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

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| UTHAIWAN WONG-OPASI, Complainant, | ) |
| v. | ) 8 U.S.C. § 1324b Proceeding<br>) OCAHO Case No. 99B00056 |
| TENNESSEE BOARD OF REGENTS (TBR), Respondent. | ) Judge Robert L. Barton, Jr. |

**ORDER DENYING RESPONDENT'S FIRST MOTION TO DISMISS**

*(December 15, 1999)*

I. *INTRODUCTION*

On September 23, 1999, Respondent Tennessee Board of Regents (TBR), filed a Motion to Dismiss in this case. TBR argues that the Complaint should be dismissed for failure to state a claim upon which relief can be granted because Complainant failed to file her Complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) within ninety (90) days after she received a determination letter from the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC). For the reasons discussed below, I DENY Respondent's Motion to Dismiss.

II. *BACKGROUND AND PROCEDURAL HISTORY*

On November 4, 1998, Complainant, formerly a professor of Spanish at Tennessee State University (TSU), filed a Charge with OSC alleging that TBR discriminated against her because of her national origin and citizenship status in violation of 8 U.S.C. § 1324b(a)(1) and retaliated against her in violation of 8 U.S.C. § 1324b(a)(5). *See* C.'s First OSC Charge at 3. In a determination letter dated April 6, 1999, OSC advised Complainant that it had

not filed a complaint on her behalf before an Administrative Law Judge (ALJ) because it had yet to determine whether reasonable cause existed to believe her charge was true. *See* OSC Letter. In the same letter, the OSC informed Complainant that she had 90 days from the date of her receipt of its letter to pursue a private cause of action against TBR before an ALJ in the OCAHO. *Id*. It appears that Complainant received the OSC determination letter on April 24, 1999. *See* OSC Letter (marginal notation). TBR does not contest this assertion. *See* R's Memo in Support of Mt. to Dismiss (hereinafter "R's Memo") at 2.

On August 13, 1999, OCAHO received Complainant's pro se Complaint alleging that TBR committed national origin and citizenship status discrimination against her when it failed to grant her an appeal from TSU's decision to deny her tenure application; moreover, Complainant alleges that TBR retaliated against her for having brought OSC charges. *See* Compl. at 4. TBR filed its Answer to the Complaint on September 23, 1999. On that same date, TBR also filed a Motion to Dismiss and a supporting Memorandum. In its Memorandum, TBR argues that Complainant has failed to state a claim upon which relief can be granted because she violated 8 U.S.C. § 1324b(d)(2), which requires that she file her Complaint with the OCAHO within 90 days after the date she received a determination letter from OSC. *See* R's Memo at 1–2. Specifically, TBR points out that Complainant's August 13, 1999, Complaint was received by the OCAHO 111 days after April 24, 1999, the date she received her determination letter from OSC. Complainant did not file a timely response to TBR's Motion to Dismiss.

On November 17, 1999, I issued an Order with respect to the Complaint in which I stated, in pertinent part, as follows:

> The Notice of Hearing issued by OCAHO on August 23, 1999, states that the Complaint was filed on August 13, 1999. However, an August 20, 1999, Memorandum from Ms. Zanie Lee Donahue-Wolle of the OCAHO clerk's office provides further illumination on this point. The Memorandum notes that although the complaint was not received by OCAHO until August 13, 1999, it had been mailed by Complainant to OCAHO on July 12, 1999. Despite the fact that the envelope was addressed to OCAHO at the correct address, it was delivered to the Office of Hearings and Appeals (an agency of the Social Security Administration) on July 16, 1999. Unfortunately, the Complaint was not forwarded and delivered to OCAHO until August 13, 1999. Apparently Ms. Donohue-Wolle's Memorandum was not previously provided to the parties. Therefore, I am attaching a copy of the Memorandum to this Order.

*Order Regarding Filing of the Complaint* at 1, 2.

