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

May 9, 2001

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. § 1324b Proceeding OCAHO Case No. 99B00037
FAIRFIELD JERSEY, INC., FAIRFIELD TEXTILES CORP., Respondents.	)	

ORDER DENYING FAIRFIELD'S MOTION FOR PARTIAL SUMMARY DECISION

I. PROCEDURAL HISTORY

This is an action arising under the nondiscrimination provisions of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1324b (INA or the Act), in which the Office of Special Counsel (OSC) is the complainant and Fairfield Jersey, Inc. and Fairfield Textiles Corp. are the respondents. OSC's original complaint alleged that the Fairfield respondents (collectively "Fairfield") engaged in discriminatory employment practices with respect to Maria Elena Carhuayo. The complaint was subsequently amended to add allegations that Fairfield engaged in a pattern and practice of citizenship status discrimination in hiring employees: specifically that Fairfield engaged in certain hiring practices for the purpose or with the intent of discriminating against persons perceived to be noncitizens of the United States in violation of §§ 1324b(a)(1) and (a)(6). The case was initially assigned to Judge Joseph E. McGuire (ret.) and was reassigned to me upon his retirement.

Presently pending is Fairfield's motion for partial summary judgment as to certain portions of the complaint. Counts I and II address claims made pursuant to the individual charge of discrimination filed by Maria Elena Carhuayo and are not challenged here. Fairfield seeks judgment as a matter of law as to portions of Counts III and IV, the counts addressed to allegations of a pattern and practice of discrimination, on the ground that they are barred by limitations. The motion has been briefed by the parties and is ripe for adjudication.

II. THE VIEWS OF THE PARTIES

Fairfield contends that, unlike the filing limitations period governing the individual allegations in Counts I and II regarding Maria Elena Carhuayo (which may encompass violations occurring within 180 days prior to the filing of her charge), the pattern and practice allegations must be limited to violations alleged to have occurred within a period of 180 days prior to the filing of OSC's complaint. It asserts as a preliminary matter that §§ 1324b(d)(1) and 1324b(d)(3) of the statute, when read in conjunction with one of the implementing regulations, 28 C.F.R. § 44.304, provide a shorter filing period for pattern and practice violations, and that it is accordingly entitled to summary decision as a matter of law dismissing the pattern and practice allegations to the extent they purport to reach violations occurring more than 180 days prior to the filing of the complaint. Second, Fairfield urges in addition that the limitations period cannot be tolled in any respect because the continuing violation doctrine is inapplicable to this case. Fairfield asserts that United States v. Robison Fruit Ranch, Inc., 6 OCAHO no. 855, 285 (1996),[1] rev'd on other grounds, 147 F.3d 798 (9th Cir. 1998) and United States v. Zabala Vineyards, 6 OCAHO no. 830, 72 (1995), to the extent they would support the opposite result, are inconsistent with other OCAHO case law and should not be followed. It argues further that Robison is contrary to the statute and inconsistent with the standard set forth in United Airlines, Inc. v. Evans, 431 U.S. 553 (1977).

OSC in response first points out that two of the provisions upon which the motion is premised, 8 U.S.C. § 1324b(d)(1) and 28 C.F.R. § 44.304, are applicable only to complaints brought by the Special Counsel pursuant to an investigation conducted on his own initiative, i.e., "independent investigations," and not to complaints which are based upon charges actually filed with its Office. OSC asserts that because this action is brought based on an investigation growing out of the charge of Maria Carhuayo, the complaint was not filed pursuant to an independent investigation and is therefore governed by 8 U.S.C. § 1324b(d)(3) which provides that no complaint may be filed respecting a practice which occurred more than 180 days prior to the date of the filing of the charge with the Office of the Special Counsel.

OSC contends, however, that the limitations period operates differently if a systemic and continuous policy or pattern and practice can be shown, and takes issue as well with Fairfield's characterization of the continuing violation doctrine. In its view Robison and Zabala were correctly decided, and it

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[1] Citations to OCAHO precedents reprinted in bound Volumes 1 through 8 reflect the volume number and the case number of the particular decision, followed by the specific page in that volume where the decision begins; the pinpoint citations which follow are thus to the pages, seriatim, of the specific entire volume. Pinpoint citations to OCAHO precedents subsequent to Volume 8, where the decision has not yet been reprinted in a bound volume, are to pages within the original issuances; the beginning page number of an unbound case will always be 1, and is omitted from the citation.

suggests that Fairfield's analysis misapplies the Evans standard. OSC contends that since 1989 Fairfield has maintained a systemic policy the application of which resulted in a discriminatory pattern and practice persisting into the present, and points out in addition that at least as to the imposition of civil money penalties, the statute itself contains no limitations period whatever. For this reason OSC believes that civil penalties may be assessed for a period as far back as the alleged discriminatory policy's inception.

