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

February 29, 1996

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

ERRATA

In my Order of Inquiry dated February 27, 1996, the text at page 7 which reads

3) the circumstances surrounding and reasons for the delay the Complaint.

is hereby corrected to read

3) the circumstances surrounding and reasons for the delay in filing the Complaint with OCAHO.

SO ORDERED.

Dated and entered this 29th day of February, 1996.

ELLEN K. THOMAS
Administrative Law Judge

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

February 27, 1996

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

ORDER OF INQUIRY

Introduction

This is an action pursuant to §102 of the Immigration Reform and Control Act of 1896 (IRCA), as amended, 8 U.S.C. §1324b, in which Sara Caspi (Caspi or Complainant) filed a Complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) alleging that Trigild Corporation (Trigild or Respondent) discriminated against her on the basis of her citizenship and national origin by terminating her employment at the Huntington Hotel, by intimidating, threatening, coercing or retaliating against her, and by engaging in document abuse. Accompanying her complaint is a copy of the charge she filed with the Office of the Special Counsel (OSC) on April 17, 1995, and a copy of a letter from OSC dated July 18, 1995, advising her of her right to file a Complaint within 90 days of her receipt of the letter. The record does not reflect when she actually received the letter from OSC. The Complaint was filed on November 27, 1995, 132 days after the date on the OSC letter.

[1] All documents received by me between December 18, 1995 and January 11, 1996 are date-stamped January 11, 1996. Official notice is taken of a federal government shutdown during this period.

Respondent's answer was timely filed on January 11, 1996[1] together with a Motion to Dismiss on the grounds that neither the Complaint nor the OSC charge were timely filed, and a Memorandum of Points and Authorities in support thereof. Complainant has filed no response to this Motion and it is ripe for ruling.[2]

Under OCAHO Rules of Practice and Procedure,[3] the provision governing motions to dismiss a claim, §68.10, 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 federal court. *Bent v. Brotman Medical Center,* 5 OCAHO 764 (1995). Accordingly, it is appropriate to look to federal court decisions for guidance in ruling on this motion, and I do so.

For purposes of this analysis, I accept the following factual allegations set forth in the Complaint and attachments as true:

> Sara (Dina) Caspi is a citizen of Israel and a permanent resident alien since 1972, authorized to be employed in the United States. She has never applied for naturalization. She holds a hotel management certificate from an accredited institution, and had been employed as a front desk clerk and night auditor at the Huntington Hotel for approximately three years in November 1993, when a court appointed Receiver took over the management of the Hotel.

William J. Hoffman of Trigild Corp., the receiver, brought in a series of new managers including Robert Frost (November-December 1993), Ilam Haroush (December 1993–May 1994), and Tony Caldwell (May 1994–). These managers repeatedly requested Caspi to produce other and different documents showing authorization to work in the U.S. and rejected her green card because it had no expiration date. Gary Nadzharryan, age 25, was hired in July 1993 as a front desk clerk and was promoted to assistant manager in May 1994. Francis St. John, a one-time resident of the Hotel under another name, was hired in 1993 as a security man and given a room without having to pay rent. Other employees resided in the Hotel rent-free as well. St. John harassed and threatened Caspi from March 14, 1994 to May 16, 1994, which she reported to her managers, who did nothing about it. He was fired as a security man but stayed in the Hotel until mid-July 1994. In

[2] §68.11(b) provides that a party has ten (10) days after service of a written motion to file a response. §68.8(c)(2) provides that where service is had by ordinary mail, five (5) days shall be added to the prescribed period.

[3] Rules of Practice and Procedure for Administrative Hearings 28 C.F.R. pt. 68 (1995)

early May 1994, Caspi asked Haroush for 2 weeks leave, which he approved. Haroush later requested Caspi to vacate the premises or start paying rent as of May 15, 1994.

When she attempted to return to work, she found Haroush had been transferred to another hotel and Caldwell was the new manager. Caspi was not allowed to return to work on May 19, 1995. She did not resign and was not told that she was fired until June 7, 1994 when she was given a notice accusing her of taking unauthorized leave. She refused to sign the personnel form. There are still unpaid wages due her for April 1994, for regular and overtime pay.

On June 30, 1994, Caspi applied for unemployment compensation. She was initially held ineligible for the six-week period ending June 25, 1994 because she did not file a timely application, but on appeal this finding was reversed because of the employer's failure to provide "definite and coherent information" about her employment status. The appeal decision states that after receiving the June 7, 1994 notice, Caspi contacted various agencies including the labor department and legal services to obtain information. She then filed an application for unemployment compensation on June 30, 1995. She made various attempts to get her job back up to and including July 19, 1994.

