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

July 1, 2004

JOSEPH E. SABOL, Complainant,	)	
v.	)	8 U.S.C. § 1324b Proceeding OCAHO Case No. 04B00003
NORTHERN MICHIGAN UNIVERSITY, Respondent.	)	

ORDER FINDING COMPLAINT TO BE TIMELY FILED BUT DISMISSING IT FOR FAILURE TO SATISFY CONDITION PRECEDENT OF TIMELY FILED OSC CHARGE

I. INTRODUCTION

The question presented in this case is whether the respective limitations periods for filing complaints with this office and administrative charges with the Office of Special Counsel for Unfair Immigration-Related Employment Practices (OSC) have been complied with and, if not, whether those deadlines should be equitably tolled. Dr. Joseph E. Sabol's complaint asserts that Northern Michigan University (NMU or the university) discriminated against him by firing him and failing to hire him as an Assistant/Associate Professor of Chemistry, and that NMU retaliated against him because he filed or planned to file a complaint. Attachments to the complaint reflect that Sabol, a United States citizen, held a term appointment at NMU for the academic year 2001-02, and that he also taught as an adjunct faculty member during the 2002 summer term but that he was not offered reappointment for the academic year 2002-03 or any time thereafter. NMU filed an answer denying Sabol's allegations and then filed a motion to dismiss the complaint. The motion raised, inter alia, the issue of timely filing with respect to both the complaint and the underlying OSC charge.

Among the conditions precedent to filing a complaint in this forum is the filing of a timely charge with OSC. The applicable statutory provision states that no OCAHO complaint may be filed with respect to employment practices occurring more than 180 days prior to the filing of the underlying OSC charge. 8 U.S.C. § 1324b(d)(3). The statute also provides that when OSC does not file a complaint within 120 days of receiving a charge, it notifies the charging party

who may then file his or her own complaint within 90 days of receiving the notice. 8 U.S.C. § 1324b(d)(2). Both deadlines are implicated here.

NMU's motion to dismiss was previously granted in part and denied in part in an unpublished order. Sabol's allegations of discrimination on the basis of national origin were dismissed for lack of jurisdiction, but the remaining allegations were found to be facially sufficient and not so conclusory as to require dismissal under the notice pleading standards articulated in *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002) and in OCAHO cases. With respect to the timeliness questions, the order observed that it was impossible to say on the basis of the bare complaint and attachments that equitable relief would be unavailable to Sabol as a matter of law. Dismissal was accordingly held premature until the facts and surrounding circumstances could be more fully developed and until Sabol had the opportunity to show due diligence. Sabol was accordingly requested to respond to the motion by filing an affidavit and/or other evidence either showing timely filings or setting forth the grounds, if any, why he should be relieved from the filing deadlines. He responded with a brief, an affidavit and attachments consisting of 41 pages. Because materials outside the pleadings are considered, I now treat the remainder of the motion as one for summary decision. Although I find the complaint to have been timely filed, it will nevertheless be dismissed for failure to satisfy a condition precedent, namely the timely filing of an OSC charge.

II. ATTACHMENTS TO SABOL'S AFFIDAVIT

Sabol's affidavit is accompanied by 41 pages denominated as A1-A41. Pages A1-A5 are Articles I and IV of a collective bargaining agreement between NMU and the American Association of University Professors (AAUP). A6 is the first page of Draft Minutes of an AAUP meeting dated August 21, 2002. A7 is a memo from Sabol to Jim Greene and Eugene Wickenheiser dated June 5, 2002. A8-A9 is an e-mail from Sabol to Greene dated August 8, 2002. A10 is an e-mail to Sabol from Greene dated August 8, 2002. A11-12 is a grievance signed by Sabol dated August 9, 2002. A13 is an e-mail to Sabol from Greene dated August 9, 2002. A14 is an e-mail from Sabol to Greene dated August 10, 2002. A15-A16 is an e-mail from Sabol to Greene, Carol Johnson and Marcus Robyns dated August 13, 2002. A17-A19 is a petition addressed to Carol A. Johnson, Marcus Robyns and Jim Greene, members of the local AAUP Executive Committee, received by AAUP on August 28, 2002. A20-21 are letters to Sabol on AAUP letterhead dated respectively September 13, 2002 and September 24, 2002. A22 is a Freedom of Information Act (FOIA) request from Sabol to NMU dated October 3, 2002. A23 is a letter to Sabol from the NMU FOIA Officer dated October 8, 2002. A24 is an e-mail from Sabol to Wickenheiser dated October 2, 2002. A25 is a letter from Sabol to Wickenheiser dated October 4, 2002. A26 is a letter to Sabol from the NMU FOIA Officer dated October 14, 2002. A27 is a response from Sabol to the NMU FOIA Officer dated October 17, 2002. A28-A29 is a response dated October 23, 2002 granting the FOIA request. A30 consists of page 4 of the Department of Labor's Form ETA 9035E. A31 is a letter dated November 12, 2002 from