Neither party submitted evidence in support or opposition so that the factual record for purposes of this motion is wholly undeveloped. The issue posed by Fairfield is one of law: whether the pattern and practice allegations, to the extent they allege violations which occurred more than 180 days prior to the filing of OSC's complaint, must be dismissed as a matter of law.

III. APPLICABLE LAW

Rules applicable to OCAHO proceedings[2] provide that summary decision as to all or part of a complaint may issue only if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that the moving party is entitled to summary decision. 28 C.F.R. § 68.38(c). In determining whether there is a genuine issue, all facts and reasonable inferences therefrom are to be viewed in the light most favorable to the nonmoving party. United States v. Primera Enters., Inc., 4 OCAHO no. 615, 259, 261 (1994). Doubts are to be resolved in favor of the party opposing summary decision. Id. Where, as here, there are no evidentiary materials submitted and the relief sought is dismissal, the governing standard is that ordinarily applicable to a motion to dismiss; that is, the challenged portions of Counts III and IV will not be dismissed unless it is clear that there is no relief which could be granted under any set of facts which could be proved consistent with the disputed allegations. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984), In re Warfarin Sodium Antitrust Litigation, 214 F.3d 395, 397-398 (3d Cir. 2000).

The "continuing violation" theory has been described as "one of the most confusing theories in employment discrimination law." Thelma A. Crivens, The Continuing Violation Theory and Systemic Discrimination: In Search of a Judicial Standard for Timely Filing, 41 VAND. L. REV. 1171, 1772 (1988). Its application in the courts has been, to say the least, inconsistent. See generally Robert J. Reid, Confusion in the Sixth Circuit: The Application of the Continuing Violation Doctrine to Employment Discrimination, 60 U.CIN.L.REV. 1335 (1992). OCAHO case law recognizes that a "continuing violation" may be established based on a showing of uninterrupted conduct over a period of time, provided that at least one violation occurred within the 180 day period.

[2] 28 C.F.R. Pt. 68 (2000).

See Hammoudah v. Rush-Presbyterian-St. Luke's Med. Ctr., 8 OCAHO no.1050, 751, 772-776 (2000) (citing cases), Robison, 6 OCAHO at 335-337, Zabala, 6 OCAHO at 75 n.3. Hammoudah characterized a pattern and practice action as one which "has applicability only to situations involving systematic behavioral practices which can be evaluated as reflective of a pattern, not to situations involving various and sporadic actions resulting from a particular way of thinking." 8 OCAHO at 772.

The Third Circuit, in which this case arises, has also long recognized that some violations may be continuing in nature. See Bronze Shields, Inc. v. New Jersey Dep't of Civil Serv., 667 F.2d 1074, 1081 (3d Cir. 1981). In effect, applying the continuing violation doctrine makes the limitations period run from the last occurrence of discrimination rather than the first. Miller v. Beneficial Mgmt. Corp., 977 F.2d 834, 842 (3d Cir. 1992). Cf. Rush v. Scott Specialty Gases Inc., 113 F.3d 476, 481 (3d Cir. 1997) (if requirements are satisfied, plaintiff "may present evidence and recover damages for the entire continuing violation and the 300-day filing period will not act as a bar."). A continuing violation may affect only one individual or a number of individuals.

The theory of a continuing violation has been recognized as well by the Supreme Court in Havens Realty Corp. v. Coleman, 455 U.S. 363, 380-81 (1982) ("where a plaintiff, pursuant to the Fair Housing Act, challenges not just one incident of conduct violative of the Act, but an unlawful practice that continues into the limitations period, the complaint is timely when it is filed within 180 days of the last asserted occurrence of that practice."). The Havens court cited Zipes v. Trans World Airlines, Inc., 455 U.S. 385 (1982), a Title VII case decided the same day, to support the proposition that limitations periods in discrimination statutes are not jurisdictional and are to be liberally interpreted.