## III. *STANDARDS GOVERNING MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED*

OCAHO Rules of Practice and Procedure authorize ALJ's to dispose of cases upon motions to dismiss for failure to state a claim upon which relief can be granted. 28 C.F.R.§ 68.10 (1999). When matters outside the immediate pleadings are considered by the ALJ, a motion to dismiss for failure to state a claim is treated as one for summary decision. 28 C.F.R. § 68.38(c) (1999). Since my assessment of TBR's Motion to Dismiss for failure to state a claim is limited to the immediate pleadings, the standards governing a motion to dismiss apply.

According to a wealth of OCAHO precedent, a motion to dismiss for failure to state a claim upon which relief can be granted under 28 C.F.R. § 68.10 is akin to a motion to dismiss under FED. R. CIV. P. 12(b)(6). *See, e.g., Bunn v. USX/US Steel*, 7 OCAHO 996, 999 (Ref. No. 985) (1998), 1998 WL 745990, at *3 (O.C.A.H.O.); *United States v. Tinoco-Medina*, 6 OCAHO 720, 728 (Ref. No. 890) (1996); 1996 WL 670175, at *7 (O.C.A.H.O.). In considering such a motion, a federal court must assume the truth of all facts alleged in the complaint and must allow the nonmoving party the benefit of all inferences that can be derived from the alleged facts. *See Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Hammons v. Norfolk Southern Corp.*, 156 F.3d 701, 704 (6th Cir. 1998); *Kasathsko v. IRS*, 6 OCAHO 176, 179 (Ref. No. 840) (1996), 1996 WL 281945, at *3 (O.C.A.H.O.); *Tinoco-Medina*, 6 OCAHO at 728. TBR's Motion to Dismiss should therefore be granted only if it appears that under any reasonable reading of the complaint, Complainant will be unable to prove any set of facts that would justify relief. *See Conley v. Gibson*, 355 U.S. 41, 45–46 (1957); *Pinney Dock & Transport Co. v. Penn Central Corp.*,—F.3d—, 1999 WL 1034203, at *2 (6th Cir. 1999); *Tinoco-Medina*, 6 OCAHO at 728.

Moreover, this Court is mindful of the principle that pro se complaints, such as the one involved here, should be held "to less stringent standards than pleadings drafted by lawyers." *See Haines v. Kerner*, 404 U.S. 519, 520–21 (1972); *Hahn v. Star Bank*, 190 F.3d 708, 715 (6th Cir. 1999); *United States v. Noriega-Perez*, 5 OCAHO 680, 686 (Ref. No. 811) (1995), 1995 WL 813234, *5 (O.C.A.H.O.). Although pro se complaints need only meet minimal requirements in order to survive a motion to dismiss for failure to state a claim, the U.S. Court of Appeals for the Sixth Circuit

reminds us that "pro se plaintiffs are not automatically entitled to take every case to trial." *See Pilgrim v. Littlefield*, 92 F.3d 413, 416 (6th Cir. 1996) (citing *Jourdan v. Jabe*, 951 F.2d 108, 110 (6th Cir. 1991)).

## IV. *ANALYSIS*

TBR correctly points out that Complainant had to file her OCAHO Complaint within 90 days after the date she received her determination letter from OSC. *See* 8 U.S.C. §§ 1324b(d)(2) (1998), 28 C.F.R. § 68.4(c) (1998). TBR also correctly points out that OCAHO received the Complaint in this case 111 days after Complainant received OSC's determination letter. Upon examination of the records kept by OCAHO's case management specialists, however, it appears that OCAHO's late receipt of the Complaint was due not to Complainant's tardiness, but to a misdirection of the Complaint by persons other than the Complainant. Moreover, this misdirection was not due to the negligence of Complainant; the envelope containing the Complaint, which is in OCAHO's official case file, was properly addressed.

Although the Complaint in this case was not filed with OCAHO until 111 days after the date Complainant received her determination letter from OSC, Complainant mailed the Complaint on July 16, 1999, only 83 days after she received her determination letter. Consequently, because I am obliged to indulge every factual presumption in Complainant's favor, I conclude that but for errors of delivery outside Complainant's control, the Complaint would have been filed with OCAHO within the statutory deadline. For the reasons stated below, I conclude that the circumstances surrounding Complainant's filing of her Complaint call for the equitable tolling of the 90-day limitations period.