Sabol to the Department of Justice captioned Re: ETA Case No. I-02205-0184373. A32 is a letter dated November 12, 2002 from Sabol to the NMU FOIA Officer captioned Information Request #2. A33 is a letter dated November 13, 2002 from Sabol to the NMU FOIA Officer captioned Information Request #3. A34 is an e-mail from Sabol to OSC dated December 5, 2002. A35 is an e-mail from OSC to Sabol dated March 12, 2003. A36-A37 is a letter from Sabol to OSC dated March 31, 2003. A38-A39 is a letter from OSC to Sabol dated April 16, 2003. A40 is an envelope addressed to Sabol from OSC showing a postmark of August 6, 2003 and a handwritten delivery date of August 13, 2003. A41 is a letter from Sabol to OCAHO dated November 5, 2003 with a Post Office receipt slip showing payment of postage and delivery confirmation fees and a postmark of November 5, 2003. The delivery confirmation card was not included.

III. FACTS TAKEN AS TRUE -- SABOL'S AFFIDAVIT AND EXHIBITS

Sabol's affidavit states in pertinent part that NMU authorized its chemistry department to make two term appointments to the faculty for 2002-03, one in organic chemistry and one in analytical chemistry. Sabol held a term appointment at NMU for the academic year 2001-02 as an assistant professor teaching analytical chemistry. A colleague held a term appointment to teach organic chemistry for the same period. The last day of the academic year was May 7, 2002. Sabol learned on or about May 28, 2002 that his colleague had been reappointed to her same position to teach organic chemistry for the upcoming academic year. However he was not notified one way or the other whether he would be reappointed to teach analytical chemistry. He was hired, however, to teach for the 2002 summer term which lasted from May to July 5, 2002. Sabol's last day under contract with NMU was July 5, 2002.

During the summer term, Sabol repeatedly asked Eugene Wickenheiser, the Chairman of the Chemistry Department, whether he would be given first consideration for the 2002-03 analytical chemistry job, but Wickenheiser avoided him, was evasive and would not answer his questions. Sabol also spoke several times to James (Jim) Greene, the AAUP union grievance officer, raising questions about NMU's hiring practices and the status of the appointment. On August 8, 2002 Sabol learned by way of an e-mail from Greene (A10) that the analytical chemistry job for 2002-03 had been filled.

On August 9, 2002 Sabol delivered a written grievance to AAUP (A11-12) which the union representative declined to pursue (A13). Sabol thereafter continued to press for his grievance to be filed (A14), requested a meeting with the AAUP Executive Committee (A15-16) and circulated a petition among faculty members (A17-19). Sabol was informed by letter from the local AAUP president that the union "has verified that the members of the Chemistry Department faculty did consider you for a new one-year term position and would have offered you the position had they been satisfied with your performance" (A20). Sabol was given the opportunity to appear before the Executive Committee on September 23, 2002, but the committee dismissed

his allegations on September 24, 2002, stating they believed there was no contractual basis supporting a grievance (A21).

Some time thereafter, Sabol contacted legal counsel. On October 3, 2002, Sabol delivered his first FOIA request to NMU (A22). The university sought a 10-day extension because documents had to be collected from various offices (A23). Sabol subsequently amended and restricted the FOIA request (A27). He was notified by letter dated October 23, 2002 (A28-29) that the documents were ready, but was not able to examine them until November 12, 2002. When he saw the documents Sabol discovered that the person who had been appointed to the 2002-03 position in analytical chemistry was not a United States citizen and had required an H-1B visa.[1]

Sabol also saw the procedures for filing complaints described on page 4 of form ETA 9035E (A30), and he sent a letter to the Department of Justice (DOJ) that same day captioned "ETA Case No. I-02205-0184373" (A31). On December 5, 2002 Sabol sent an e-mail to OSC requesting information about ETA Case No. I-02205-0184373 (A34), but he did not receive a reply until March 12, 2003. The response (A35) advised Sabol that OSC's database did not indicate he had ever filed a charge with that office, and that the case reference number suggested he had filed with the Department of Labor (DOL). OSC gave him a telephone number to inquire about the status of the DOL complaint and also advised Sabol about the procedures for filing an OSC charge. Sabol subsequently sent a cover letter (A36-37) with his OSC charge on March 31, 2003. The charge was accepted as complete on April 9, 2003 (A38-39). On August 13, 2003 Sabol received the letter authorizing him to file a complaint with OCAHO (A40). He mailed the complaint to OCAHO on November 5, 2003 (A41).