Tony Caldwell caused three unlawful detainer cases to be filed against Caspi between August 31, 1994 and mid-October 1994. On March 10, 1995, Caspi filed a charge with EEOC alleging sex, age, religion, and national origin discrimination.

In January 1995, Caspi attempted to send a charge to the OSC via UPS but it was returned to her on January 18, 1995 marked "incorrect/incomplete delivery address". She subsequently filed a charge by U.S. mail on April 17, 1995.

The question posed by the Motion to Dismiss is whether these facts and the favorable inferences drawn from them state a claim for relief which is cognizable in this forum.

Applicable Law

A motion to dismiss 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 & Spaulding,* 467 U.S. 69, 73 (1984). Thus in evaluating this motion, I must view the allegations in the Complaint in the light most favorable to complainant, with all the factual allegations accepted as true, and with all reasonable inferences drawn in favor of the Complainant. I may not consider matters outside the pleadings[4] as this motion is solely a test of the legal sufficiency of the complaint. A complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under *some* viable legal theory. *L.R.L. Properties v. Portage Metro Housing Author ity*, 55 F.3d 1097 (6th Cir. 1995).

In order to rule on the instant motion, it is necessary at the threshold to address certain preliminary matters which may affect the disposition of either the motion or the case, in whole or in part.

Inquiries

A. *Citizenship Status Discrimination*

First, IRCA provides that in order to be eligible to assert a citizenship status discrimination claim under 8 U.S.C. §1324b, a complainant must qualify as a "protected individual." A permanent resident alien is not a protected individual if he or she "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 . . . " §1324b(a)(3)(B).

According to the Complaint and attachments, Caspi is a citizen of Israel and has been a permanent resident alien since 1972, but has never applied for naturalization. The parties, and especially the Complainant, are requested to comment and/or submit any relevant evidence as to if and when she ever became eligible to apply for naturalization, including information as to whether she is now or ever was married to a citizen of the United States.

B. *National Origin Discrimination*

Jurisdiction of administrative law judges in national origin discrimination claims under §1324b is generally limited to cases involving employers of three or more individuals, subject to a ceiling of

[4] For purposes of this Motion, attachments are considered part of the Complaint.

fourteen individuals. 8 U.S.C. §1324b(a)(2). National origin discrimination cases involving employers of more than fourteen individuals (for each working day in each of twenty or more calendar weeks in the current or preceding calendar year) generally falls within the jurisdiction of the Equal Employment Opportunity Commission (EEOC). 42 U.S.C. §2000e(b).

When filing her charge with OSC, Caspi indicated that there were fewer than 15 employees but more than 3 employees on the Huntington Hotel premises, but that she was unable to estimate the number of employees in the whole company. Attachments to her complaint, however, state that on March 10, 1995, she filed an EEOC charge alleging "discrimination practices of sex (gender), age, religion, national origin, citizenship status, and wrongful termination." No copy was provided of this charge. A copy of her charge with the California Department of Fair Employment and Housing *is* attached, but contains only allegations as to sex and age discrimination. It indicates, however, that Respondent has 15 employees.

§1324b(b)(2) provides

> 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 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 under this section as being outside the scope of this section.

The parties are requested to comment and to submit any available documentary evidence as to 1) the number of individuals employed by Respondent in 1994, and 2) the current status of any EEOC charges by Caspi against Respondent dealing with the same facts and circumstances here alleged.

C. *Timeliness*

At least since *Zipes v. Trans World Airlines,* 455 U.S. 385,393 (1982), it has been clear that statutory time limit for filing charges under Title VII, 42 U.S.C. §2000e et seq., is not a jurisdictional prerequisite to a suit in federal court but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable

tolling. In *Baldwin County Welcome Center v. Brown*, 466 U.S. 174 (1984), the court noted that the same equitable principles could, in appropriate circumstances, be applied as well to toll the running of the 90-day statutory period to file a Title VII action in federal court. In holding the same principles applicable to the 30-day period for bring Title VII suits against the federal government, the Court cautioned:

> . . . Federal courts have typically extended equitable relief only sparingly . . . the principles of equitable tolling . . . do not extend to what is at best a garden variety claim of excusable neglect. *Irwin v. Dept. Of Veterans Affairs,* 498 U.S. 89, 96 (1990).

