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

MARGARITA YEFREMOV, Complainant,	)	
v.	)	8 U.S.C. §1324b Proceeding Case No. 92B00096
NYC DEPARTMENT OF TRANSPORTATION, Respondent.	)	

ERRATA TO ORDER ISSUED OCTOBER 23, 1992
(October 26, 1992)

The last sentence of the first paragraph of section II. B (page 3) is corrected as follows:

insert "a" before "DHR"
delete "issued its"
insert "was" before "confirmed by"

As the result of these changes, the corrected sentence reads as follows:

Subsequent to Complainant's OSC filing, a DHR determination letter, dated September 20, 1991, was affirmed by the New York District Office of EEOC on November 5, 1991.

SO ORDERED.

Dated and entered this 26th day of October 1992.

MARVIN H. MORSE
Administrative Law Judge

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

MARGARITA YEFREMOV, Complainant,	)	
v.	)	8 U.S.C. §1324b Proceeding Case No. 92B00096
NYC DEPARTMENT OF TRANSPORTATION Respondent.	)	

ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY DECISION MISCELLANEOUS RULINGS
(October 23, 1992)

I. *Respondent's Motion for Summary Decision*

On October 16, 1992 Respondent filed a Motion for Summary Decision with Memorandum of Law in Support, dated October 15, 1992. Respondent (City) recites that (1), the alleged discrimination took place no later than September 8 or 9, 1989 but that (2), Complainant waited until on or about October 6, 1991 to file her charge with the Office of Special Counsel (OSC). As the result of a delay of more than 180 days between the alleged discrimination and filing of the charge with OSC, Respondent contends that Yefremov's claim is time barred and that the complaint must be dismissed. 8 U.S.C. §1324b(d)(3).

City also relies on Fordjour v. General Dynamics, 1 OCAHO 286 (1/11/91), aff'd, Fordjour v. United States Dept. of Justice, 959 F.2d 240 (9th Cir. 1992)(list). According to Respondent, Fordjour holds it is proper to dismiss a national origin claim cognizable under Title VII and a citizenship charge filed ten months after the occurrence of the alleged discriminatory act.

II. *Discussion*

I issue this order sua sponte, without awaiting the response of the pro se Complainant. Respondent's motion omits certain procedural events pertinent to the case at bar.

A. Dismissal of the National Origin Claim

At this juncture, there is no national origin claim. I dismissed the national origin portion of the complaint in my order of October 1, 1992, for the reasons reiterated below.

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 for a person or other entity to discriminate against any individual (other than an unauthorized alien. . .) with respect to . . . the discharging of the individual from employment because of that individual's national origin or . . . citizenship status.
>
> * * *
>
> It is also an unfair immigration-related employment practice for a person or other entity to intimidate, threaten, coerce, or retaliate against any individual for the purpose of interfering with any right or privilege secured under this section or because the individual intends to file or has filed a charge or a complaint. . . or participated in any manner in an investigation, proceeding, or hearing under this section. An individual so intimidated, threatened, coerced, or retaliated against shall be considered . . . to have been discriminated against.

8 U.S.C. §1324b(1), (5).

Complainant explicitly alleges national origin and citizenship status discrimination and implicitly alleges employer retaliation.

As noted in the August 19 prehearing conference report and order, "[A]s to national origin, it is well established that jurisdiction of administrative law judges is limited to employers of not more than fourteen employees."

Upon review of the file and considering City's answer to the complaint and its subsequent filings, I take official notice of the fact that Respondent employs more than fourteen individuals.[1] The result is the same whether Respondent is viewed as the employer of all individuals who work for the City of New York or only those who work for the Department of Transportation.

Additionally, an ongoing action is pending in the United States District Court for the Southern District of New York under Title VII

[1] The October 1 order took official notice that Respondent employs more than "four individuals". That number, but not the conclusion, is an error and here is corrected by substituting "fourteen" for "four." 42 U.S.C. §2000e-2.

of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000-e et seq. The pendency of a Title VII action bars a national origin claim before me arising out of the same facts. 8 U.S.C. §1324b(b)(2). Therefore, I dismiss that portion of the complaint alleging national origin discrimination.

The grounds for dismissal are Respondent's size and the pendency of a Title VII action arising out of the same facts. Today's order reiterates that I lack jurisdiction over the national origin portion of the complaint, both because Respondent employs more than fourteen individuals and because of the pending case in the Southern District. 8 U.S.C. §§1324b(a)(2)(B) and 1324b(b)(2).

B. Complainant's EEOC Filing

Respondent's motion also fails to note that Complainant filed a charge with the EEOC by a filing with the New York State Division of Human Rights (DHR), on September 13, 1989, only four or five days after the alleged discrimination. On October 10, 1991, Yefremov filed her charge with OSC. Subsequent to Complainant's OSC filing, DHR issued its determination letter, dated September 20, 1991, affirmed by the New York District Office of EEOC on November 5, 1991.