IV. APPLICABLE LAW

It is well settled that the 90 day time limit for filing an OCAHO complaint is not a jurisdictional prerequisite, but is rather, like a statute of limitations, subject to waiver, estoppel and equitable tolling. *Mikhailine v. Web Sci Techs.*, 8 OCAHO no. 1033, 513, 519 (1999).[2] The same is true

[1] Sabol's Attachment A36 reflects that Sabol told OSC that he obtained documents and learned of the selection on October 14, 2002. The discrepancy in dates is not explained.

[2] 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

(continued...)

with respect to the 180 day OSC charge filing period. *Halim v. Accu-Labs Research, Inc.*, 3 OCAHO no. 474, 765, 779 (1992). This approach is in accord with other case law in the federal courts finding that employment discrimination filing periods are subject to equitable doctrines. *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002). OCAHO jurisprudence governing equitable modification is generally consistent with and influenced, but not controlled, by the approach taken by the federal courts under analogous statutes. Equitable remedies under either approach are sparingly applied, *cf. Irwin v. Veterans Affairs*, 498 U.S. 89, 96 (1990); *Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147, 152 (1984) (per curiam), and are ordinarily available only where the failure to meet a deadline arose from circumstances beyond the litigant's control. *Graham-Humphreys v. Memphis Brooks Museum of Art Inc.*, 209 F.3d 552, 560-61 (6th Cir. 2000).

Discrete acts of discrimination which occurred outside the statutory filing periods are thus ordinarily time-barred. *Morgan*, 536 U.S. at 113. A discriminatory act which is not made the basis of a timely charge is merely an "unfortunate event in history which has no present legal consequences." *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558 (1977). Absent a showing which supports equitable tolling, OCAHO case law does not permit an exception to the timely filing requirements simply because of a party's pro se status. *United States v. Workrite Unif. Co., Inc.*, 5 OCAHO no. 736, 107, 114 (1995). *Cf. Graham-Humphreys*, 209 F.3d at 561 ("even a pro se litigant . . . is required to follow the law. In particular, a willfully unrepresented *plaintiff* volitionally assumes the risks and accepts the hazards which accompany self-representation."). This is no less true when a filing is as little as one day late. *Grodzki v. OOCL (USA), Inc.*, 1 OCAHO no. 295, 1948, 1956 (1991). As explained in *Spears v. City of Indianapolis*, 74 F.3d 153, 157 (7th Cir. 1996), "We live in a world of deadlines. If we're late for the start of the game or the movie, or late for the departure of the plane or the train, things go forward without us."

The Sixth Circuit, in which this case arises, holds generally that there are five factors to be considered when assessing a request for equitable tolling: 1) lack of notice of the filing requirement; 2) lack of constructive knowledge of the filing requirement; 3) diligence in pursuing one's rights; 4) absence of prejudice to the defendant;[3] and 5) the plaintiff's reasonableness in remaining ignorant of the legal requirement. *Seay v. Tennessee Valley Auth.*, 339 F.3d 454, 469 (6th Cir. 2003). The factors are not comprehensive, nor is each relevant in all cases. *Graham-Humphreys*, 209 F.3d at 561. Notwithstanding these factors, ignorance of the OSC charge filing requirements has not in itself ordinarily been held in our jurisprudence to extend the charge-filing period. *Rusk v. Northrop Corp.*, 4 OCAHO no. 607, 153, 172 (1994) (lack of knowledge of

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[2](...continued)
accordingly omitted from the citation.

[3] Absence of prejudice is not, however, an independent basis for invoking equitable tolling. *Baldwin County*, 466 U.S. at 152.

proper filing procedures does not entitle a complainant to an extension of time); *Halim*, 3 OCAHO at 780-81. Among the most common circumstances recognized in OCAHO jurisprudence as warranting equitable relief are those in which 1) the employer held out hope of employment or did not inform the applicant that he would not be considered, 2) the charging party filed a timely charge in the wrong forum, or 3) the employer lulled the applicant into inaction during the filing period by misconduct or otherwise. *Bozoghlanian v. Magnavox Advanced Prod. & Sys. Co.*, 4 OCAHO no. 653, 543, 546 (1994).

Due diligence is the sine qua non for equitable relief. *Goel v. Indotronix Int'l Corp.*, 9 OCAHO no. 1102, 20 (2003). A plaintiff may under some circumstances avoid a limitations bar if he is unable, despite the exercise of due diligence, to obtain vital information bearing on the existence of his claim. *EEOC v. Kentucky State Police Dep't.*, 80 F.3d 1086, 1095 (6th Cir. 1996). However absent other circumstances weighing in favor of equitable tolling, the running of the statute will not ordinarily be suspended until the plaintiff learns sufficient facts to suspect discriminatory intent on the part of the defendant. *Amini v. Oberlin Coll.*, 259 F.3d 493, 502 (6th Cir. 2001), citing *Hill v. Department of Labor*, 65 F.3d 1331, 1337 (6th Cir. 1995).

