questions addressed to each.

III. *Discussion*

A. The Complaint Was Not Timely Filed

The OSC determination letter was received by counsel for Complainant on October 29, 1991. The complaint was filed on January 30, 1992, 93 days later. It is undisputed that the complaint was not filed within the ninety day period from receipt by counsel on Rosales' behalf. 8 U.S.C. 1324b(d)(2). Complainant argues instead that the Federal Rules of Civil Procedure (Rules) and caselaw support her claim that Respondent's failure to raise timely filing as an affirmative defense at the first opportunity, i.e., in the original answer, renders it defective. I do not agree. In light of the liberal amendment policy in federal practice, neither the Rules nor caselaw support her claim.

Complainant's argument regarding the affirmative defense of limitations is incomplete. Complainant's reliance on Rule 8(c), fails to take into account the necessary juxtaposition of that Rule with Rule 15. Rule 15 sets forth the well established policy favoring liberal amendment of pleadings. Caselaw does not support Complainant's affirmative defense argument. Rather, the established principle is that a timeliness defense is prohibited only when absence of such a prohibition would result in unfair surprise or prejudice to the plaintiff or complainant. Because Donuts amended its answer, i.e., raised the timeliness issue, as early as the first prehearing conference, Complainant's rights are not so compromised. She has not, nor could she, show such surprise or prejudice as to entitle her to an amendment prohibition. Combee v. Shell Oil Co., 615 F.2d 698 (5th Cir. 1980) (reversing the trial court for abuse of discretion in allowing party to amend answer to assert an affirmative defense after both parties rested, therefore unjustly surprising the opposing party); Senter v. General Motors Corp., 532 F.2d 511 (6th Cir. 1976) (affirming denial of motion to amend answer where appellee filed such motion for the first time "after the district court had rendered its opinion."); Peterson v. Air Line Pilots Association, International, 759 F.2d 1161 (4th Cir. 1985); Wycoff v. Menke, 773 F.2d 983 (8th Cir. 1985); De Hoyos v. Sealed Power Technologies, Ltd. Ptnshp., No. 90-C5226, 1991 U.S. Dist.

LEXIS 17132 (N.D. Ill. Nov. 21, 1991); Stanley Works v. Snydergeneral Corp., 781 F. Supp. 659 (E.D. Cal. 1990); DiLoreto v. Oaklyn, 744 F. Supp. 610 (D.M.J. 1990); Quality Technology v. Stone Webster Engineering, 745 F. Supp. 1331 (E.D. Tenn. 1989); Transport Trailer Service v. Inc. v. UpJohn, 506 F. Supp. 442 (E.D. Penn. 1981).

Authorities rejecting a limitations defense after a case has run its course are inapposite.[3] I consider the defense of untimely filing to have been adequately pleaded. Accordingly, I hold and conclude that the complaint in this case was filed out of time, and must be dismissed.

B. Complainant is not a Protected Individual

Even had the complaint been timely filed, Rosales lacks protection as to her citizenship status discrimination claim because she is not a protected person within the meaning of 8 U.S.C. §1324b(a)(1)(B) and 8 U.S.C. §1324b(a)(3). As discussed below, the responses provided by her counsel in the June 19 filing to my Order of Inquiry make clear that Rosales is not within the class of individuals protected against citizenship status discrimination.[4]

IRCA excludes, inter alia, from the class of protected individuals

> an alien who fails to apply for naturalization within six months of the date the alien first becomes eligible (by virtue of period of lawful permanent residence) to apply for naturalization . . .

8 U.S.C. §1324b(a)(3)(B)(i). A permanent resident alien is first eligible to file for naturalization after residing in the United States for at least five years after attaining status as a lawful permanent resident. 8

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[3] The requirement for timely filing of a complaints before administrative law judges under 8 U.S.C. §1324b has been held to be one of limitations, and not jurisdictional. Grodski v. OOCL (USA) Inc., 1 OCAHO 295 (2/13/91) at 4. Although such a limitations period in a remedial context such as this one is susceptible to equitable tolling in an appropriate case, no such claim has been made here, nor is it generally available to a party represented by counsel. Grodski, 1 OCAHO at 4; Lundy v. OOCL (USA) Inc., 1 OCAHO 215 (8/8/90) at 8; U.S. v. Mesa Airlines, 1 OCAHO 74 (7/24/89), appeal dismissed, No. 89-9552 (10th Cir. 1991).

[4] The Order of Inquiry cited 8 U.S.C.§1324b(a)(3)(B), explicitly reciting that the question arises "whether she fell out of protected status." The Order also cited those provisions of the Immigration and Nationality Act which define eligibility for naturalization. Considered in that context, I appreciate the directness and candor of the responses filed by Rosales.

U.S.C. 1427(a). However, a permanent resident living with a citizen spouse becomes eligible after only three years. 8 U.S.C. §1430(a)[5]

Rosales has been a permanent resident alien since January 15, 1967. Rosales never applied for naturalization. Her absences from the United States were occasional, none for more than a month. By her own statement, she became eligible to become a citizen in January, 1972. By any accounting she has for many years been eligible for, but has not applied for, naturalization.

By operation of law, Rosales is excluded from the class of individuals entitled to protection against citizenship status discrimination. I have no option, but to find and conclude that Complainant failed to apply for naturalization and therefore is not a protected individual within the protection of the prohibition against citizenship status discrimination.

C. Fee Shifting Denied

Respondent's amended answer requests award of attorneys' fees. Attorneys' fees can be awarded "in the judge's discretion" to a "prevailing party, other than the United States . . . if the losing party's argument is without reasonable foundation in law and fact." 8 U.S.C. §1324b(h). The conclusion that Complainant fell out of protected individual status by failing to satisfy the naturalization application requirement is, so far as I am aware, a matter of first impression in IRCA jurisprudence. There is no basis to discredit her counsel's claim that he was unaware of the date he received the OSC determination letter. For these reasons, I deny the application for fee shifting.

IV. *Ultimate Findings, Conclusions and Order*

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[5] As originally enacted, IRCA also limited eligibility to assert citizenship status discrimination to otherwise covered individuals who qualified as "intending citizens." Former 8 U.S.C. §1324b(a)(1)(B) as defined in former 8 U.S.C. §1324b(a)(3)((B)(ii). As amended, there is no longer an "intending citizen" qualification. Rather, protection is available to a covered individual (other than one who is excluded) without regard to intent to become a citizen. 8 U.S.C. §§1324b(a)(1)(B) and 1324b (a)(3)(B).

Elimination of the "intending citizen" requirement may have enlarged the numbers of those protected against citizenship status discrimination. It is speculative whether it would have been logical also to have eliminated the requirement that those eligible for naturalization make application for citizenship within six months of eligibility.

I have considered the pleadings, memoranda, arguments and trans-cript of the prehearing conference. All motions and other requests not previously disposed of are denied. Accordingly, as more fully explained above, I find and conclude that Complainant is not a covered individual under 8 U.S.C. §1324b, and that her complaint was not timely filed. Accordingly, the complaint is dismissed. 8 U.S.C. §1324b(g)(2). The hearing is canceled.

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

SO ORDERED.

Dated and entered this 26th day of June, 1992.

MARVIN H. MORSE
Administrative Law Judge