

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

In Re Investigation of St. Christopher-Ottilie

File Nos. 88-2-01-0016A0, 88-2-01-0016B0, 88-2-01-0016C0, 88-2-01-0016D0
(Case Nos. 88S0016A0,88S0016B0,88S0016C0,88S0016D0)

**ORDER DENYING PETITIONS TO QUASH BUT REQUIRING THAT
SUBPOENAS, IF ANY, NEWLY ISSUE**

On March 16, 1988, I issued four investigatory subpoenas duces tecum upon the request of the Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC) in the investigation styled In Re Investigation of St. Christopher-Ottilie. By substantially similar petitions dated March 21, 1988, St. Christopher-Ottilie, by counsel, sought to quash on the grounds that (i) the charge filed with OSC, which provided the premise for the investigatory subpoenas, was time-barred as not having been filed within the 180 day period from the date of the alleged discriminatory act as provided by 8 U.S.C. 1324b(d)(3) and (ii) one of the four subpoenas was void on its face because of a patently erroneous return date.

I subsequently received an OSC memorandum of points and authorities which replied to the allegations of the petitions to quash. Pursuant to my order dated April 11, 1988, St. Christopher-Ottilie was provided an opportunity to file a responsive pleading addressed to OSC's memorandum. Such a pleading was tendered, dated April 21, 1988.

Having considered the memoranda submitted in support of and in opposition to St. Christopher-Ottilie's petitions to quash investigatory subpoenas, I deny the petitions to quash on the ground that I am persuaded that it is not clear, based on the bare outline of facts demonstrated in the memoranda and absent further investigation, that the charge was not timely filed with the Office of Special Counsel. This is in no way a determination that the charge was filed in a timely manner but is rather a ruling that OSC is entitled

to investigate to determine the applicability of the doctrine of equitable tolling and its effect, if any, on the timeliness of the charge in this matter.

The Office of Special Counsel contends that limitation periods for filing charges of discrimination are susceptible to equitable tolling. Case law cited by OSC supports this position. See Miller v. International Telephone and Telegraph Corp., 755 F.2d 20, 24 (2d Cir. 1985), cert. denied, 474 U.S. 851 (1985) (although the court found no basis for the extension of the period for filing an age discrimination claim with the EEOC on the facts before it, the court, nonetheless, acknowledged that in certain circumstances tolling of the time period might be permitted as a matter of fairness); Cerbone v. International Ladies' Garment Workers' Union, 768 F.2d 45, 48 (2d Cir. 1985) (in appropriate circumstances, the time limitations governing filing an age discrimination charge with the EEOC may be tolled or delayed); Meyer v. Riegel Products Corp., 720 F.2d 303, 307 (3d Cir. 1983), cert. dismissed, 465 U.S. 1091 (1984) (a plaintiff's failure to file a timely charge of wrongful discharge on the basis of his age would neither deprive the court of jurisdiction nor preclude it from equitably tolling the limitation period).

In addition, case authority cited by OSC involving enforcement of administrative subpoenas is particularly persuasive. For example, in Equal Employment Opportunity Commission v. Tempel Steel Corp., 814 F.2d 482 (7th Cir. 1987), the court rejected the argument that the claim of an individual who had filed a charge of race discrimination with the EEOC more than 180 days after first learning that he would not be rehired was time-barred and that, therefore, the EEOC had no authority to investigate the claim. Focusing on the broad authority of the EEOC to investigate all charges of employment discrimination under Title VII and the ``sharply limited'' role of the court in a subpoena enforcement proceeding, the court held that the defendant's timeliness objection was not a proper defense to enforcement of the subpoena. The court went on to note (id. at 485):

... the EEOC's authority to investigate is not negated simply because the party under investigation may have a valid defense to a later suit. ... If every possible defense, procedural or substantive, were litigated at the subpoena enforcement stage, administrative investigations obviously would be subjected to great delay.

We therefore join those courts that have determined that a timeliness defense may not be raised to block enforcement of an EEOC subpoena. (Citations omitted).

Similarly, the Ninth Circuit in Equal Employment Opportunity Commission v. Children's Hospital Medical Center of Northern California, 719 F.2d 1426 (9th Cir. 1983), stated that a party may not defeat an agency's authority to investigate pursuant to subpoena-

nas by a claim that could be a defense if the agency were to subsequently bring an action against it, citing its own and other precedents (id. at 1429-30):

This court has held that it is premature to allow a party being investigated to raise a statute of limitations defense to an EEOC demand for documents; even assuming that the timeliness of a complaint is jurisdictional, we noted that the agency should be allowed to investigate to make the determination whether the violation is continuing in nature, thereby providing it with jurisdiction. (Citations omitted).

The sole case cited by St. Christopher-Ottillie in its memorandum in support of its petitions, Del Costello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983), dealt with the question of competing limitation periods, but did not address our question. Rather, Del Costello, supra, involved the question whether to apply a federal or state statute of limitations to an action brought by an employee under the Labor Management Relations Act. A divided Supreme Court held that the six (6) month limitation period of the National Labor Relations Act for filing unfair labor practice charges was the statute of limitations applicable to an employee's action against both the employer and the union for breach of a collective bargaining agreement and breach of the duty of fair representation because such action had no close analogy in state law.

The cases cited by OSC, involving employment discrimination claims under the Age Discrimination in Employment Act and Title VII, provide the better analogy on which to test the provisions of 8 U.S.C. 1324b; nothing in Del Costello is inconsistent with the rationale of those cases. In fact, the Supreme Court in Del Costello remanded to allow consideration of one petitioner's contention that certain events had tolled the running of the limitations period until about three months before he had filed suit.

At this stage, the case law cited by OSC for analogy, in this case of first impression under 8 U.S.C. 1324b provides, in my judgment, ample authority to deny the petitions to quash. Consistent with those authorities, in particular, Equal Employment Opportunity Commission v. Tempel Steel Corp., supra, and Equal Employment Opportunity Commission v. Children's Hospital Medical Center of Northern California, supra, I find that St. Christopher-Ottillie's timeliness objection to the charge filed with OSC does not bar enforcement of OSC's investigatory subpoenas. For the foregoing reasons, I deny St. Christopher-Ottillie's petitions to quash.

Both because the return date on one of the subpoenas at issue was manifestly in error and because of the passage of time subsequent to the return dates on the others (as the result of "motion

practice"), the OSC may apply for new investigatory subpoenas to issue, consistent with this ruling.

SO ORDERED.

Dated this 5th day of May, 1988.

MARVIN H. MORSE
Administrative Law Judge