V. THE TIMELINESS OF THE COMPLAINT

Sabol received OSC's notification letter on August 13, 2003 (A40). The filing date appearing on the back of his OCAHO complaint is November 12, 2003. Applicable rules[4] provide that a complaint is filed when it is actually received. 28 C.F.R. § 68.8(b). *See Salcido v. New-Way Pork Co.*, 3 OCAHO no. 425, 262, 268-69 (1992). Sabol's affidavit states that he mailed his complaint on November 5, 2003 and that it was received at OCAHO on November 7, 2003, but it did not explain how he knew when the complaint was received. While statements of fact contained in an affidavit will ordinarily be taken as true, this deference is questionable where there is no apparent basis for the affiant to have personal knowledge of the fact stated; 28 C.F.R. § 68.38(b) requires that affidavits must set forth such facts as would be admissible in evidence in a proceeding subject to 5 U.S.C. 556 and 557 and show affirmatively that the affiant is competent to testify to the matter stated. Sabol's Attachment A41 reflected only that he mailed a letter to OCAHO on November 5, 2003 and paid the fees for postage and delivery confirmation, but the return confirmation of receipt was not included in the attachment.

On May 18, 2004, I therefore issued an Order of Inquiry requesting Sabol to furnish a copy of the return receipt if he had it, or otherwise to state with specificity by what means he obtained his alleged knowledge of receipt at OCAHO on November 7, 2003, or alternatively, to state what grounds he has for belief that his complaint was received prior to November 12, 2003 inasmuch as no document received from Sabol by this office bears a date stamp earlier than November 12,

[4] Rules of Practice and Procedure, 28 C.F.R. Part 68 (2003).

2003. Sabol responded by sending a printout from the USPS Track and Confirm website which shows delivery in Falls Church on November, 7, 2003. Sabol also sent a copy of a fax transmission cover page addressed to an OCAHO employee dated November 10, 2003; this was a supplementary statement and is appended to the complaint. Thus while the complaint itself reflects a filing date of November 12, 2003, it nevertheless appears that for reasons I am unable to discern an error must have been made in entering the filing date which should have been the actual date of receipt, November 7, 2003. The complaint was thus timely filed within 90 days after August 13, 2003.[5]

VI. THE TIMELINESS OF THE OSC CHARGE

Sabol's complaint says that he filed his OSC charge on April 9, 2003. The charge itself is dated March 31, 2003. Regulations provide that a submission to OSC is deemed a filed charge as of the date adequate information is received in writing, after which OSC issues the appropriate notices.[6] 28 C.F.R. § 44.301(c)(1). It appears that OSC treated the charge as having been filed on April 9, 2003[7] and therefore I do so as well, but note that the result would not differ were March 31 used as the filing date.

Because 8 U.S.C. § 1324b(d)(3) prohibits complaints about employment practices occurring more than 180 days prior to the filing of an OSC charge, events occurring on or before October 12, 2002 would presumptively be time-barred absent grounds for equitable tolling. Sabol identified no employment decision affecting him which did not occur well before that. He said he was fired on July 5, 2002, his last day of work for NMU. Although his charge stated that

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[5] The ninetieth day after Sabol's receipt of OSC's letter was Tuesday, November 11, 2003. I take judicial notice that November 11 is Veterans' Day, a federal holiday. The rules provide that when the last day of a filing period falls on Saturday, Sunday or a legal holiday observed by the Federal Government, the filing period extends to the next business day. 28 C.F.R. § 68.8(a). Sabol's complaint would thus have been rendered timely by operation of that rule even had it not actually been received before November 12, 2003.

[6] A mailed charge, unlike a complaint, is ordinarily deemed filed on the date it is postmarked. 28 C.F.R. § 44.300(b). Evidently Sabol's initial submission was insufficient to constitute a charge. The Special Counsel has discretion to deem an insufficient charge filed on the date of receipt, 28 C.F.R. § 44.301(c)(2), and obtain additional information afterward.

[7] OSC has 120 days to investigate a charge. 8 U.S.C. § 1324b(d)(1). Sabol's Attachment A38 reflects that OSC notified him that the 120 day period would end on August 7, 2002. Attached to the complaint is the notice letter required by 8 U.S.C. § 1324b(d)(2) notifying him of his right to file a complaint. It is dated August 6, 2002.

the failure to hire him occurred some time between August 8, 2002 and October 14, 2002,[8] his affidavit acknowledges that he learned on August 8, 2002 that someone else had been appointed to teach analytical chemistry and that he would not be rehired. It therefore appears that Sabol's charge was untimely filed as to the employment decisions he complained about.

