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

March 8, 1996

JOAN A. LARDY, MARY A. MOORE, KAROLINA S. GANTCHAR, LINDA S. WALKER, SUSAN SUHERLAND, JURIAN FARQUHARSON, CAROLYN HARMAR, CAROL VIEUX, Complainants,	)	
v.	)	8 U.S.C. §1324b Proceeding OCAHO Case No. 92B00085
UNITED AIRLINES, INC., Respondent.	)	

ORDER DENYING MOTION TO INTERVENE

I. *Introduction*

On April 23, 1992, Joan A. Lardy, Mary A. Moore, and Karolina S. Gantchar (Complainants) filed a complaint in their own names and on behalf of "all those similarly situated." The Complaint filed in the Office of the Chief Administrative Hearing Officer (OCAHO) sought relief from an Administrative Law Judge (ALJ) under Section 102 of the Immigration Reform and Control Act of 1986 (IRCA), as amended, 8 U.S.C. §1324b.

Complainants alleged that United Air Lines, Inc. (Respondent or United), discriminated against them when it refused to retain, transfer, and/or hire them following United's acquisition of Pan American World Airways' (Pan Am) London routes, air services and operations in 1991. Complainants alleged also that in 1992 United retaliated against them—former Pan Am flight attendants who

protested United's actions—by refusing to include them in settlement negotiations regarding all claims asserted by certain former Pan Am flight attendants and by treating them less favorably than those who did not engage in protected activity under IRCA. On January 11, 1993, a Complaint was filed in a related case, *Walker, et al v. United Air Lines, Inc*., OCAHO Case Number 93B00004.

This case and the *Walker* case were originally assigned to Administrative Law Judge Robert B. Schneider. The cases were reassigned to me on February 7, 1995. This case has had a lengthy procedural history summarized here with particular reference to those portions relevant to this Order.

On June 1, 1992, Respondent filed a Motion to Dismiss and to stay all discovery pending resolution of the Motion to Dismiss. On June 3, 1992, Judge Schneider issued an Order which stayed all discovery except that needed to resolve the Motion to Dismiss. On January 11, 1994, following extensive pleadings by both parties, Judge Schneider issued a Decision and Order, 4 OCAHO 595, which: (1) denied Respondent's Motion to Dismiss for lack of jurisdiction and lack of timeliness; (2) granted in part and denied in part Respondent's Motion to Dismiss for failure to state a claim upon which relief can be granted; (3) granted in part and found moot in part Complainants' Motion to Strike Certain Affirmative Defenses; (4) denied Complainants' request for sanctions; and (5) lifted the discovery stay.

On January 28, 1994, Complainants in both *Lardy* and *Walker* concurrently filed Complainants' Joint Motion to Consolidate and for Leave to Amend. By Order dated September 9, 1994, Judge Schneider instructed Complainants to file an amended Complaint naming the *Walker* Complainants as parties to the *Lardy* action as designated in an August 26, 1994 Decision and Order in *Walker* (as amended by a September 13, 1994 Amended Decision and Order, 4 OCAHO 686 (1994)).

The September 13, 1994 Order in *Walker* granted in part and denied in part United's Motion for Summary Decision in that case (filed February 12, 1993), and granted in part and denied in part Complainants' Motion for Joinder (filed concurrently on February 12, 1993). Pursuant to that Order, Complainants Hannelore Hainke, Helena Farquharson, Susan Sutherland, Carol Vieux, Jurian Vreeburg, Linda S. Walker, and Carol Harmer were permitted to join the *Lardy* case as Complainants; Walker and Harmer for their retal-

iation claims only, the others for both citizenship status discrimination and retaliation claims. *Id.* at 71–72. United's Motion for Summary Decision was granted as to Walker's and Harmer's allegations of citizenship status discrimination; Complainants' Motion for Joinder was denied as to "any and all unnamed former Pan Am flight attendants." *Id.* at 72. That Order also provided that IRCA does not authorize class claims. *Id.* at 48.

