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

TANYA LOUISE SEAVER Complainant,	)	8 U.S.C. § 1324b Proceeding
v.	)	OCAHO Case No. 04B00059
BAE SYSTEMS, Respondent	)	Judge Robert L. Barton, Jr.

ORDER GRANTING RESPONDENT'S MOTION TO DISMISS

(*December 1, 2004*)

I. SUMMARY

On August 31, 2004, Tanya Louise Seaver (Complainant or Seaver) filed a Complaint with the Office of the Chief Administrative Hearing Officer (OCAHO), alleging that BAE Systems (Respondent or BAE Systems) had committed immigration-related unfair employment practices in failing to hire her as a "Warehouse Specialist." On October 21, 2004, Respondent filed a Motion to Dismiss, supported by a Memorandum. Respondent also attached to its Motion to Dismiss Exhibits RX-A through RX-M, and a Declaration of BAE Systems employee Bert Uehara, which was not labeled as an exhibit. Complainant, who is proceeding pro se, did not file a response to this Motion to Dismiss or move for an extension of time to do so. Respondent filed an Answer to the Complaint on October 25, 2004. On November 9, 2004, a telephonic prehearing conference was held and Respondent's Motion to Dismiss was discussed. Both Respondent's counsel and Complainant attended the conference, a court reporter was present, and a transcript of the conference was prepared (cited as PHC Tr.).

I conclude that Complainant's claim of citizenship status discrimination must be DISMISSED because Complainant was not a "protected individual" under 8 U.S.C. § 1324b(a)(1)(B) at the time the alleged discriminatory acts occurred. I further conclude that Complainant's claims of national origin and citizenship status discrimination must be DISMISSED under 8 U.S.C. § 1324b(d)(2), because Complainant, a non-United States citizen, was ineligible for the position of "Warehouse Specialist" under the National Industrial Security Program Operating Manual (NISPOM) and a contract entered into between Respondent and the United States Department of Defense. Lastly, I determine that Complainant's Complaint must be DISMISSED

because it is barred by the statute of limitations at 8 U.S.C. § 1324b(d)(2).

II. STANDARDS GOVERNING A MOTION TO DISMISS/MOTION FOR SUMMARY DECISION

A. Motion to Dismiss: Subject-Matter Jurisdiction

Respondent asserts grounds for dismissal based on OCAHO's lack of subject-matter jurisdiction and the alleged failure of Complainant to state a claim upon which relief can be granted. I am bound to consider the motion regarding subject-matter jurisdiction first, since Respondent's motion to dismiss for failure to state a claim becomes moot if this court lacks subject-matter jurisdiction. See Ruan v. United States Navy, 8 OCAHO 714, 716, 2000 WL 773075, *2 (citing Bell v. Hood, 327 U.S. 678, 682 (1946); CHARLES ALAN WRIGHT & ARTHUR R. MILLER, 5A FEDERAL PRACTICE AND PROCEDURE § 1350, 209-210 (1990)).

The OCAHO rules of practice do not provide for motions to dismiss for lack of subject-matter jurisdiction. The OCAHO rules, however, state that the Federal Rules of Civil Procedure "may be used as a general guideline in any situation not provided for or controlled by these rules, the Administrative Procedure Act, or by any other applicable statute, executive order, or regulation." 28 C.F.R. § 68.1 (2004). Thus, Rule 12(b)(1), providing for motions to dismiss for lack of subject-matter jurisdiction, and Rule 12(h)(3), compelling dismissal of actions "[w]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction over the subject matter," may be employed as a general guideline when an OCAHO Administrative Law Judge has reason to question OCAHO's subject-matter jurisdiction. See, e.g., Ruan, supra, at 716-717, *2 (citing Hammoudah v. Rush-Presbyterian-St. Luke's Med. Center, 8 OCAHO 254, 256-257, 1998 WL 1085948, *2; Artioukhine v. Kurani, Inc. d/b/a Pizza Hut, 1998 WL 356926, *3-4 (OCAHO) (unpublished); Boyd v. Sherling, 6 OCAHO 1113, 1119, 1997 WL 176910, *5; Caspi v. Trigild Corp., 6 OCAHO 957, 960, 1997 WL 131354, *2-3).