IV. DISCUSSION

A. Whether OSC's pattern and practice allegations are based on the Carhuayo charge

Section 1324b(d)(1), upon which Fairfield relies, sets out the Special Counsel's obligation to investigate each charge it receives, and also provides that the Special Counsel may conduct investigations on his own initiative. 8 U.S.C. § 1324b(d)(1). With respect to self-initiated investigations it states that the Special Counsel may, "subject to paragraph (3), file a complaint." Paragraph (3) in turn provides:

> No complaint may be filed respecting any unfair immigration-related employment practice occurring more than 180 days prior to the date of the filing of the charge with the Special Counsel. This subparagraph shall not prevent the subsequent amending of a charge or complaint under subsection (e)(1) of this section.

Id.

While nothing in the statute itself puts any time limitation on OSC's right to file a complaint based upon an independent investigation, the regulation, § 44.304, provides that where the Special Counsel conducts an investigation on his or her own initiative, the complaint may be filed where "there is reasonable cause to believe that an unfair immigration-related employment practice has occurred within 180 days from (sic) the date of the filing of the complaint." 28 C.F.R. § 44.304 (2000). The Preamble accompanying the final rule notes that the rule was amended to limit the period in which the Special Counsel could investigate and file a complaint on his own initiative because "[w]e believe that requiring a complaint to be filed within 180 days of the occurrence of an unfair immigration-related employment practice is a reasonable implementation of the desire of Congress reflected in 8 U.S.C. § 1324b(d)(1), (3), to place a time limit on the actions of the Special Counsel." 52 Fed.Reg. 37,402, 37,409 (Oct. 6, 1987).

Although Fairfield seeks the dismissal of the pattern and practice claims to the extent that they seek to encompass violations alleged to have occurred more than 180 days prior to the filing of the complaint, its logic would suggest that the period should actually be 180 days prior to the amendment, rather than the filing, of the complaint because it was the amendment, not the initial complaint, which first set out the pattern and practice allegations. Fairfield has, however, offered no evidence to show that the amendments to OSC's complaint were based on an "independent" or self-initiated investigation and cited no authority in support of its claim that Counts III and IV of the complaint were not based on OSC's investigation of the Carhuayo charge. The assertion is simply a bald conclusion. Absent either rationale or support, this conclusion will not be adopted. As the moving party, Fairfield has the burden of showing both the absence of a material issue of fact and its entitlement to judgment as a matter of law. This burden is not satisfied by fiat based on no evidentiary showing that the amendment to the complaint did not grow out of the investigation of Carhuayo's charge.

It is long and well established that agency enforcement proceedings may extend to like and related events which can reasonably be expected to grow out of the agency's investigation of a charge, Sanchez v. Standard Brands, Inc., 431 F.2d 455, 466 (5th Cir. 1970), and are thus not strictly limited to the allegations made by the charging party. Cf. General Tel. Co. of the Northwest, Inc. v. EEOC, 446 U.S. 318, 331 (1980) ("Any violations that the EEOC ascertains in the course of a reasonable investigation of the charging party's complaint are actionable"). This general rule has been recognized and followed in the Third Circuit, in which this case arises, Ostapowicz v. Johnson Bronze Co., 541 F.2d 394 (3d Cir. 1976), Anjelino v. The New York Times Co., 200 F.3d 73 (3d Cir. 2000), as well as in OCAHO proceedings. Guzman v. Yakima Fruit and Cold Storage, 9 OCAHO no. 1066, 8 (2001), Aguirre v. KDI American Products, Inc., 6 OCAHO no. 882, 632, 642-43 (1996), Westendorf v. Brown & Root, Inc., 3 OCAHO no. 477, 801, 806-07 (1992).

Absent some showing that OSC ever conducted an independent investigation of Fairfield, much less that it based Counts III and IV of its complaint on such an investigation, I am unable to conclude either that Fairfield's unsupported factual assertion as to the source of the allegations is correct, or that it is entitled to judgment as a matter of law on this issue.

B. Whether the filing limitations period also defines the period for potential relief

Fairfield's analysis appears to assume that the limitation on when a charge may be filed also equates to a strict limitation on which alleged violations may be included in the case as well as on what remedies may potentially be imposed. It asserts that "[t]he statute is silent as to the concept of 'pattern and practice' claims; and, therefore logic dictates that even a pattern and practice claim may include only those alleged violations which occurred within 180-day period." The conclusion does not follow from the premise, and the premise itself is flawed.