By Order dated November 10, 1994, Judge Schneider stayed the *Lardy* proceedings until March 1, 1995, and invited non-party flight attendants to file motions to intervene on or before December 16, 1994. That Order was served on the *Lardy* Complainants' counsel who also are counsel for the non-party flight attendants. On December 16, 1994, 22 former Pan Am flight attendants (movants) filed a Motion to Intervene which states:

> Each of the movants is a former [Pan Am] flight attendant. Movants Karen Bertschinger, Denise Blanc, Sharron A. Brown, Isanna Dale, Helena Esmat, Linda Galt, Bruce Gately, Marcia Jones-Pisi, Dorothy Kelly, Sheila A. McNamara, Helene Ostbo, Ann Price, Christopher Socci, Oonah McFarlane Wells, and Sheila White seeks to intervene for the purpose of pursuing claims of citizenship discrimination and retaliation against United. . . . Their claims arise out of the same course of conduct by United as the claims of the Complainants in this action, and the decision not to employ them was made at the same time and by the same United personnel who made the decision not to employ the Complainants. Movants Cornelia Meili Carre, Eva Fredrikkson, Eva Griffiths, Angela Heslop, Lena Jansson, Margaret Regan and Christine Van Loon seek to intervene as complainants in this action for purposes of pursuing retaliation claims only.

On January 20, 1995, Respondent filed its memorandum in response to the Motion to Intervene (Resp. Memo). Respondent asserts that the Motion to Intervene should be denied because it is untimely, and would materially prejudice United. Additionally, Respondent asserts that at least fifteen of the flight attendants should not be allowed to intervene because their claims are time-barred under the September 13, 1994 Amended Decision and Order in *Walker,* 4 OCAHO 686 (1994).

II. *Discussion*

A. *Intervention Requirements*

OCAHO Rules of Practice and Procedure which govern this proceeding provide, in pertinent part, that:

> any . . . interested person . . . may petition to intervene as a party in unfair immigration-related employment cases. The Administrative Law Judge, in his or her discretion, may grant or deny such a petition.

28 C.F.R. §68.15.

While this rule renders a decision regarding intervention discretionary, 28 C.F.R. §68.1 provides that:

> [t]he Rules of Civil Procedure for the District Courts of the United States may be used as a general guideline in any situation not provided for or controlled by these rules, the administrative Procedures Act, or by any other applicable statute, executive order, or regulation.

The applicable Federal Rule of Civil Procedure regarding permissive intervention provides that:

> Upon timely application anyone may be permitted to intervene in an action: . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Fed. R. Civ. P. 24(b).

Federal courts interpreting this rule consider three factors in deciding whether to grant permissive intervention: (1) whether the application is timely, (2) whether there is a question of law or fact in common, and (3) whether intervention will unduly delay or prejudice the adjudication of the rights of the original parties. *See e.g., Hill v. Western Electric Company, Inc.,* 672 F.2d. 381, 385 (4th Cir. 1982).

It is undisputed that the 22 individuals seeking to intervene raise questions of law and fact in common with the original Complainants in this action. Specifically, each movant is a former Pan Am flight attendant allegedly denied employment by Respondent following the acquisition of Pan Am's London routes. They seek to intervene as Complainants to pursue citizenship status discrimination and/or retaliation claims, as the current Complainants assert. As such, the factual and legal issues involved are in common with the Complainants already in this case.

B. *Discussion of Intervention Timeliness*

The timeliness of a motion to intervene is determined from all the circumstances of a case, including, but not limited to, the point to

which the case progressed as of the time the motion is filed. *NAACP v. New York,* 413 U.S. 345, 365–366 (1973). Other factors courts consider in deciding the timeliness of a motion to intervene include: (1) the length of time the intervenor knew or should have known of its interest in the case, (2) the degree of prejudice to existing parties if the motion to intervene is granted, (3) the reason for the tardiness in moving to intervene, and (4) any unusual circumstances which may warrant intervention. *Id.* At 366–369; *Gould v. Alleco, Inc.*, 883 F.2d 281, 286–287 (4th Cir. 1989), *cert. denied*, 493 U.S. 1058 (1990).