In addition, 28 C.F.R. § 68.57 (2004) provides that any person aggrieved by a final agency order issued with respect to unfair immigration-related employment practice cases may seek review in the United States court of appeals in which the violation is alleged to have occurred or in which the employer resides or transacts business. Since the relevant events in this case took place in Hawaii, case law precedent from the United States Court of Appeals for the Ninth Circuit is pertinent.

Respondent's attack on OCAHO's subject-matter jurisdiction can be considered a "speaking motion;" that is, it challenges this Court's subject-matter jurisdiction in fact, without regard to the formal sufficiency of the allegations made in the Complaint. See Thornhill Publishing Co. v. General Telephone and Electronics Corp., 594 F.2d 730, 733 (9th Cir 1979). In the case of a speaking motion, the plaintiff bears the burden of proof that jurisdiction does in fact exist. Id.

Moreover, "no presumptive truthfulness attaches to plaintiff's allegations, and the presence of disputed material facts will not prevent the trial court from evaluating for itself the merits of jurisdictional claims." Id. (quoting Mortensen v. First Federal Savings & Loan Association, 549 F.2d 884, 891 (3d Cir. 1977)).

B. Motion to Dismiss: Failure to State a Claim Upon Which Relief May be Granted

The 90-day deadline at 8 U.S.C. § 1324b(d)(2) for filing a private action with OCAHO is not jurisdictional, but is rather in the nature of a statute of limitations, subject to waiver, estoppel and equitable tolling. See Wong-Opasi v. Tennesse Board of Regents, 8 OCAHO 583, 586-588, 1999 WL 1893879, *3-4. Therefore, Respondent's argument that Complainant failed to file a timely complaint must be characterized as a motion to dismiss for failure to state a claim. See id.

The OCAHO rules expressly provide for motions to dismiss for failure to state a claim upon which relief may be granted at 28 C.F.R. § 68.10 (2004). A motion to dismiss under 28 C.F.R. § 68.10 is akin to a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). See, e.g., Reyes-Martinon v. Swift and Company, 9 OCAHO Ref. No. 1068, 9, 2001 WL 909276, *7 (citing Bunn v. USX/US Steel, 7 OCAHO 996, 999-1000, 1998 WL 745990, *3; United States v. Tinoco-Medina, 6 OCAHO 720, 728, 1996 WL 670175, *6). In considering such a motion, the court must assume the truth of all facts alleged in the complaint and must allow the nonmoving party the benefit of all inferences that can be derived from the alleged facts. Reyes-Martinon, supra, at 9, *7 (citing Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)). A respondent's motion to dismiss should be granted only if it appears that under any reasonable reading of the complaint, the complainant will be unable to prove any set of facts that would justify relief. Id. (citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957)).

C. Summary Decision

OCAHO judges analyze motions to dismiss as motions for summary decision when the proponent relies upon matters outside the pleadings. See, e.g., Santos v. United States Postal Service, 9 OCAHO Ref. No. 1105, 3, 2004 WL 1539490, *3 (citing United States v. Italy Department Store, Inc., 6 OCAHO 229, 231, 1996 WL 312113, *2; Flores v. Logan Foods Co., 6 OCAHO 545, 549, 1996 WL 525690, *3). Here, Respondent relies on documents outside of the Complaint in arguing that (a) Complainant does not fall within the class of immigrants protected against citizenship status discrimination under the law, (b) federal law precludes Complainant from acquiring the security clearance necessary to be employed in the disputed position, and (c) Complainant failed to file her Complaint with OCAHO within 90 days of receiving authorization to do so. Accordingly, I adjudicate Respondent's Motion to Dismiss under the standards governing motions for summary decision where appropriate.

A motion for summary decision may be granted if there is no genuine issue of material fact and the moving party is entitled to decision as a matter of law. Aguirre v. KDI American Products, Inc., 6 OCAHO 632, 640, 1996 WL 637474, *7 (citing Curuta v. U.S. Water Conservation Lab., 19 F.3d 26 (9th Cir.1994); New Burnham Prairie Homes, Inc. v. Village of Burnham, 910 F.2d 1474, 1477 (7th Cir.1990)). In determining whether a fact is material, any uncertainty must be considered in the light most favorable to the non-moving party. Id. (citing 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, but once the movant meets its initial burden the non-moving party must show that there is a genuine issue of material fact for trial. Id. (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)). An issue of material fact is genuine only if it has a real basis in the record and is material only if it might affect the outcome of the case. Id. (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)).