OCAHO jurisprudence has been guided by these principles as well, see, e.g., *United States v. Weld County School District* 2 OCAHO 326 (1991). Federal courts have differed, however, with respect to the application of these principles in particular cases, and the effect at the pleading stage of a failure to plead facts which would provide a basis for equitable tolling.

The Complaint form completed by Caspi in this case asserts that she initially filed a charge with the OSC on "14 January 1995." Under the instruction "IMPORTANT: YOU MUST ATTACH A COPY OF THE CHARGE" there is a handwritten notation:

> I mailed it via U.P.S. Because of the unusual floods. Very bad weather. But they could not deliver it accordingly to a P.O. Box, so they returned it. (See copy of envelope) and then I mailed it again by the Post Office Later.

The copy of the UPS envelope shows a return date of January 18, 1995. The actual charge attached is dated April 17, 1995. No explanation is offered for the delay from January 18 to April 17, 1995.

Neither is there an explanation for the lengthy delay in filing the complaint. The record does not reflect the date Caspi actually received the OSC letter authorizing her to file a complaint.

In the Ninth Circuit, it is settled law that time limitations are susceptible to equitable modification on a case by case basis. In addressing a motion to dismiss a §1983 action based on a limitations defense, it was recently observed that under such circumstances the motion

> . . . can be granted only if the assertions of the complaint, read with the required liberality, would not permit the plaintiff to prove that the statute was tolled . . .

Cervantes v. City of San Diego, 5 F.3d 1273 (9th Cir. 1993).

More recently, in *Supermail Cargo, Inc. v. United States,* 68 F.3d 1204 (9th Cir. 1995), it was emphasized in another context that before a complaint may be dismissed it must *appear beyond doubt* that no facts could be proved to support equitable tolling:

> . . . we have reversed dismissals where the applicability of the equitable tolling doctrine depended upon factual questions not clearly resolved in the pleadings . . . (citing cases) . . .
>
> . . . Similarly we must reverse if the factual and legal issues are not sufficiently clear to permit us to determine with certainty whether the doctrine could be successfully invoked. 68 F.2d at 1207.

While findings in state unemployment compensation proceedings which have not been judicially reviewed are not entitled to collateral estoppel effect, *Mack v. South Bay Beer Distributors*, 798 F.2d 1279 (9th Cir. 1986), I nevertheless construe the facts found in the unemployment proceeding most favorably for Caspi, and note that they support equitable tolling at least until June 30, 1995 because she did not know until then that she was fired. There are no other facts alleged which would give rise to equitable tolling, but it is not possible to conclude at the pleading stage that there are no such facts.

Particularly where, as here, Caspi is unrepresented and it is not clear to a certainty that there are no additional facts which would provide a basis for equitable tolling, it is appropriate that Caspi have the opportunity to present such facts before suffering a dismissal.

In another §1983 case where the plaintiff was unrepresented, the Ninth Circuit directed that prior to dismissing the *pro se* complaint, a lower court must provide the litigant with notice of the deficiencies in the complaint and an opportunity to amend, unless it clear on the record that no amendment could cure the defect, *McGucken v. Smith*, 974 F.2d 1050 (9th Cir. 1992). With that in mind, the parties, especially the Complainant, should have an opportunity to comment and elaborate upon three subjects:

> 1) when Caspi actually received the OSC letter,
>
> 2) the circumstances surrounding and reasons for the delay in filing with the OSC, and
>
> 3) the circumstances surrounding and reasons for the delay the Complaint.

This is that opportunity.

Conclusion and Order

The parties are therefore requested to provide any facts in their possession regarding the following issues:

1. when and if Caspi became eligible to apply for naturalization,
2. the number of employees Trigild had in 1994,
3. the current status of Caspi's EEOC charge,
4. the date of receipt of the OSC letter and reasons for Caspi's delay in filing both the charge and the complaint.

The parties are advised that responses to this Order will be timely if filed no later than March 8, 1996.

ANY FILING WHICH DOES NOT CERTIFY TRUTHFULLY THAT A CONCURRENT COPY HAS BEEN SERVED ON THE ADVERSE PARTY WILL BE REJECTED.

The parties are advised that upon review of the responses to this Order, I may convert the Motion to Dismiss to a Motion for Summary Decision, and issue a final decision and order which fully disposes of this case.

SO ORDERED.

Dated and entered this 27th day of February, 1996.

ELLEN K. THOMAS
Administrative Law Judge