VII. WHETHER THE CIRCUMSTANCES SUPPORT EQUITABLE RELIEF

Sabol argues that at all times he exercised due diligence and that there was no delay in filing his OSC charge. He also argues that he could not pursue administrative review "outside the union-employer relationship" until AAUP formally abandoned him. Finally, although his brief did not raise the issue, I also consider the question of whether any of his communications with OSC or other governmental agencies would support equitable tolling.

A. Whether the commencement of the filing period was tolled until Sabol found out about the successful candidate

Sabol says he first learned on November 12, 2002 that the person who got the job needed an H-1B visa, and he evidently seeks to count the 180 day filing period as starting on that date. A limitations period ordinarily begins to run, however, when a final employment decision is made and communicated to the employee. This does not mean that where, as here, the employer fails to communicate the decision the limitations period never begins to run. As pointed out in *EEOC v. United Parcel Serv.*, 249 F.3d 557, 562 (6th Cir. 2001), once the employee is aware or reasonably should be aware of the employment decision, the clock starts ticking on the limitations period. *Amini* too makes clear that the starting date is when the plaintiff learns of the employment decision, not when he or she learns that the decision may have been discriminatorily motivated. 259 F.3d at 499.

Sabol's e-mail to Greene on August 8, 2002 (A8) stated, inter alia, "I have never been informed whether the [analytical] chemistry position has been filled. I am aware that the first offer was not accepted in time and that a second offer was made, but I do not know the status of it. Can you find out?" Greene responded the same day (A10) advising Sabol that the analytical chemistry position had been filled. It is beyond cavil that Sabol was on notice at that point that the employment decision had been made and another candidate appointed; he sought to file a written grievance the very next day (A11-12) complaining about the failure to give him first consideration and questioning whether proper procedures had been followed.

While Sabol contends that he did not yet know at this point who had been hired for the job, he

[8] Documents submitted with NMU's motion suggest that the analytical chemistry position was actually filled in early July, 2002.

did not contend, or set out any facts which suggest, that he ever asked that question, either of Wickenheiser or Greene or of anyone else at the university.[9] NMU is a state institution; the names of its faculty members are not secret information. Article 1.4.1 of the collective bargaining agreement (A3) specifically requires the university to provide monthly updates to the union of any changes in the list of faculty members, so information about new faculty would have been available through the union as well as through the Department; it may even have appeared on the university's website.

Sabol's attempt to delay the commencement of the filing period past August 8, 2002 appears to be foreclosed by the reasoning in *Amini*, a case factually quite similar to this one. Amini had applied for a faculty position in the mathematics department at Oberlin College, a private institution. The court held that the period for filing an EEOC charge began to run when Amini found out he would not be hired, not when he finally found out that the successful candidate was a younger white male, quoting *Hill*, 65 F.3d at 1337, which explained that,

> . . . it might be years before a person apprehends that unpleasant events in the past were caused by illegal discrimination. In the meantime, under plaintiff's theory, the employer would remain vulnerable to suits based on these old acts.

Amini had been advised on January 12, 1999 that the position he applied for had been filled. He made attempts to learn the name of the successful candidate by checking the college's website, and also visited the campus where he searched the announcement board for the math department but without success. As of July the name of the successful candidate had still not been posted on the website. It was not until Amini checked the website again in September that he finally learned who had been selected. The court was unimpressed with Amini's listless efforts to find out who had been hired and found no basis for equitable tolling of the 300-day EEOC limitations period. Amini, like Sabol, did not allege that he ever actually contacted anyone at the college to find out about the selectee, nor did he claim that the college made any affirmative attempt to prevent him from discovering the information. 259 F.3d at 501.

If an employer makes affirmative misrepresentations which mislead a party into missing a filing deadline, that might be sufficient to toll a filing period,[10] *Steiner v. Henderson*, 354 F.3d 432, 436 (6th Cir. 2003), but no such misrepresentations are alleged here. There is no suggestion that

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[9] Sabol's first FOIA request (A22) does not specifically ask this question either, although the information would necessarily be produced in response to his request for "all records regarding filling both 2002-2003 term faculty appointments in the Department of Chemistry."

[10] Other circuits have characterized such circumstances as giving rise to equitable estoppel, not equitable tolling.

NMU did anything to conceal information about the new appointee or to mislead Sabol. So far as his affidavit discloses, Sabol simply made no effort to find out who had been hired; the information came to him incidentally in response to his FOIA inquiry. In any event, when Sabol learned who had been hired there were still 84 days left in the filing period, so the delay in finding out who got the job did not in itself prevent a timely filing with OSC.