III. ANALYSIS

A. Protected Individual Under 8 U.S.C. § 1324b(a)(3)

Respondent argues that Complainant's claim of discrimination based upon her status as a Jamaican citizen must be dismissed because she does not fall within the class of immigrants protected against discrimination under § 1324b. Specifically, Respondent asserts that Complainant does not qualify as a "protected individual" under 8 U.S.C. § 1324b(a)(3), because she failed to apply for naturalization within six months of the date she first became eligible to do so. Motion to Dismiss at 6-8.

Section 1324b(a)(1) prohibits, as an unfair immigration-related employment practice, employer discrimination in hiring, firing, recruitment, or referral for a fee, "against any individual," other than an unauthorized alien, because of such individual's national origin, or in the case of a "protected individual," as defined at § 1324b(a)(3), because of such individual's citizenship status. Thus, to maintain a citizenship status discrimination claim, an individual must be a "protected individual." See, e.g., Santos, supra, at 4-5, *4 (citing Hsieh v. PMC Sierra, Inc., 9 OCAHO Ref. No. 1100, 18-19, 2003 WL 22519502, *16-17). "Protected individuals" include United States citizens and nationals, lawful permanent residents, lawful temporary residents under 8 U.S.C. §§ 1160(a) or 1255a(a)(1), and refugees and asylees. 8 U.S.C. § 1324b(a)(3)(A)-(B); see also Ondina-Mendez v. Sugar Creek Packing Co., 9 OCAHO Ref. No. 1085, 12, 2002 WL 31663164, *10. However, a lawful permanent resident loses "protected individual" status if that individual fails to apply for naturalization within six months of the date he or she first becomes eligible to apply. 8 U.S.C. § 1324b(a)(3)(B)(i). Generally, an individual becomes eligible to apply for naturalization after having been a lawful permanent resident for five years. 8 U.S.C. § 1427(a). Also, an individual who is not a "protected individual" at the time that an alleged unfair employment practice occurred cannot gain protection retroactively by obtaining legitimate status before filing a lawsuit. See Garcia-Contreras v. Cascade Fruit Company, 9 OCAHO Ref. No. 1090, 22, 2003 WL 634576, *16.

In the instant matter, it is possible to adjudicate Respondent's § 1324b(a)(3)(B)(i) argument as a motion to dismiss for lack of subject-matter jurisdiction without resorting to evidence outside of the Complaint. Complainant asserts in her Complaint that she is a lawful permanent resident who first became authorized to work in the United States on April 28, 1977. Complaint at 2. She further states that she started the process for naturalization in November of 2003, but she has not followed through with this process. Id. Complainant confirmed during the prehearing conference that she became a lawful permanent resident in 1977 and started the naturalization process in 2003. PHC Tr. 14-15. After becoming a lawful permanent resident in 1977, Complainant would have first been eligible to apply for naturalization sometime in 1982, but she did not begin the naturalization process until November of 2003. Thus, Complainant waited over two decades from the date she first became eligible to apply for naturalization before starting the naturalization process, well outside the six-month window necessary for her to qualify as a "protected individual." See 8 U.S.C. § 1324b(a)(3)(B)(i). Therefore, this Court lacks jurisdiction over the subject matter of Complainant's claim of citizenship status discrimination. See Fed. R. Civ. Proc. 12(h)(3); Thornhill Publishing Co., supra at 733.

B. Security Clearance and 8 U.S.C. § 1324b(a)(2)(C)

Respondent also claims that Complainant's claims of national origin and citizenship status discrimination must be dismissed because federal law precludes her from being employed as a "Warehouse Specialist." In particular, Respondent avers that Respondent's contract with the United States Department of Defense required Complainant to obtain a secret security clearance, and only United States citizens are eligible for such security clearance. Motion to Dismiss at 8-10. This policy is set forth at page 2-2-2 of the NISPOM, attached as RX-M to Respondent's brief. Although Respondent styled this argument as a motion to dismiss for lack of subject-matter jurisdiction, I analyze the argument under summary decision standards because Respondent relies on documents outside of the Complaint.

