

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

November 29, 2012

HAMIDOU SALL,)	
Complainant,)	
)	
v.)	8 U.S.C. § 1324b Proceeding
)	OCAHO Case No. 12B00042
)	
WAL-MART STORES, INC.,)	
Respondent.)	
_____)	

FINAL ORDER OF DISMISSAL

I. PROCEDURAL HISTORY

This is an action arising under the nondiscrimination provisions of the Immigration and Naturalization Act as amended, 8 U.S.C. § 1324b (2006), in which Hamidou Sall alleged that Wal-Mart Stores, Inc., through its Avon Colorado store, discriminated against him by firing him on July 7, 2009. The complaint alleges that Sall filed a charge with the Office of Special Counsel (OSC) on October 5, 2009, but the record reflects that he filed a charge with the Equal Employment Opportunity Commission (EEOC) on that date. EEOC at some point evidently referred a portion of the charge to OSC, and OSC subsequently sent a letter to Sall advising him that he had the right to file a complaint within ninety days of his receipt of the letter. The letter is dated October 12, 2011. Sall filed his complaint on March 9, 2012; in it he asserts that he received OSC's letter on December 10, 2011, but provided no explanation as to how it came about that the letter was not delivered to him for almost two months.

An order of inquiry was accordingly issued to Sall requesting additional information not provided in his complaint, and a simultaneous inquiry was issued to OSC requesting any information it had as to the delay in delivery of the ninety-day letter. Both parties are represented by counsel.

II. RESPONSES MADE TO THE INQUIRIES

Sall filed a response explaining that he did not receive OSC's initial letter which was returned as undeliverable. He said OSC could verify that it eventually resent the letter and that he received it on December 10, 2011. OSC confirmed that it originally sent the letter on October 12, 2011, but that on October 24, 2012 the letter was returned by the U.S. Postal Service as undeliverable and unable to forward. OSC went on to state in pertinent part that,

OSC made several telephonic inquiries to the community worker, Brendon Greene, in Western Colorado, who was in contact with the Charging Parties. Mr. Greene was diligent in his efforts to locate Mr. Sall and after assiduous investigation, Mr. Sall was finally located. After Mr. Sall's new mailing address was confirmed, OSC transmitted a second letter on December 7, 2012, enclosing OSC's first October 12, 2011, notice letter, to Mr. Sall. Part of the delay in transmitting the notice letter to Mr. Sall was OSC's continued effort to receive and confirm the addresses of other Charging Parties whose notice letters were also returned to OSC.

Attached to the response were exhibits consisting of 1) a letter to Sall from OSC dated June 24, 2011; 2) a certified mail receipt accompanying the June 24, 2011 letter; 3) a letter to Sall from OSC dated October 12, 2011; 4) a certified mail receipt accompanying the October 12, 2011 letter; 5) a postal return receipt and a copy of an envelope addressed to Sall but returned to OSC as undeliverable on November 11, 2011; 6) a letter from OSC to Sall dated December 7, 2011; and 7) a USPS domestic return receipt showing that Sall signed for exhibit 6 on December 10, 2011.

Exhibit 1, the June 24 letter, notified Sall that his discrimination charge was accepted as complete and that an investigation would begin. It also advised him that after 120 days he would be notified by mail as to the status of the investigation, and that "it is very important to notify us immediately of any changes in your address or telephone number." Exhibit 5 reflects that OSC's mailing of October 12 was returned to it marked, "attempted – not known, unable to forward, return to sender," and dated October 24, 2011. The letter sent to Sall on October 12, 2011 (Ex. 3) was sent to the same address in Avon, Colorado, as appears in the letter sent to Sall on June 24, 2011 accepting his charge as complete (Ex. 1). Sall evidently moved without notifying OSC that he had changed his address.