1. *Determination that Class Action Cannot Prevail*

As discussed below, I conclude that the Motion to Intervene is untimely. The movants were aware of this action in March 1992, over one month before the filing of this action.[1] However, they assert that this should not be the controlling date by which to measure timeliness because the Complaint was originally filed as a class action and, therefore, the movants believed that they could recover as members of the proposed class. Furthermore, the movants claim that they filed their Motion to Intervene shortly after Judge Schneider ruled that a class action could not be maintained on August 26, 1994. I do not agree that the August 26, 1994 ruling that the class action could not be maintained is the proper benchmark date for assessing the timeliness of the Motion to Intervene.

While the movants assert that they "had no reason to believe that they would not be able to secure relief as members of the class prior to this Court's August 26, 1994 order" (Motion to Intervene at 5), the file shows that they were aware of this action before it commenced, did not file charge forms with the Office of Special Counsel, and did not file their Motion to Intervene until Judge Schneider instructed them to do so despite the fact that the *Lardy* Complainants never moved for class certification. The movants assert that on January 28, 1994 the original *Lardy* Complainants moved to amend the Complaint to name the movants as additional claimants and that

[1] That the movants knew of these proceedings is demonstrated by a March 13, 1992 letter from counsel naming them as "other former Pan American flight attendants," and by a March 26, 1992 follow-up letter from counsel which specifically identifies this IRCA action. *See* Affidavit of Michael A. Curley ¶3; Exhs. A, B. Furthermore, the movants on brief do not dispute that they had knowledge of this proceeding. Rather, they rely on the initial filing of the Complaint as a proposed class action to argue that the Motion to Intervene is timely. *See* Motion to Intervene at 5–7.

until that motion was denied by the August 26, 1994 Order they believed they were protected as class members. *See* Motion to Intervene at 5–6 discussing Complainants Joint Motion to Consolidate and for Leave to Amend (January 28, 1994) at 1–2. However, the January 28, 1994 Motion did not constitute a motion to certify a class. Furthermore, the January 28, 1994 Motion did not name the movants as among the individuals seeking to be added into the action by amending the Complaint.

That Judge Schneider did not address the issue of viability of a class action under 8 U.S.C. §1324b until August 26, 1994, and that Complainants had filed their Motion to Amend the Complaint on January 28, 1994, does not excuse the nearly two years of inaction on the parts of the movants. The issue of a class action was repeatedly discussed throughout this case. As early as September 3, 1992, Judge Schneider stated that "[a]lthough I have requested briefing on whether I have jurisdiction to hear a class action, I will not decide that issue at this time. . . . I will rule on whether I have jurisdiction to hear a class action and, if so, after an appropriate motion is filed by Complainants, I will rule on whether I can certify the class." 3 OCAHO 450 at 1, n. 1 (1992). As previously noted, such a motion was never filed. The movants' reliance on the January 28, 1994 motion is misplaced. Although they state that they "sought to be included as complainants in this case through Complainants' motion to amend the complaint," Motion to Intervene at 6–7, they were not identified in that motion and, accordingly, cannot rely on it.

2. *Motion to Amend is Late Per Se*

Even if the Motion to Amend were considered a motion to intervene for purposes of determining the timeliness issue, the Motion to Amend itself is untimely. The movants assert that the Motion to Amend cannot be untimely because it was filed "seven months *before* there was any indication from this court that a class action might not be available as a mechanism for relief." *Id.* at 7. The movants rely on *Hill v. Western Electric Co., Inc.*, 672 F.2d 381 (4th Cir. 1982), *cert. denied*, 459 U.S. 981 (1982) and *Foster v. Gueory*, 655 F.2d 1319 (D.C. Cir. 1981). These cases are, however, distinguishable from this case because in each a motion for class certification was filed, denied and intervention sought shortly thereafter. The courts of appeals found that the motions to intervene were timely under circumstances which do not exist here. Here, movants' belief that they could rely on classwide relief was misplaced when no motion for

class certification had been filed despite Judge Schneider's instructions to seek class standing, and his reservation of decision as to jurisdiction to entertain such an action. There is no reason to suppose they had been given to believe by any action of the Judge that the class had been requested or certified. To the contrary, as appears from the Order, it was clear that a filing was awaited. At a minimum, they were on notice that there was serious question regarding the viability of a class action under 8 U.S.C. §1324b at the latest as of the September 3, 1992 Order. But the movants did nothing to intervene here until their December 1994 Motion to Intervene. In assessing the circumstances of this case so as to determine the timeliness of the Motion to Intervene, and in considering the factors enumerated above for that determination, I find that when they filed their motion, the movants had known of their purported interest in this case for over two years. Their excuse for tardiness in filing and the misplaced reliance on class status is unconvincing.