### A. *Equitable Tolling in the Title VII Context*

The U.S. Supreme Court holds, in the Title VII context, that

> filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling. The structure of Title VII, the congressional policy underlying it, and the reasoning of our cases all lead to this conclusion.

*See Zipes, et al. v. Trans-World Airlines, Inc.*, 455 U.S. 385, 393 (1982).

Although the *Zipes* case involved a late-filed EEOC *charge* rather than a late-filed Title VII *complaint*, the Court's reasoning applies with equal force in the context of late-filed complaints. *See, e.g.*, *Truitt v. County of Wayne*, 148 F.3d 644, 646 (6th Cir. 1998); *Williams-Guice v. Board of Ed.*, 45 F.3d 161, 165 (7th Cir. 1995); *Jarrett v. U.S. Sprint Communications Co.*, 22 F.3d 256, 259–60 (10th Cir. 1994); *see also Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 151, *reh'g denied*, 467 U.S. 1231 (1984). Indeed, the *Zipes* Court cited its own prior decision in *Mohasco Corp. v. Silver*, dealing in part with a late-filed Title VII complaint, as support for the conclusion that Title VII filing periods are subject to tolling. *See Zipes*, 455 U.S. at 397–98.

In *Mohasco Corp.*, the Court discovered that a Title VII plaintiff had filed his pro se complaint with the district court 91 days after receiving his determination letter from EEOC. *See Mohasco Corp. v. Silver*, 447 U.S. 807, 811 (1980). In 1980, as now, Title VII plaintiffs were subject to a 90-day filing limitation with respect to such complaints. *See* 42 U.S.C. § 2000e–5(f)(1). Because the defendant had failed to raise the plaintiff's late-filed complaint as a defense in the district court, however, the *Mohasco Corp.* Court declined to address that issue on appeal, implicitly concluding that defendant had waived the defense. *Mohasco Corp.*, 447 U.S. at 811 n.9. Since jurisdictional requirements cannot be waived, the *Mohasco Corp.* Court necessarily concluded that the limitations period for filing Title VII complaints was non-jurisdictional, and therefore subject to waiver and tolling when equity requires.

Moreover, the Supreme Court in *Baldwin County Welcome Center* intimated, but did not hold, that late-filed Title VII complaints could be accepted as timely where (1) a claimant has received inadequate notice, (2) a motion for appointment of counsel is pending and equity would justify tolling the statutory period until the motion is acted upon, (3) the court has led the plaintiff to believe that she had done everything required of her, or (4) affirmative misconduct on the part of a defendant lulled the plaintiff into inaction. 466 U.S. at 151. The Sixth Circuit has transformed the *Baldwin County Welcome Center* dictum into a holding, but only in an unpublished, non- precedential disposition. *See Okparaocha v. Lazarus, Inc.*, 127 F.3d 1103 (Table) (6th Cir. 1997), 1997 WL 668954, at *1 (unpublished disposition).

Courts applying the *Zipes* and *Baldwin County Welcome Center* rules have also concluded that no special prohibition on equitable

tolling applies where the defendant is a governmental entity, subject to suit pursuant only to a congressional abrogation or waiver of sovereign immunity. *See Irwin v. Dept. of Veterans Affairs*, 498 U.S. 89, 95–96 (1990) (holding that once Congress has waived federal sovereign immunity in a statute, "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States."); *Oliver v. State of Nevada*, 582 F. Supp. 142, 144 (D. Nev. 1984) (invoking equitable tolling to revive a late-filed EEOC charge on behalf of a state employee suing the Nevada Department of Wildlife for Title VII sex discrimination); *Udala v. New York State Dept. of Education*, 4 OCAHO (Ref. No. 633) (1994), 1994 WL 386847, at *5–6 (O.C.A.H.O.) (recognizing, in a § 1324b action brought against a state agency, that equitable tolling may be applicable under appropriate circumstances).