B. Whether Sabol's invocation of grievance procedures tolled the filing period

Sabol also contends that he diligently pursued his contract claim and that he was required by Article IV of the collective bargaining agreement (A5) to pursue any contract violations through the grievance procedure. He says his understanding was that AAUP represented him and he could take no official administrative action until the union "released their control." Examination of Article IV, however, reflects that the contractual grievance procedure set forth is applicable only to violations of the collective bargaining agreement itself. There is no suggestion that the contract procedures were designed to displace or preempt statutory rights. Neither did Sabol state reasonable grounds for a belief that the union "represented" him when all it did was resist his requests that a grievance be filed.

It is, moreover, well and long established on the highest of authority that the pendency of grievance procedures under a collective bargaining agreement does not operate to toll a statutory limitations period for filing administrative charges of employment discrimination. *Delaware State Coll. v. Ricks*, 449 U.S. 250, 261 (1980); *International Union of Elec., Radio and Machine Workers, AFL-CIO, Local 790 v. Robbins & Myers*, 429 U.S. 229, 236-37 (1976); *Everson v. McLouth Steel Corp.*, 586 F.2d 6, 7 (6th Cir. 1978) (grievance procedures in collective bargaining agreements and Title VII statutory rights are mutually exclusive). Neither the grievance procedure itself nor any misunderstanding Sabol might have had about its preemptive effect can operate to toll a statutory limitations period. The grievance procedure, moreover, lasted only until September 24, 2002; at that point there were still 133 days left in the filing period, so Sabol's attempts to use grievance procedure did not prevent a timely filing either.

That Sabol may have been diligent in pursuing the union grievance procedure has no bearing on the degree of diligence he used in pursuit of statutory claims of employment discrimination or other noncontractual remedies. Sabol said that at some unidentified time after September 24, 2002 he "contacted legal counsel regarding my case: the consensus advice was that I engage in FOIA activity and return when I have information on NMU's customary practices and documents why I was not hired." There is no indication that the attorney told Sabol to find out about the person who was hired. In fact, Sabol's affidavit does not disclose anything the attorney may have told him;[11] it says only that the "consensus advice" was that he should pursue a FOIA inquiry.

[11] Some cases suggest that equitable tolling is not appropriate where counsel is available (continued...)

The meaning of the term "consensus advice" is unelaborated. Sabol did make another FOIA request on November 13, 2002 seeking documents related to the H-1B visa application for the successful candidate, but his affidavit does not disclose whether Sabol ever returned to the attorney with additional information. The affidavit is wholly silent on the question of what, if anything, Sabol did thereafter to follow up on his initial discussion with counsel.

C. Whether OSC's delay in responding to Sabol's e-mail or his dealings with other agencies toll the filing period

Finally, I consider whether Sabol's e-mail to OSC or any of his dealings with other governmental agencies warrant equitable remedies. Sabol's cover letter to OSC (A37) said that he believed the late filing of his charge should be excused because of OSC's delay in responding to his e-mail of December 5, 2002. That e-mail was Sabol's first contact with OSC and there was no response to it until March 12, 2003 (A35). The text of Sabol's December 5th e-mail stated in its entirety,

> Re: ETA[12] Case No. I-02205-0184373
> On 12 November 2002, I filed a complaint regarding the above captioned H1B visa application: I was a qualified US worker and displaced by the non-US worker. Was my complaint received? Should I report to the Wage and Hour Div., US D of Labor? Thanks.

The reference was evidently to a letter dated November 12, 2002 which Sabol had previously addressed to the DOJ generally and captioned "To Whom it May Concern" (A31). That letter too indicates that its subject matter is "Re: ETA Case No. I-02205-0184373. The letter alleges that NMU displaced a U.S. worker, failed to offer employment to a U.S. worker and also engaged in certain posting violations with regard to the required Notice of Filing Application for H-1B. It is not clear what actually became of this letter. However, among the attachments to Sabol's complaint is a letter to Sabol from the Wage and Hour Division of the DOL dated January 2, 2003 acknowledging receipt of information concerning possible violations of the H-1B provisions of the INA and indicating that an investigator had been assigned to the case. So far as the record discloses, Sabol did not actually make any complaint directly to the DOL and his November letter may have been forwarded to that agency. There is no suggestion in the record that the letter was ever received or seen by anyone at OSC.

The response OSC eventually made to Sabol's e-mail said it had not previously received a charge

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[11](...continued)
to a party. *Salcido*, 3 OCAHO at 273-74 (citing *Lundy*, 1 OCAHO at 1148).

