

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

July 16, 2013

SALIM J. HAJIANI,)	
Complainant,)	
)	8 U.S.C. § 1324b Proceeding
v.)	OCAHO Case No. 12B00087
)	
ALI PROPERTIES, LLC, AIRPORT SHELL)	
Respondent.)	
_____)	

FINAL ORDER OF DISMISSAL

I. PROCEDURAL HISTORY

This is an action arising under the Immigration and Nationality Act (INA), 8 U.S.C. § 1324b (2006), as amended by the Immigration Reform and Control Act of 1986 (IRCA), in which Salim J. Hajiani is the complainant and Ali Properties, LLC, Airport Shell is the respondent. Hajiani filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) on June 18, 2012 alleging that respondent discriminated against him by firing him because of his citizenship status and national origin and retaliating against him, thereby violating 8 U.S.C. § 1324b (2006).

The complaint states that Hajiani filed a charge with the Office of Special Counsel (OSC) on October 24, 2011 and that OSC sent him a determination letter dated December 21, 2011 advising him that he had the right to file a complaint within ninety days of his receipt of the letter. Hajiani asserts in his complaint that he received the letter of December 21, 2011 on February 7, 2012. Ali Properties filed a timely answer denying the material allegations of the complaint and raising various affirmative defenses. The company also filed a simultaneous motion to dismiss based on one of its affirmative defenses, that the complaint was not filed within the time required by law and is accordingly barred by limitations. No timely response was made to the motion and the time for responding has expired.¹ A Notice and Order of Inquiry was thereafter sent to Hajiani requesting more detailed information about the alleged delay of more than a month in his receipt of OSC’s letter, and he filed a timely affidavit in

¹ See Rules of Practice and Procedure, 28 C.F.R. pt. 68 (2012). A party has ten days in which to respond to a motion. 28 C.F.R. § 68.11(b). Where service has been made by ordinary mail, five days are added to the period. 28 C.F.R. § 68.8(c)(2). The motion was served on July 25, 2012 so Hajiani’s response would have been due by August 9, 2012.

response. Ali Properties then filed what is styled as a reply memorandum in support of its motion to dismiss, after which an inquiry was made to the Office of Special Counsel for any records it had respecting the mailing and delivery of its letter of December 21, 2011 to Hajiani. OSC made a timely response to the inquiry.

In order to permit these responses and accompanying materials outside the pleadings to be considered, the company's motion to dismiss was converted to one for summary decision. *See Peterson v. Atlanta Hous. Auth.*, 998 F.2d 904, 913 (11th Cir. 1993). Written notice was issued to the parties informing them of the conversion and affording them the opportunity to supplement their previous filings on or before June 14, 2013. Ali Properties filed an additional memorandum in support of its motion to dismiss, and Hajiani responded by letter accompanied by exhibits. The motion is ripe for adjudication.

II. TIMELINESS ISSUES PRESENTED

Hajiani's affidavit of September 11, 2012 makes clear that there are actually two timeliness questions, not one, to be addressed in this matter; the first involves the mailing and receipt of the OSC letter of December 21, 2011, and the second involves the actual filing of the complaint itself. Hajiani's response to the notice of intent to convert belatedly raises an additional issue as to his receipt of Ali Properties' original motion to dismiss.

A. The Mailing and Receipt of the OSC Letter

The initial inquiry to Hajiani and the subsequent inquiry to OSC were made because Hajiani provided no explanation in his complaint as to why it would have taken more than a month for OSC's letter to reach him. Hajiani's response to the first inquiry said that the letter "was wrongly delivered to someone else by the post office," and that "When I contacted OSC for a routine update, they informed me about the letter." No specifics were provided as to how Hajiani knew the letter was "wrongly delivered," what he meant by the term "routine inquiry," or how long he waited to contact OSC. Hajiani said only that a "new letter" was sent to him and that he received it on February 7, 2012.

Because Hajiani's explanation was lacking in specificity, a subsequent inquiry was made to OSC to ascertain whether it had information in its records that could shed light on what happened. OSC's response stated that its official docket file reflected in pertinent part that,

The December 21, 2011, letter . . . was transmitted to Mr. Hajiani by certified U.S. mail with a return receipt request addressed to the mailing address provided by Mr. Hajiani . . . and

the receipt returned by the U.S. Postal Service in connection with this correspondence, a copy of which is attached . . . indicates that OSC's letter of December 21, 2011, was delivered on December 27, 2011.

The letter thus was not returned to OSC as undeliverable, and the attached copy of the return receipt for the letter reflects instead that it was delivered on December 27, 2011 to the post office box address that Hajiani had provided to OSC. OSC's response also states that a subsequent letter was sent to Hajiani on February 7, 2012 advising him that OSC "is forwarding you a copy of the dismissal letter dated December 21, 2011, per your request. Our records indicate that the letter was received on December 27, 2011." The letter of February 7, 2012 transmitting a copy of the original letter was sent to Hajiani at the same post office box address to which the original letter of December 21, 2011 was addressed. The name on the signature line of the return receipt card for the original letter, however, is Ramon G., not Salim Hajiani.