First, the statute is <u>not</u> silent as to the concept of pattern and practice claims, it is silent only as to a time bar for filing claims based on an OSC-initiated investigation. While the particular section of the statute which Fairfield quotes makes no reference to pattern and practice cases, the concept is expressly referenced in § 1324b(d)(2); charges, investigations and complaints of such a nature are clearly contemplated not only by the Special Counsel but also by private individuals, who have the right to file charges based on a pattern and practice and also to file such a complaint if OSC does not. Fairfield's assertion in its reply brief that "[a] pattern and practice claim is a case initiated by the OSC" is thus simply incorrect. A pattern and practice claim may be a case initiated by OSC, but it may also be a case initiated by a person on his or her own behalf or on behalf of another or others. 8 U.S.C. § 1324b(b)(1) and (d)(2). The statutory time bar for a pattern and practice case based on a charge is the same as for an individual case, that contained in § 1324b(d)(3): at least one unlawful practice must have occurred within 180 days prior to the filing of the charge.

If the time limitations for filing a complaint were also to be construed, as Fairfield wishes, to define the period for which relief could be granted, there would have been no necessity for Congress to have enacted the two-year limitation on backpay remedies contained at § 1324b(g)(2)(C). Were backpay remedies intended to be limited solely to violations occurring within the 180 day charge-filing period, complainants would never be able to obtain backpay relief, as § 1324b(g)(2)(C) so clearly provides that they may, for a period of up to two years prior to the filing of a charge.

The limitations period for filing a complaint is thus not necessarily coincident with the time period for the backpay remedy,[3] and it is not self-evident why it should necessarily be coincident with the period of availability of other remedies either.

Fairfield is correct, however, in stating that the statute is silent as to the time period for which the civil penalties set out at § 1324b(g)(B)(iv) may be assessed. While Fairfield urges that this Congressional silence should logically be interpreted to mean that such relief may be granted only for the time period described in the provision governing when a complaint may be filed, it does not explain what logic it is which dictates such a conclusion. OSC reads the same silence to mean that relief may extend indefinitely into the past to whenever the offending policy was adopted. These are not, of course, the only alternatives.

Neither of the parties has discussed whether the time periods for different forms of relief could differ or why same time period should necessarily govern regardless of the nature of the relief sought. In United States v. Marsten Apartments, Inc., 175 F.R.D. 257 (E.D. Mich. 1997), for example, the court found that the remedies for the government's pattern and practice claims under the Fair Housing Act were governed in part by the three year limitations period in 28 U.S.C. § 2415(b) to the extent that money damages were sought, in part by 28 U.S.C. § 2462 to the extent that civil money penalties were sought, and by no limitations period at all to the extent injunctive and declarative relief were sought. Id. at 263. The so-called "catch all" statute of limitations for civil money penalty actions pursuant to statutes without limitations provisions of their own, 28 U.S.C. § 2462, provides:

> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

[3] Neither of the parties has made any reference the limitation on backpay, and it is unclear from the briefs whether either anticipates backpay relief for affected individuals, if any, other than Carhuayo. The amended complaint seeks backpay for Carhuayo and makes a generalized request for "make-whole" relief for other affected individuals. The specific requests, however, are chiefly for relief consisting of injunctive remedies and civil money penalties.

Section 2462 has been widely applied to the enforcement of civil penalties under a variety of federal statutes otherwise without limitations periods,[4] although there is a conflict in the circuits as to when the five year time period actually begins to run. Cf. United States v. Core Labs., Inc.,759 F.2d 480 (5th Cir. 1995) (date of the underlying violation of Export Administration Act, 50 U.S.C. App. § 2401, is when the claim accrues) to United States v. Meyer, 808 F.2d 912 (1st Cir. 1987) (because Export Administration Act provides administrative procedure for assessing penalty, claim does not accrue until the penalty has been assessed administratively).[5] See also Robert D. Laurie, When Does Time Begin: A Clarification of the Federal Courts' Inconsistent Application of the Federal "Catch All" Statute of Limitations, 5 SUFFOLK J. TRIAL & APPELLATE ADVOC. 57 (2000), Susan S. McDonald, A Case of Statutory Misinterpretation: An 1839 Statute of Limitation on a Form of Debt Action is Being Misapplied to Limit Modern Regulatory Proceedings, 49 AM.U.L.REV. 659 (2000). Given the lengthy limitations period provided in § 2462 for civil money penalties for violations of other federal regulatory statutes which are silent as to limitations, it would be anomalous indeed to find, as Fairfield urges I do, that civil money penalties for violations of § 1324b alone are limited to a period of 180 days prior to the filing of a complaint.