OSC and EEOC have adopted a Memorandum of Understanding (MOU). 54 FR 32499 (Aug. 8, 1989). Each agency has appointed the other as its agent to accept charges, thereby tolling the time limits for filing national origin and citizenship discrimination charges. The effect of the MOU is that a filing with OSC is understood to be a constructive simultaneous filing with EEOC and vice versa. Curuta v. U.S. Water Conservation Lab, OCAHO Case No. 92B00142 (9/24/92).

> A timely EEOC filing cures the tardiness of a subsequent OSC filing. The purpose of the MOU is to ameliorate uncertainty as to the correct forum resulting from separate jurisdiction (EEOC on the one hand, and IRCA administrative law judges on the other) . . .

Lundy v. OOCL (USA) Inc., 1 OCAHO 215 (8/8/90) at 18.

See also Curuta, OCAHO Case No. 92B00142; U.S. v. Mesa Airlines, 1 OCAHO 74 (7/24/89) at 29.[2]

---

[2] There may well be a case where the complainant files in the wrong forum, receives notification of his/her error from such forum, and does not file in the appropriate forum promptly enough. In such a case the MOU might be unavailing and the complaint susceptible to dismissal for untimeliness. Here, however, Yefremov filed her OSC charge

(continued...)

I have expressly considered and conclude that the MOU protects a complainant whose claim sounds only in citizenship discrimination, as well as one whose claim implicates national origin discrimination. The MOU provides that charges are to be referred by one agency to another where

> it becomes apparent to the agency processing the charge that the charge or any aspect of the charge falls outside its jurisdiction but may be within the jurisdiction of the other agency . . .

MOU, 54 FR at 32500.

I conclude that Complainant timely filed her charge albeit with the wrong agency. That filing protects her against a defense of an untimely filing with OSC.

C. Fordjour Decision Distinguished

The Fordjour decision relied on by Respondent, is inapposite, although Respondent is correct that the decision in that case also deals with timeliness. In contrast to Yefremov, the Fordjour complainant did not make an EEOC filing. Therefore, interposition of the MOU was not available to the charging party in response to the defense of untimely filing with OSC. Moreover, on appeal from dismissal of another case under §1324b, the Second Circuit has expressed its concern that the responsible agencies remain alert to the relationship between Title VII and 8 U.S.C. §1324b, in light of their remedial character. Huang v. U.S. Dept. of Justice, 962 F.2d 1 (2d Cir. 1992) (list), aff'g Huang v. U.S. Postal Service, 1 OCAHO 288 (1/11/91).

III. *Denial of Motion for Summary Decision*

Having considered Respondent's motion for summary decision, I deny such motion for the aforementioned reasons.

IV. *Miscellaneous Rulings*

On October 19, 1992, Complainant filed a 14 page letter-pleading dated October 16, with exhibits numbered MY-01 through MY-18 and attachments. On October 21, Complainant filed a one-page set of typographical corrections dated October 17.

---

[2](...continued)
prior to receiving the final EEOC determination letter. She is neither guilty of undue delay nor accountable for the fact that the EEOC process lasted virtually two years.

Complainant is advised that the exhibits will not be treated as evidence, except to the extent that they are tendered and received at the hearing. If she desires them to be so received, she will be expected to provide an additional set to be identified on the record and handed to the official stenographer at that time. Since Complainant has already provided a set to me and to City by the October 16 mailing, she does not need to provide more than the one set for the stenographer. However, any additional documents to be tendered must be provided at hearing in three copies.

In light of Complainant's pro se status, I contemplate permitting her to take the 14 page document with her on the witness stand as an aid in presenting her direct examination.

Complainant has filed a request for issuance of two subpoenas. One potential witness is identified only as "the representative of L.O. 523 of the State Department of Labor," 815 Burke Avenue, Bronx N.Y. 10467; the other is Vladimir N. Yefremov at Complainant's address of record.

Complainant is requested to promptly advise my office of a more particular identification, preferably by name, for the first requested subpoena. Respondent is asked to assist by advising my staff of any particulars which might render more certain the successful issuance and service of an appropriate subpoena. Complainant is advised that a subpoena is not necessarily required for appearance of a friendly witness. If Complainant still desires a subpoena for Vladimir N. Yefremov, she should so inform my staff. The parties are reminded that upon issuance by the judge of a subpoena and transmittal to the requesting party, service is the responsibility of that party.

The schedule and directions provided at section VI of the October 1, 1992 remain in effect. It is expected that the hearing scheduled to begin at 9:00 a.m. on November 9, 1992 will conclude that day or, at the latest, not later than approximately 1:00 p.m. on November 10.

SO ORDERED.

Dated and entered this 23rd day of October, 1992.

MARVIN H. MORSE
Administrative Law Judge