III. STANDARDS APPLIED

It is well established that filing deadlines are not jurisdictional in nature and are subject to equitable remedies such as waiver, estoppel, and equitable tolling, under appropriate circumstances. *Caspi v. Trigild Corp.*, 7 OCAHO no. 991, 1064, 1071-73 (1998).¹ Because Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. (1982), was the point of departure used in drafting § 1324b, *Jones v. Dewitt Nursing Home*, 1 OCAHO no. 189, 1235, 1251 (1990), OCAHO cases have long looked for guidance to cases decided pursuant to that statute in analogous circumstances. *United States v. Westin Hotel Co.*, 4 OCAHO no. 701, 975, 981 (1994). This includes looking for guidance with respect to the timely filing of charges and complaints, as well as when and whether principles of equitable tolling may be applied. See *Grodzki v. OOCL (USA), Inc.*, 1 OCAHO no. 295, 1948, 1953 (1991).

Relying on *Scholar v. Pacific Bell*, 963 F.2d 264, 267 (9th Cir. 1992); *St. Louis v. Alverno College*, 744 F.2d 1314, 1317 (7th Cir. 1984); and *Banks v. Rockwell International North American Aircraft Operations*, 855 F.2d 324, 325 (6th Cir. 1988), the court in *Nelmida v. Shelly Eurocars, Inc.*, 112 F.3d 380, 384 (9th Cir. 1996), held that the limitations period for an employee to file a complaint begins running when the Postal Service attempts delivery of the right-to-sue notice at the address of record that the employee provided to the EEOC at the time the charge was filed. See also *Williams v. Thomson Corp.*, 383 F.3d 789, 790-91 (8th Cir. 2004). The court in *Nelmida* went on to consider whether equitable tolling would be available under circumstances when an employee failed to update his or her address with EEOC after a move. After reviewing *Hunter v. Stephenson Roofing, Inc.*, 790 F.2d 472, 475 (6th Cir. 1986); *Hill v. John Chezik Imports*, 869 F.2d 1122, 1123-24 (8th Cir. 1989); and *Harvey v. City of New Bern Police Department*, 813 F.2d 652, 654 (4th Cir. 1987), the court followed the lead of those cases to hold that equitable tolling was inapplicable, noting, inter alia, that it could not be said that Nelmida acted with diligence in ensuring that she received the right-to-sue notice when she failed to inform EEOC of her change of address. Other circuit courts have similarly held. See *Abraham v. Woods Hole Oceanographic Inst.*, 553 F.3d 114, 120-21 (2009) (noting specifically that proceeding pro se does not excuse a petitioner from complying with the change of address

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 accordingly omitted from the citation. Published decisions may be accessed in the Westlaw database “FIM-OCAHO,” or in the LexisNexis database “OCAHO,” or on the website at <http://www.justice.gov/eoir/OcahoMain/ocahosibpage.htm#PubDecOrders>.

requirement); *Bess v. Barnhart*, 337 F.3d 988, 990 (2003); *Banks v. Rockwell*, 855 F.2d at 325-26.

IV. DISCUSSION AND ANALYSIS

Here, the limitations period began running on October 24, 2011, the day the Postal Service attempted delivery of OSC's letter to the address Sall had provided to the agency. It appears that Sall did not notify OSC when he left Colorado and moved to Cincinnati, Ohio, where the letter was eventually delivered to him. While Sall's complaint was filed on the 90th day after he received OSC's letter on December 10, 2011, it was filed on the 137th day after the post office returned the letter indicating as of October 24 that delivery was unsuccessfully attempted at his address in Colorado, and that the letter could not be forwarded.

The complaint is accordingly untimely filed. The record reflects that although he was advised at the time the charge was filed that it was important for him to notify OSC of any change in his address or telephone number, Sall failed to inform OSC when he moved. Equitable tolling is inapplicable to circumstances where a late filing is due to the failure to exercise due diligence, *Caspi*, 7 OCAHO no. 991 at 1072. That Sall was unrepresented at the time does not excuse him for failing to notify OSC of his change of address. *See Woods Hole*, 553 F.3d at 121.

ORDER

The complaint is dismissed as untimely filed.

SO ORDERED.

Dated and entered this 29th day of November, 2012.

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 files a timely petition for 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.