OCAHO case law has applied § 2462 to civil money penalty proceedings for violations of both 8 U.S.C. § 1324a, United States v. WSC Plumbing, Inc., 9 OCAHO no. 1061, 10 (2000), United States v. Curran Eng'g Co., 7 OCAHO no. 975, 874, 879-882 (1997) and 8 U.S.C. § 1324c, United States v. DeLeon-Valenzuela, 8 OCAHO no.1004, 131, 134-35 (1998), aff'd 182 F.3d 914 (5th Cir. 1999) (table), United States v. Davila, 7 OCAHO no. 936, 253, 266-271, aff'd 158 F.3d 584 (5th Cir. 1997) (table), again with some dispute as to when the period actually begins to run. Neither party here has addressed the question of the statute's applicability to civil penalties for violations of § 1324b, although the issue has previously been raised, without resolution, in OCAHO proceedings. United States v. Agripac, Inc., 8 OCAHO no. 1028, 399, 407-408 (1999).

I am not persuaded that either party's analysis of the issue at this stage demonstrates entitlement to summary decision as a matter of law on the issue of what limitations period should govern the imposition of civil money penalties in a pattern and practice case if a continuing violation can be shown. Accordingly, summary decision will be denied as to this issue as well.

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[4] See Colin S. Diver, The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies, 79 COLUM.L.REV. 1435, 1438 (1979) (listing 348 statutes authorizing civil penalties, administered by 27departments and agencies).

[5] The Third Circuit, in which this case arises, has not spoken to the question, but in United States v. Great American Veal, Inc., 998 F.Supp. 416 (D.N.J. 1998) the court suggested that the circuit would follow Meyer rather than Core.

C. Whether the concept of continuing violation is inapplicable to this case

No one can quarrel with Fairfield's assertion that a filing by one individual does not operate to toll the limitations period "for another person's unrelated claim" (emphasis added), but this assertion begs the question: if the claims are truly unrelated, there would be no pattern and practice because it is the essence of such an action that the claims to be included are related and substantially similar. Whether the violations alleged in this case are similar or related is one of fact, Santos v. Rush-Presbyterian-St. Luke's Med. Ctr., 641 F.Supp. 353, 360 (N.D. Ill. 1986), and one upon which neither of the parties has tendered evidence. While assertions are made in the briefs as to the nature of the violations, these assertions are not evidence and are not properly considered in ruling on a motion for summary decision. See, 28 C.F.R. § 68.38(b), United States v. IBP, Inc., 8 OCAHO no. 1021, 295, 300 (1999). The precise nature of the violations and whether or not they are related is not adequately presented and is thus not susceptible to resolution on this undeveloped factual record. For purposes of this motion I will construe the facts, as I must, in favor of the nonmoving party and assume that the alleged violations are related and that they could potentially demonstrate an ongoing policy and course of conduct.

Fairfield's analysis, however, appears to confuse the so-called "single-filing rule" with the concept of a continuing violation. The two are analytically distinct. The single filing rule provides that under some circumstances, the filing of a charge by one individual may permit other aggrieved individuals to "piggyback" similar claims on that charge without the necessity of filing their own charges. Walker v. United Air Lines, Inc., 4 OCAHO no. 686, 791, 831-36 (1994). The rule ordinarily has application only to those similarly situated persons who could themselves have filed their own timely charges on or after the date of filing the charge upon which the suit is based. Wetzel v. Liberty Mutual Ins. Co., 508 F.2d 239, 246-47 (3d Cir.), cert. denied, 421 U.S. 1011 (1975). The continuing violation doctrine, on the other hand, is one which permits the inclusion of claims not only for similarly situated persons who might have filed timely charges on the same day, but also of claims which might otherwise be barred by limitations.

Fairfield's view is evidently that as a matter of law and regardless of whether the alleged violations are related, each individual violation for which relief is sought must independently be a present violation; that is, each person must demonstrate that there was a continuing course of conduct directed toward himself or herself, and that one of the acts toward each person occurred within the 180 day period. This analysis would allow tolling for so-called "serial" violations against the same individual as long as one of the acts occurred within 180 days of filing, but not for "systemic" violations involving the maintenance of an ongoing systemic discriminatory policy affecting different individuals at different times (except for those individuals actually affected during the 180 day period). In support of this view it relies chiefly on authority from another circuit, Domingo v. New England Fish Co., 727 F.2d 1429 (9th Cir. 1984), while acknowledging that other courts have disagreed.