In pertinent part, § 1324b(a)(2)(C) provides that the anti-discrimination provisions of § 1324b(a)(1) do not apply where citizenship status discrimination is required to comply with law, regulation, or executive order, or is required by Federal contract. OCAHO judges have applied this provision in dismissing complaints because federal law required United States citizenship. See, e.g., Kasathsko v. Internal Revenue Service, 6 OCAHO 176, 185, 1996 WL 281945, *7 (holding that the anti-discrimination provisions at § 1324b(a)(1) did not apply pursuant to § 1324b(a)(2)(C), because the complainant did not "owe permanent allegiance to the United States," as required by the Treasury, Postal Service and General Government Appropriations Act of 1995 (Public Law 103-329)). Similarly, OCAHO precedent supports the entry of summary decision against a complainant under § 1324b(a)(2)(C) where the employer's allegedly discriminatory conduct was authorized under state law. See, e.g., Anderson v. Newark Public Schools, 8 OCAHO 361, 371-373, 1999 WL

497197, *7-8; United States of America v. Patrol & Guard Enterprises, Inc., 8 OCAHO 603, 618-623, *9-13.

In this case, Respondent's contract with the Department of Defense provides, in relevant part, that "Ammunition/Hazardous Material Handlers" must possess a secret security clearance. RX-D (Complete Department of Defense-BAE Systems Contract); RX-E (Excerpt from Department of Defense-BAE Systems Contract showing personnel requirements). The position that Seaver applied for with Respondent (Warehouse Specialist) involves the routine handling of ammunition, and hazardous materials or waste. RX-A (Warehouse Specialist Position Announcement). Warehouse Specialists thus must have a secret security clearance and "only U.S. citizens are eligible for a security clearance." RX-M at 2-2-2 (NISPOM). I conclude that the anti-discrimination provisions of § 1324b(a)(1) did not apply to Respondent's denial of Seaver's application, because the Department of Defense-BAE Systems contract and the NISPOM limited potential hires to U.S. citizens who could obtain the requisite security clearance. See 8 U.S.C. § 1324b(a)(2)(C); Kasathko, supra, at 185, *7; Anderson, supra, at 371-373, *7-8; Patrol & Guard Enterprises, Inc., supra, at 618-623, *9-13. Accordingly, no genuine issues of material fact remain with respect to Complainant's claims of national origin and citizenship status discrimination, and Respondent is entitled to decision as a matter of law. See Aguirre supra, at 640, *7 (internal citations omitted).

C. Timeliness Under 8 U.S.C. § 1324b(d)(2)

Finally, Respondent argues that Complainant's Complaint must be dismissed because she failed to file it within 90 days of receiving authorization to do so from the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC). Motion to Dismiss at 5-6. Since I must refer to documents outside of the Complaint in adjudicating this argument, summary decision standards apply.

An individual alleging discrimination under 8 U.S.C. § 1324b must file a charge with OSC within 180 days of the date of the alleged unfair immigration-related employment practice. 8 U.S.C. §§ 1324b(b)(1) and 1324b(d)(3); 28 C.F.R. § 68.4(a) (2004). Within 120 days of the date of receipt of the charge, OSC then must notify the charging individual whether or not it will bring a complaint respecting the charge. 8 U.S.C. § 1324b(d)(1); 28 C.F.R. § 68.4(b)(1)-(2) (2004). If OSC chooses not to prosecute the case, the charging individual may file a complaint directly with OCAHO **within 90 days after the date of receipt of the right-to-sue letter**. See 8 U.S.C. § 1324b(d)(2) (emphasis added); 28 C.F.R. § 68.4(c) (2004) (emphasis added). OCAHO precedent supports the dismissal of a complaint for untimeliness when a person fails to file the complaint within 90 days of receipt of the right-to-sue letter from OSC. See, e.g., Soto v. Top Industrial, Inc., 7 OCAHO 1210, 1998 WL 746020; Aguirre, supra.

