

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

Errol Williams, Complainant v. Deloitte & Touche (formerly Touche Ross & Co.), Respondent; 8 U.S.C. § 1324b Proceeding; Case No. 89200537.

**FINAL DECISION AND ORDER DISMISSING COMPLAINT AND FINDING COMPLAINANT
IN DEFAULT**

(November 1, 1990)

SYLLABUS

1. Directions by the staff of the Chief Administrative Hearing Officer to a complainant with respect to amending a complaint filed in letter format in a private action pursuant to 8 U.S.C. § 1324b(d)(2) do not affect the timeliness of the original filing.

2. Equitable tolling of the timeliness requirement for filing a complaint in a private action will not be granted absent at least some showing that the lateness of the filing was occasioned by the respondent's misrepresentation or deceit.

3. Failure to respond to an order to show cause will be treated as a failure to appear for hearing which failure warrants dismissal of the complaint and a finding of default under the rules of practice and procedure for cases before administrative law judges of the Office of the Chief Administrative Hearing Officer.

MARVIN H. MORSE, Administrative Law Judge

Appearances: **ERROL LLOYD WILLIAMS**, Complainant.

THOMAS M. LAWLER, JR., Esq. on behalf of Respondent.

I. STATUTORY AND REGULATORY BACKGROUND

The Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359 (November 6, 1986), enacted a prohibition against unfair immigration-related employment practices at section 102, by amending the Immigration and Nationality Act of

1952 (INA § 274B), codified at 8 U.S.C. §§ 1101 et seq. Section 274B, codified at 8 U.S.C. § 1324b, provides that ``[I]t is an unfair immigration-related employment practice to discriminate against any individual other than an unauthorized alien with respect to hiring, recruitment, referral for a fee, or discharge from employment because of that individual's national origin or citizenship status. . . .'' (Emphasis added). Section 274B protection from citizenship status discrimination extends to an individual who is a United States citizen or qualifies as an intending citizen as defined by 8 U.S.C. § 1324b(a)(3).

Congress established new causes of action out of concern that the employer sanctions program enacted at Section 101 of IRCA (INA § 274A), 8 U.S.C. § 1324a, might lead to employment discrimination against those who are ``foreign looking'' or ``foreign sounding'' and those who, even though not citizens of the United States, are lawfully in the United States. See ``Joint Explanatory Statement of the Committee of Conference,'' Conference Report, IRCA, H.R. Rep. No. 1000, 99th Cong., 2d Sess., at 87 (1986).

Title 8 U.S.C. § 1324b contemplates that individuals who believe that they have been discriminated against on the basis of national origin or citizenship may bring charges before a newly established Office of Special Counsel for Immigration Related Unfair Employment Practices (Special Counsel or OSC). OSC, in turn, is authorized to file complaints before administrative law judges who are specially designated by the Attorney General as having had special training ``respecting employment discrimination.'' 8 U.S.C. § 1324b(e)(2).

IRCA also explicitly authorizes private actions. Whenever the Special Counsel does not within 120 days after receiving a charge of national origin or citizenship status discrimination file a complaint before an administrative law judge with respect to such charge, the person making the charge may file a complaint directly before such a judge. 8 U.S.C. § 1324b(d)(2).

II. PROCEDURAL SUMMARY

Complainant, Errol Williams, filed a pro se Complaint in letter format, dated October 19, 1989 on October 23, 1990 with the Office of the Chief Administrative Hearing Officer (OCAHO). The Complaint alleges national origin and citizenship based discrimination against Respondent Deloitte & Touche (formerly Touche Ross & Co.) in violation of 8 U.S.C. § 1324b. Complainant alleges that on or about January 27, 1989, Deloitte and Touche refused him employment despite repeated applications ``in favor of less qualified appli-

cants.'" Williams asserts that the refusal to employ was based on his national origin and citizenship status.

Williams filed a charge form dated March 19, 1989 with OSC on March 23, 1989. OSC advised in a letter dated July 20, 1989 that there was ``no reasonable cause to believe that the charge of citizenship status discrimination is true.'" OSC also concluded that it ``lacked jurisdiction over the allegation of national origin discrimination because it was covered by section 703 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e-2.'" OSC notified Complainant that he could file a complaint directly before an administrative law judge no later than October 19, 1989. 28 C.F.R. § 44.303(c)(2).

Following issuance by OCAHO of a notice of hearing transmitting the Complaint to Respondent, an Answer was filed on March 28, 1990. I issued an Order of Inquiry to the parties dated May 24, 1990. Complainant's response to the Order of May 24 was filed on June 21, 1990, Respondent's response was filed on June 27, 1990.