Domingo was an action by private plaintiffs seeking backpay, not one by an agency seeking civil penalties. I am not persuaded that its reasoning is sufficiently compelling to govern the outcome here, or that it accurately states the applicable law. OCAHO case law, in fact, appears to hold otherwise, as Fairfield recognizes. In Zabala, 6 OCAHO at 75 n.3 for example, it was stated that "OCAHO case law makes clear that § 1324b(a)(6) pattern or practice cases involve continuing violations, overcoming the § 1324b(d)(3) requirement that the cause of action be limited to conduct within 180-days prior to filing an OSC charge." It also appears that the views of the circuit in which this case arises may be otherwise as well. In Jewett v. International Tel. & Tel. Corp., 653 F.2d 89, 91-92 (3d Cir.), cert. denied, 454 U.S. 969 (1981) the court observed that the mere occurrence of "isolated or sporadic acts of intentional discrimination" would not permit a plaintiff to prevail on a continuing violation theory. However, where it could be shown that discrimination against a class of which the plaintiff was a member was the company's "standard operating procedure," quoting International Bhd. of Teamsters v. United States, 431 U.S. 324, 336 (1977), a plaintiff would overcome the limitations period provided the practice or policy remained in effect within the period. Id. Cf. Courtney v. La Salle Univ., 124 F.3d 499, 505 (3d Cir. 1997) (where there is a discriminatory policy, each application of that policy to an employee constitutes an act of discrimination). On the other hand, if the defendant can show that the policy was discontinued before the limitations period, the claims must be dismissed as a matter of law. Jewett, 653 F.2d at 93.

I do not read United Airlines, Inc. v. Evans, 431 U.S. 553 (1997) as narrowly as Fairfield does, nor do I believe that it necessarily has application to a pattern and practice case. In that case, Carolyn Evans had resigned her job as a flight attendant in 1968 because of United's no-marriage rule for female flight attendants, a policy she did not challenge before she quit. Id. at 554-55. Four years later, and well after United had abandoned its no-marriage policy, Evans was rehired as a new employee. Id. at 555. A year after that, she filed a charge complaining that United's seniority system, which treated all rehired former employees as new employees with no seniority, discriminated against her. Id. at 556. Evans did not hold, as Fairfield suggests, that violations occurring before the filing date can never be a basis for relief. It held that the application of the airline's discontinued no-marriage policy to effect Evans' discharge as a flight attendant in 1968 did not continue into 1972, and that the "present effects of past discrimination" theory could not be used to invalidate an otherwise bona fide seniority system. Id. at 558. Nothing in Evans speaks to the question of pattern and practice claims where the alleged discriminatory policy is still in effect and currently being applied, a situation more akin to Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982), than to Evans.

The Havens court noted that,

> We agree with the Court of Appeals that for purposes of § 812(a), a "continuing violation" of the Fair Housing Act should be treated differently from one discrete act of discrimination. Statutes of limitations such as that contained in § 812(a) are intended to keep stale claims out of the courts. See Chase Securities Corp. v. Donaldson, 325 U.S. 304, 314, 65 S.Ct. 1137, 1142, 89 L.Ed. 1628 (1945). Where the challenged violation is a continuing one, the staleness concern disappears. Petitioners' wooden application of § 812(a), which ignores the continuing nature of the alleged violation, only undermines the broad remedial intent of Congress embodied in the Act, see Jones v. Alfred H. Mayer Co., 392 U.S. 409, 417, 88 S.Ct. 2186, 2191, 20 L.Ed.2d 1189 (1968).

Id. at 380.

The question posed by Fairfield's motion is whether claims outside the 180 day period must be dismissed summarily as a matter of law. Case law in this agency as well as in the circuit heightens my reluctance at this time to order summary disposition based on a limitations defense absent a factual record. I am unable to conclude as a matter of law and in a factual vacuum that there are no circumstances under which OSC could demonstrate a continuing violation, or that Robison and Zabala were wrongly decided. This is not to say that OSC will, or is even likely to, prevail. It is simply to say that OSC is entitled to offer evidence and to make the attempt. A finding of pattern and practice too, is ultimately a factual finding. United States v. Balistrieri, 981 F.2d 916, 930 (7th Cir. 1992). OSC may or may not be able to muster sufficient evidence to prove the existence of a pattern and practice, but such inquiry is better performed upon a more fully developed record than has been made here.

V. CONCLUSION

Fairfield's motion for summary decision is denied.

SO ORDERED.

Dated and entered this 9th day of May, 2001.

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Ellen K. Thomas
Administrative Law Judge