3. *Intervention is Prejudicially Inappropriate*

In assessing the appropriateness of intervention it is also necessary to consider the potential prejudice to existing parties. The movants assert that United would *not* be prejudiced because United has been aware of the potential for classwide liability since the filing of the Complaint, and that extensive discovery has been completed in a related federal court action in which all of the movants are parties.

United asserts that merely styling the Complaint as a class action does not cure the prejudice to Respondent should intervention be allowed. Specifically, Respondent states that it never conceded or agreed that a class action could be maintained under IRCA and that Complainants never moved for class certification so the possibility of classwide liability never came into fruition. Furthermore, the movants' theory is flawed because "as long as the complaint is styled as a class action, a defendant could never be prejudiced by intervention, regardless of when that intervention occurs and regardless of whether the Complainants ever even move for class certification. Movants' approach is inherently flawed because it eviscerates the analysis required by Rule 24(b)." Resp. Memo at 14. As discussed previously, permissive intervention requires both that the motion to intervene be timely filed and that the parties to the action will not be prejudiced by the intervention. United also asserts that the movants' reliance on the discovery already accomplished in the re-

lated court case is misplaced; if intervention is granted, it "will require additional discovery on several threshold issues with respect to movants' IRCA claims." *Id.* at 15.

I agree with Respondent. While the potential for classwide relief was evident from the inception of this case, there was no reason to assume the viability of a class action under IRCA. Judge Schneider made clear in September 1992 that he would not address the issue until the *Lardy* Complainants moved for class certification. Accordingly, Respondent was not obliged to anticipate a class action until at a minimum the Complainants filed pursuant to the Schneider Order. The Complainants did not move for class certification and Judge Schneider ultimately ruled without a motion that a class action could not be maintained. In addition, Respondent correctly states that additional discovery can be expected following intervention, and has not offered to waive further discovery on its part. To defend a cause of action under 8 U.S.C. §1324b it can be supposed that Respondent would have to inquire into the protected individual status of each individual who asserts a citizenship status discrimination claim. Furthermore, discovery may be needed, as Respondent argues, into any changed circumstances of the status of the movants. Finally, discovery would be required concerning the time when each movant received unequivocal notice of non-selection by United. Specifically, United not unreasonably asserts that it has not fully explored the issue of the date when unequivocal notice of non-selection was received by each movant, which is relevant to the timeliness of their claims. The combination of the (1) failure by *Lardy* Complainants to move to certify the class and thereby not making the issue of the viability of a class action ripe for ruling under Judge Schneider's September 3, 1992 Order, (2) the fact that the movants did not move to intervene until over two years after they became aware of this case, and (3) the additional discovery which would be required should intervention be permitted, requires the finding that adding the 22 additional complainants to the nine already in the action would prejudice the Respondent.

III. *Conclusion*

Having concluded that the Motion to Intervene is untimely, and that in any event intervention would prejudice Respondent, the Motion to Intervene is denied. The result of this Order is that intervention in *Lardy* is denied for the 22 individuals named *supra*, at

2–3 (as identified in the quotation from the December 16, 1994 Motion to Intervene).

The September 13, 1994 Amended Decision and Order in *Walker,* 4 OCAHO 686, resolved all issues regarding the January 28, 1994 Joint Motion to Consolidate and for Leave to Amend. The *Walker* Complainants whose claims survived partial summary decision in favor of United were joined in Lardy by the September 13, 1994 Amended Decision and Order (as identified *supra*, at 2). As those surviving *Walker* allegations were merged into *Lardy,* an appropriate Order dismissing *Walker* will be forthcoming in light of this Order Denying Motion to Intervene.

The parties are ordered to file a joint status report or concurrent status reports on or before March 29, 1996 which shall inform regarding the time frame required before scheduling of an evidentiary hearing in this case.

SO ORDERED.

Dated and entered this 8th day of March, 1996.

MARVIN H. MORSE
Administrative Law Judge