On August 22, 1990 I issued an Order Dismissing Claim of National Origin Discrimination, and To Show Cause Why Citizenship Discrimination Claim Is Not Time Barred. That Order directed Complainant to show cause why the balance of his Complaint alleging citizenship based discrimination should not be dismissed as a matter of law for failure to have timely filed his Complaint. Complainant has not responded to the August 22 Order, or otherwise shown cause why his Complaint should not be time barred. For the reasons stated below, I dismiss the Complaint and find Complainant in default.

III. ANALYSIS

A. The Complaint is Time-Barred

Respondent raises as an affirmative defense that Complainant's filing is time-barred. Mr. Williams filed a Complaint dated October 19, 1989 on October 23, 1990, four (4) days after the filing deadline calculated pursuant to 28 C.F.R. § 44.303(c)(2), i.e., 90 days after expiration of the 120 day period for investigation by the Office of Special Counsel. 8 U.S.C. § 1324b(d)(1). In both the August 22 Order and Order of Inquiry to the Parties dated May 24, 1990 I quoted the salient provision of the rules of practice and procedure of this Office, 28 C.F.R. § 68.7(b), ``[P]leadings are not deemed filed until received by the Office of the Chief Administrative Hearing Officer or Administrative Law Judge assigned to the case' when filed by mail.'"

Both the August 22 and the May 24 Orders requested that Complainant explain why he believed his action is not time-barred, cau-

tioning that failure to respond ``may result in dismissal of this action.'' On June 21, 1990 Complainant filed a letter stating that he had been, ``granted an extension of time to January 30, 1990 in order to file an amended complaint. This was confirmed by Mr. David Gorman in your office.'' Complainant attached a copy of a January 10, 1990 letter from Mr. Gorman, law clerk, Office of the Chief Administrative Hearing Officer (OCAHO). According to Complainant that letter ``unequivocally affirms that the October 19, 1989 date was extended.'' Mr. Williams further submits that he was granted another extension of time to submit a ``standard complaint form.''

Contrary to the view expressed by Mr. Williams, absent a further showing of good cause why his Complaint is not time-barred, I find his quoted statement to be an admission of untimely filing. He does not deny that the Complaint was filed on October 23, 1990, nor does he explain why it was not filed on or before October 19, 1990. Rather, he relates that after he filed his original complaint he received the letter from Mr. Gorman who advised Complainant of the opportunity to file an amended complaint. The opportunity provided was consistent with a November 1, 1989 letter to Complainant from B. Jack Rivers, Counsel to the Chief Administrative Hearing Officer, to the effect that Complainant may file an amended complaint pursuant to a format which he enclosed. The Gorman letter gave Complainant until January 30, 1990 to file an amended complaint. Mr. Williams filed his Amended Complaint with OCAHO on February 20, 1990.

Extensions of time by counsel to the Chief Administrative Hearing Officer, or by anyone else, to file an amended complaint have no bearing on the threshold question of whether an original complaint was timely filed. Nothing contained in the communications from OCAHO suggest an extension of time to file an original complaint. Rather, both OCAHO letters are consistent with an effort to provide to Complainant a form of amended complaint to be filed in lieu of the original letter format. Indeed, the November 1, 1989 letter from Mr. Rivers explicitly acknowledged that, ``[Y]our letter has been accepted as a complaint.'' Nothing contained in either OCAHO letter addressed the timeliness of the original filing.

The January 10, 1990 letter from Mr. Gorman stated that failure to file an amended complaint by January 30 would result in an administrative dismissal of the original complaint. I find nothing in either the Rivers or Gorman letters, or elsewhere in the file, to suggest that a late-filed original complaint had been authorized, or that a late filing had been ratified. Moreover, although not critical to this Decision and Order, the amended complaint was not filed

until February 20, 1990, almost three weeks after the date which Complainant contends he was provided by Mr. Gorman.

B. The Equitable Tolling Issue

Failure to comply with a statutory or regulatory filing deadline, however, is not always fatal to a claim of citizenship based discrimination when a complainant has been unrepresented by counsel. Agency filing periods are in the nature of statutes of limitations as distinct from jurisdictional bars. See, e.g., Zipes v. Transworld Airlines, 455 U.S. 385, 393 (1982); Coke v. General Adjustment Bureau, Inc., 640 F.2d 584 (5th Cir. 1981). Time limits on agency filings are subject to equitable tolling. Lundy v. OOCL (USA), Inc., OCAHO Case No. 89200457 (August 8, 1990) at 8; U.S. v. Mesa Airlines, OCAHO Case No. 88200001 (July 24, 1989) at 22. Equitable tolling may be invoked in an appropriate case to protect lay persons from the harsh consequences of strict application of procedural requirements. Thus, where there is a late filing, a complainant who demonstrates that the filing deadline should be equitably tolled will be allowed to proceed. Here, Complainant has neither alleged nor made any such showing that his filing should be equitably tolled.