[12] The term "ETA" refers to the Employment and Training Administration, a component of the DOL.

from him, and that it appeared from the reference number that he had filed a complaint with the DOL. The e-mail response also provided a telephone number at DOL where Sabol could inquire about the status of that complaint. OSC further explained that its own jurisdiction was limited to certain claims of employment discrimination based on national origin or citizenship status, overdocumentation in the employment eligibility process and retaliation. The response also explained the OSC charge filing process and how to obtain the forms for filing with OSC. By the time OSC e-mailed Sabol back on March 12, 2003, however, the filing period had already expired for events which occurred in August of 2002.

The Immigration and Nationality Act (INA) provides that H-1B workers are permitted entry for a limited period to work in specialty occupations. 8 U.S.C. § 1101(a)(15)(H)(i)(B). Implementing regulations provide that the Departments of Labor, State and Justice each play discrete roles in the H-1B process. 20 C.F.R. § 655.705. DOL administers the labor condition application process and enforcement provisions (exclusive of complaints regarding non-selection of U.S. workers): its Employment and Training Administration (ETA) receives and certifies the Labor Condition Applications (LCAs) while its Wage and Hour Division of the Employment Standards Administration (ESA) investigates misrepresentation in or failure to comply with LCAs. 20 C.F.R. §§ 655.705 (a)(1) and (2). DOJ administers a system for enforcement and disposition of complaints regarding an H-1B dependent employer's or previous willful violator employer's failure to offer a position to an equally or better qualified U.S. worker. 8 U.S.C. §1182(n)(1)(E), § 1182(n)(5); 20 C.F.R § 655.705(b). It does not appear that NMU is either an H-1B dependent employer or a previous willful violator. Sabol's Attachment A30 is page 4 of the Labor Condition Application for the successful candidate. The form, ETA Form 9035E, describes two procedures for filing complaints related to the H-1B process; one for filing complaints about various issues with the Wage and Hour Division of DOL and another for complaints alleging failure to offer employment to an equally or better qualified U.S. worker, which the form specifies are to be directed to DOJ. Sabol's letter encompassed both types of issues.

Procedures dealing with LCAs are entirely separate and distinct from the procedures implementing 8 U.S.C. § 1324b. The term "U.S. worker" refers to a person authorized to work in the United States; it includes both citizens and work authorized aliens. The term is defined in 20 C.F.R. § 656.3 as one who "is a U.S. citizen; is a U.S. national; is lawfully admitted for permanent residence; is granted the status of an alien lawfully admitted for permanent residence under 8 U.S.C. 1160(a), or 1255a(a)(1); is admitted as a refugee under 8 U.S.C. 1157; or is granted asylum under 8 U.S.C. 1158." Thus an allegation of failure to offer a position to a "US worker" does not implicate questions of citizenship or national origin discrimination.

There is accordingly no basis to infer from Sabol's e-mail to OSC or his earlier letter addressed generally to DOJ that he had ever sought to make a charge of citizenship status discrimination pursuant to 8 U.S.C. § 1324b. Nothing in the e-mail or in Sabol's earlier letter raising issues related to 8 U.S.C. § 1182(n) would put a recipient on notice of any potential violation of § 1324b. It appears from attachments to Sabol's complaint that he also filed a charge with the

Michigan Department of Civil Rights and EEOC on November 21, 2002; nothing in that charge either suggests that Sabol intended to complain about citizenship status or national origin based discrimination. The Michigan/EEOC charge alleges discrimination on the basis of age, sex and marital status. Had Sabol's e-mail to OSC or his earlier letter actually stated facts which could support a charge of citizenship status discrimination, there might be some merit in his request for equitable relief, although he would still have a major problem demonstrating that waiting three months for OSC to respond to his e-mail could ever be found to constitute due diligence. Sabol provided no explanation as to why he never recontacted OSC after he failed to receive a prompt response.

There is case law to the effect that a timely filing with the wrong agency may under some limited circumstances operate to satisfy a filing requirement. *Udala v. New York State Dept. of Educ.*, 4 OCAHO no. 633, 390, 396 (1994). But where an administrative charge fails to implicate any allegation cognizable under § 1324b, a complainant cannot claim the benefit of the narrow exception designed to prevent injustice arising from erroneous forum selection. *Cf. United States v. Auburn Univ.*, 4 OCAHO no. 617, 268, 278-80 (1994). That a complainant will not be penalized for selecting the wrong forum does not render allegations timely which were never made to the first agency at all. *Caspi v. Trigild Corp.*, 7 OCAHO no. 991, 1064, 1068 (1998). Sabol's is thus not among the narrow category of cases in which the employee raised the precise statutory claim at issue, albeit by mistake in the wrong forum. *See, e.g., Farrell v. Automobile Club of Michigan*, 870 F.2d 1129 (6th Cir. 1989). Here the university was never given timely notice of the specific statutory claim because the claim of discrimination on the basis of citizenship status was never timely alleged in any forum.