However, the 90-day time limit for filing a complaint is not a jurisdictional prerequisite, and it is subject to the doctrine of equitable tolling. Mikhailine v. Web Sci Techs, 8 OCAHO 513, 519;

1999 WL 1893876 at *4-5; Soto at *5. Equitable tolling does not extend to the "garden variety of excusable neglect." Soto at *5 (citing Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 96 (1990)) (holding that complainant did not toll the running of the 90-day period by contacting OSC to inquire as to whether they would reopen the case on the basis of a gratuitous document forwarded to them by complainant). In addition, the Ninth Circuit has applied equitable tolling sparingly. See, e.g., Lehman v. United States, 154 F.3d 1010, 1016 (9th Cir. 1998). The party filing the complaint bears the burden of proving that equitable tolling is appropriate. Vaughn v. Teledyne, Inc., 628 F.2d 1214, 1218 (9th Cir. 1980) (internal citation omitted). Moreover, equitable tolling is not available to avoid the consequences of a plaintiff's own negligence, Lehman at 1016, and the plaintiff's own ignorance of the law will usually not justify equitable tolling. See Williamson v. Hubbard, 27 Fed.Appx. 733, 736, 2001 WL 1174037, *3 (9th Cir. 2001) (not selected for publication in the Federal Reporter). As the Ninth Circuit has stated, "Courts have been generally unforgiving [] when a late filing is due to

[the] claimant's failure to exercise due diligence in preserving his legal rights." Scholar v. Pacific Bell, 963 F.2d 264, 267-268 (9th Cir. 1992) (internal quotation omitted) (Title VII case).

In this case, Complainant filed her Charge with OSC on December 3, 2003, RX-H (Charge); RX-L at 1 (Complaint), and OSC informed her by letter, dated April 2, 2004, that it would not prosecute the case. RX-I (Right-to-Sue Letter). The right-to-sue letter clearly and unambiguously stated that Seaver had 90 days from the date of her receipt of the letter to file a charge with OCAHO, and provided her with OCAHO's mailing address. Id. Complainant admitted during the prehearing conference that she received the right-to-sue letter sometime in April of 2004. PHC Tr. 16. Moreover, the return receipt card and United States Postal Service tracking report from OSC, filed by Respondent on November 12, 2004, show that Complainant received the letter on April 6, 2004. Since Complainant received this right-to-sue letter on April 6, 2004, and July 5, 2004 was an observed federal holiday, she had until July 6, 2004 to file a complaint with OCAHO. See 8 U.S.C. 1324(d)(2); 28 C.F.R. §§ 68.4(c) and 68.8(a) (2004). Complainant did not file her Complaint with OCAHO until August 31, 2004, almost two months late. Therefore, I find that Complainant's Complaint is untimely.

I also conclude that the doctrine of equitable tolling does not apply in this case. The right-to-sue letter from OSC clearly informed Complainant that she had 90 days from her receipt of the letter to file a complaint with OCAHO and explicitly provided the address for filing. Additionally, the language of 8 U.S.C. § 1324b(d)(2) and 28 C.F.R. § 68.4(c) explicitly sets forth this 90-day filing deadline. During the prehearing conference, Complainant admitted her awareness of the 90-day deadline and stated that she missed the deadline because she was preoccupied by working and caring for her children, and she was unable to retain legal counsel. PHC Tr. 16-19. Thus, I find that Complainant knew that the 90-day limitations period was running, and that she had to file her Complaint with OCAHO on or before July 6, 2004. See Scholar, supra, at 267-268. Complainant has not argued that equitable tolling should apply, and in any event, there is no basis for applying that doctrine in this case. See Soto, supra, at *5 (citing Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 96 (1990)); Lehman, supra, at 1016. Therefore, no genuine issues of material fact remain with

respect to the untimeliness of Complainant's Complaint, and Respondent is entitled to decision as a matter of law on this ground as well. See Aguirre supra, at 640, *7 (internal citations omitted).

IV. CONCLUSION

Because Complainant was not a "protected individual" under 8 U.S.C. § 1324b(a)(1)(B) at the time the alleged discriminatory acts occurred, Complainant was ineligible for the disputed position under 8 U.S.C. § 1324b(a)(2)(C), and Complainant's Complaint is barred by the statute of limitations at 8 U.S.C. § 1324b(d)(2), Respondent's Motion to Dismiss is GRANTED.

ROBERT L. BARTON, JR.
ADMINISTRATIVE LAW JUDGE

Notice Concerning Appeal

This Order constitutes a final agency decision. As provided by statute, no later than 60 days after entry of this final Order, a person aggrieved by such Order may seek a review of the Order in the 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. See 8 U.S.C. § 1324b(i); 28 C.F.R. § 68.57 (2004).