B. *Equitable Tolling in the § 1324b Context*

OCAHO ALJ's have long held that the Supreme Court's reasoning in *Zipes* applies when litigants fail to satisfy the time limitations set forth at 8 U.S.C. § 1324b(d)(2). *See, e.g., United States v. Mesa Airlines*, 1 OCAHO 462, 482–490 (Ref. No. 74) (1989), 1989 WL 433896, at *19–24 (O.C.A.H.O.); *Briceno-Briceno v. Farmco Farms*, 4 OCAHO 364, 379 (Ref. No. 629) (1994), 1994 WL 386827, at *9 (O.C.A.H.O.); *Horne v. Town of Hampstead*, 6 OCAHO 941, 954–55 (Ref. No. 906) (1997), 1997 WL 131346, at *9–10 (O.C.A.H.O.); *Caspi v. Trigild Corp.*, 7 OCAHO 1064, 1071–73 (Ref. No. 991) (1998), 1998 WL 746000, at *5–6 (O.C.A.H.O.); *Soto v. Top Industrial, Inc.*, 7 OCAHO 1210, 1217–20 (Ref. No. 999) (1998), 1998 WL 746020, at *5–7 (O.C.A.H.O.). Moreover, the single U.S. Court of Appeals to consider whether *Zipes* applies in § 1324b cases has agreed with OCAHO's conclusion, albeit in an non-precedential unpublished disposition. *See Trivedi v. United States Department of Defense*, 69 F.3d 545, 1995 WL 572883, *1 (9th Cir. 1995) (unpublished disposition). No court holds that *Zipes* does not apply in the § 1324b context.

C. *Equitable Tolling in Wong-opasi v. TBR*

Although *Zipes*, *Baldwin County Welcome Center*, *Mohasco Corp.* and *Truitt*, and numerous OCAHO cases permit equitable tolling of filing periods under Title VII and § 1324b, the question remains whether, under Sixth Circuit standards, the facts of *Wong-opasi*

*v. TBR* justify such relief. To answer this question, I apply the legal standard articulated in the Sixth Circuit's *Truitt* decision.

In *Truitt*, the Sixth Circuit identified five factors to consider when determining the appropriateness of equitably tolling a statute of limitations:

> 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; and 5) the plaintiff's reasonableness in remaining ignorant of the particular legal requirement.

*Truitt*, 148 F.3d at 648. Applying this standard to the facts of the instant case, I make the following factual determinations: First, Complainant possessed full knowledge of the 90-day filing requirement; indeed, she actually mailed the complaint to OCAHO well within the statutory filing period. Second, the failure of the complaint to reach OCAHO within 90 days of Complainant's receipt of her OSC determination letter was caused not by a lack of diligence on the part of Complainant, but by errors of delivery entirely outside her control. Third, while TBR in this case may be somewhat prejudiced by having to defend a late-filed Complaint, that prejudice is attributable exclusively to the conduct of persons other than Complainant. Finally, Complainant was plainly not ignorant of the filing requirement in this case. As a result of these factual findings, I conclude that the circumstances surrounding Complainant's filing of her Complaint in this case justify the invocation of equitable principles to toll the 90-day filing period set forth at 8 U.S.C. §§ 1324b(d)(2).

## V. *CONCLUSION*

Authoritative precedent from the U.S. Supreme Court and the U.S. Court of Appeals for the Sixth Circuit, coupled with a wealth of OCAHO precedent, establish that OCAHO ALJs may equitably toll § 1324b(d)(2) filing periods under appropriate circumstances. In light of Complainant's diligence in seeking to file her Complaint in a timely fashion, the court hereby tolls the 90-day limitations period for filing OCAHO complaints and DENIES Respondent's Motion to Dismiss.

It is so ordered.

ROBERT L. BARTON, JR.
ADMINISTRATIVE LAW JUDGE