Neither is this a case like *Brown v. Crowe*, 963 F.2d 895 (6th Cir. 1992) in which, unbeknownst to the plaintiff, a legal mistake was made by a government agency which caused him not to meet a time requirement through no fault of his own. *Cf. Nichols v. Muskingum Coll.*, 318 F.3d 674 (6th Cir. 2003). While it is regrettable that OSC did not reply earlier to Sabol's e-mail, that failure does not rise to the level of an affirmative legal mistake and Sabol was not unaware of it. OSC did not give Sabol erroneous information nor did it mislead him in any way; all it did was fail to respond promptly to an e-mail alleging issues not encompassed within its jurisdiction. *Cf. Goel*, 9 OCAHO at 22 (OSC lacks jurisdiction over assertions of violations of LCA rules and regulations, abuse of H-1B visas and similar matters). Although Sabol implies, and I credit, that had OSC responded more expeditiously to his e-mail he might have filed a timely charge, that possibility cannot in itself support equitable tolling.

VIII. CONCLUSION

Tolling is available only in compelling circumstances which justify a departure from established procedures. *Bevins v. Dollar Gen. Corp.*, 952 F.Supp. 504, 508 (E.D. Ky. 1997), citing *Puckett v. Tennessee Eastman Co.*, 889 F.2d 1481 (6th Cir. 1989). Sabol's failure to file a timely OSC

charge did not arise unavoidably from circumstances beyond his control. *Cf. Graham-Humphreys*, 209 F.3d at 560-61. Absent compelling justification or excuse, summary dismissal is appropriate where statutory deadlines are not met. *Id.* at 557 n.8. As Judge Posner advised in *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 453 (7th Cir. 1990), filing limitations periods should not be trivialized by "promiscuous application of tolling doctrines." Those doctrines are reserved for extraordinary circumstances and the circumstances of this case are not of that character.

FINDINGS OF FACT

1. Joseph E. Sabol is a citizen of the United States.

2. Northern Michigan University is a state institution of higher education located in Marquette, Michigan.

3. Northern Michigan University recognizes the AAUP-NMU Chapter as the exclusive collective bargaining representative for a bargaining unit consisting of faculty members holding academic rank.

4. Eugene Wickenheiser was at all relevant times the Chairman of NMU's Chemistry Department.

5. James (Jim) Greene was at all relevant times the local AAUP union grievance officer.

6. Sabol held a term appointment in NMU's Department of Chemistry to teach analytical chemistry for the academic year 2001-02.

7. Sabol taught at NMU during the summer session from May until July 5, 2002.

8. Sabol was an applicant for a term appointment to NMU's Department of Chemistry to teach analytical chemistry for the academic year 2002- 03.

9. Sabol learned on August 8, 2002 from James Greene that he had not been selected for the appointment to teach analytical chemistry for the academic year 2002-03.

10. Sabol filed a charge with the Office of Special Counsel for Unfair Immigration-Related Employment Practices (OSC) on April 9, 2003.

11. The employment practices alleged in Sabol's OSC charge occurred more than 180 days prior to the filing of the charge.

12. No extraordinary circumstances prevented Sabol from filing an OSC charge in a

timely manner.

13. On August 13, 2003, Sabol received a letter from OSC authorizing him to file a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO).

14. Although Sabol's OCAHO complaint bears a filing date of November 12, 2003, it was actually received on November 7, 2003.

CONCLUSIONS OF LAW

1. Sabol is a protected individual within the meaning of 8 U.S.C. § 1324b(a)(3)(A).

2. NMU is an entity within the meaning of 8 U.S.C. § 1324b(a)(1).

3. Sabol's OCAHO complaint was timely filed.

4. Sabol failed to satisfy one of the conditions precedent to the institution of an OCAHO complaint; namely the timely filing of a charge with OSC.

5. Sabol presented no triable issue of fact sufficient to warrant a hearing as to the application of equitable remedies to excuse the untimely filing of his OSC charge.

To the extent any statement of fact is deemed to be a conclusion of law, or any conclusion of law is deemed to be a statement of fact, the same is so denominated as if set forth herein at length.

ORDER

The complaint is dismissed. All other pending motions are denied.

SO ORDERED.

Dated and entered this 1st day of July, 2004.

_____

Ellen K. Thomas
Administrative Law Judge

Appeal Information

In accordance with the provisions of 8 U.S.C. § 1324b(g)(1), this Order shall become final upon issuance and service upon the parties, unless, as provided for under the provisions of 8 U.S.C. § 1324b(i), any person aggrieved by such Order seeks timely review of that 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, and does so no later than 60 days after the entry of such Order.