First among the criteria to invoke equitable tolling is that the complaining party must not be represented by legal counsel during the relevant filing period. Cf. Lundy v. OOCL (USA), Inc., OCAHO Case No. 89200457 (August 8, 1990) (where the filing deadline was not equitably tolled for a complainant who was represented by counsel during the substantial part of the regulatory filing period). Pro se status, however, does not guarantee a grant of equitable tolling. Cruz v. Triangle Affiliates, Inc., 571 F.Supp. 1218 (E.D.N.Y. 1983). Additional considerations such as the legal sophistication of a complainant and potential prejudice to the opposing party may be relevant. Generally, courts have required a showing of misrepresentation or deceit by the party opposing equitable tolling, causing a delay in filing, in order to warrant equitable tolling. See, e.g., Jensen v. Frank, Postmaster General, USPS, 54 Empl. Prac. Dec. (CCH) para. 40,191 (1st Cir. 1990); Sillman v. Combustion Engineering Co., 784 F.2d 57 (2d Cir. 1986); Manning v. Carlin, 786 F.2d 1108 (11th Cir. 1986); Felty v. Grave-Humphreys Co. (I), 785 F.2d 516 (4th Cir. 1986); Pruet Production Co. v. Ayles, 784 F.2d 1275 (5th Cir. 1986); Reeb v. Economic Opportunity Atlanta, Inc., 516 F.2d 924 (5th Cir. 1975). Here, Complainant has made no case for equitable tolling and I find no conduct on the part of Respondent which would meet the criteria for invoking the doctrine with respect to the late filing of the Complaint on October 23, 1989.

C. Complainant's Failure To Respond

Complainant's disregard of my August 22 Order constitutes a failure to persecute his Complaint. Complainant was warned that failure to respond to that Order might result in his being treated as having failed, without good cause, to appear at a hearing. Title 28 C.F.R. §§ 68.35(b) and (c) (issued at 54 Fed. Reg. 48,593, 48,604 (November 24, 1989)) have been held to provide authority to enter an order dismissing a complaint and finding the complainant in default for failure to respond to a pretrial order. See U.S. v. Nu Line Fashions, Inc., OCAHO Case No. 89100566 (March 30, 1990), and Troncoso v. Ferlin Service Industries, Inc., OCAHO Case No. 88200235 (December 5, 1989) (default judgments entered for failure to respond to pretrial order). See also Fed. R. Civ. P. 41(b) (to the extent contemplated by 28 C.F.R. § 68.1, a complaint may be involuntarily dismissed for, inter alia, failure to comply with any order); Cascante v. Kayak Club, OCAHO Case No. 89200530 (Order Dismissing Action for Lack of Prosecution Pursuant to FRCP Rule 41(b)).

IV. ULTIMATE FINDINGS, CONCLUSIONS, AND ORDER

I have considered the pleadings submitted by the parties. All motions and all requests not previously disposed of are denied. Accordingly, and in addition to the findings and conclusions already mentioned, I make the following determinations, findings of fact, and conclusions of law:

1. That the Complaint was filed four (4) days after expiration of the time frame required by regulation, 28 C.F.R. § 44.303(c)(2).

2. That the Complaint was filed more than 90 days after OSC's election not to file a complaint, i.e., 90 days after the OSC 120 day investigatory period. 8 U.S.C. § 1324b(d)(2).

3. That Respondent has not been shown to have occasioned the late filing of the Complaint so as to invoke the doctrine of equitable tolling.

4. That Complainant failed to respond to the August 22, 1990 Order, and, therefore, is treated as having failed to appear for hearing within the meaning of the rules of practice and procedure of this Office, and as having abandoned his Complaint.

5. That the national origin discrimination claim was dismissed by the August 22 Order, and Complainant being here found in default in accordance with 28 C.F.R. § 68.35(c) with respect to his citizenship discrimination claim, the Complaint is dismissed with prejudice. 28 C.F.R. § 68.35(b).

This proceeding is now concluded. This Decision and Order addressing the citizenship claim is the final administrative order in

this case pursuant to 8 U.S.C. § 1324b(g)(1), and ``shall be final unless appealed'' to a United States court of appeals in accordance with 8 U.S.C. § 1324b(i).

SO ORDERED.

Dated this 1st day of November, 1990.

MARVIN H. MORSE
Administrative Law Judge