Hajiani sent a response to OSC's filing in which he reiterated again with the same lack of specificity that when he didn't hear from OSC, he called its office for a "routine enquiry (sic)," after which the second letter was sent to him. He pointed out that his name and signature were not on the return receipt for the first letter, and that the letter "has been delivered to someone named 'ramon' (sic)." Hajiani's response did not say, however, that he did not know Ramon, or that Ramon was not a person authorized to receive mail sent to Hajiani's post office box. How Ramon would otherwise have had access to Hajiani's post office box without his consent is unexplained. Hajiani's response did, however, assert that his OCAHO complaint was not actually filed on June 18, 2012 as previously stated, but on March 18, 2012.

B. The Filing of Hajiani's OCAHO Complaint

A complaint is deemed filed on the date that it is actually received by OCAHO. 28 C.F.R. § 68.8(b), *see Pan v. Jude Engineering, Inc.*, 4 OCAHO no. 648, 496, 508-09 (1994),² and OCAHO records indicate that Hajiani's complaint was filed on June 18, 2012. His affidavit

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 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>.

states, however, that he filed his complaint on March 18, 2012, and it was “probably” received at OCAHO on March 21, 2012. Accompanying the affidavit as exhibits 5 and 6 are a post office track and confirm sheet, together with a copy of a return receipt card and a receipt for \$18.95 for mailing a package from Atlanta, Georgia to Falls Church, Virginia on March 18, 2012. There is no evidence as to what the contents of the package consisted of and OCAHO records do not reflect that this package was actually received by the agency.

Much of Hajiani’s exhibit 5 is either illegible or obscured by an overlay. The portion of the card on the right side under the designation TO, to show the addressee, cannot be read at all. On the left-hand side of the card under the designation FROM, the text is partially illegible but appears to contain a street address and suite number corresponding to the address for this agency but without the name of any addressee. The building located at that address is a twenty-six story commercial office building containing offices for more than one government agency. Exhibit 6 appears to show the delivery of mail to Falls Church, Virginia, but shows no delivery address at all.

C. Hajiani’s Response to the Notice of Intent to Convert Motion

Hajiani’s response to the notice of intent to convert consists principally of another reiteration of his previous generalized assertions, but in a new final paragraph he also asserts that he never received the motion to dismiss, and that “I am highly optimistic about the fact that it would not have my name on it. Apparently, the post office once again must have had delivered it to a wrong person, as they did it with the december (sic) 2011 mail.” The certificate of service accompanying Ali Properties’ motion to dismiss reflects that the motion was served by United States Mail to the address Hajiani provided in his complaint. Since it was evidently sent by ordinary mail, there would be no return receipt for the motion.

The exhibits accompanying Hajiani’s response were principally duplicates of his previous filings, with the exception of one new page with his exhibit 6, consisting of a post office notice dated March 26, 2013, evidently in response to Hajiani’s inquiry for delivery information for his Express Mail item number E150 8613 215U S. The notice states that the item was delivered in Falls Church on March 21, 2012, and the scanned image of the recipient information indicates that the item was signed for by someone named Bobby Shearer, whose address is shown as P.O. Box 8530.

III. STANDARDS APPLIED

A. When the Filing Period Begins to Run

The general rule in employment discrimination cases is that the delivery of notice of the right to sue at the address designated by the claimant starts the running of the limitations period. *See, e.g., Williams v. Thomson Corp.*, 383 F.3d 789, 790-91 (8th Cir. 2004); *Nelmida v. Shelly Eurocars, Inc.*, 112 F.3d 380, 384 (9th Cir. 1997); *Banks v. Rockwell Int'l North Am. Aircraft Operations*, 855 F.2d 324, 325-26 (6th Cir. 1988); *Espinoza v. Mo. Pac. R.R. Co.*, 754 F.2d 1247, 1250 (5th Cir. 1985); *St. Louis v. Alverno Coll.*, 744 F.2d 1314, 1316 (7th Cir. 1984).

Where, for example, the right-to-sue letter was picked up at the post office by the plaintiff's son, a seventeen-year-old high school student, and placed on the kitchen table where the plaintiff did not see it until a few days later, the filing period began to run when the son picked up the mail from the post office. *See Law v. Hercules, Inc.*, 713 F.2d 691, 692-93 (11th Cir. 1983). Similarly in *Bell v. Eagle Motor Lines, Inc.*, 693 F.2d 1086, 1087 (11th Cir. 1982), where the plaintiff first learned of the letter eight days after it was received by his wife at his designated address, the court found that receipt of the letter triggered the running of the filing period, cautioning that a plaintiff should not be able to enjoy a "manipulable, open-ended time extension."

The circuit in which this case arises has adopted a flexible approach to determine on a case-by-case basis whether extension of the time is warranted. *See Kerr v. McDonald's Corp.*, 427 F.3d 947, 952 (11th Cir. 2005). Where an individual is able to demonstrate that delivery of the letter was delayed or not delivered through no fault of his or her own, a complainant may not be held to the usual rule. *See, e.g., Stallworth v. Wells Fargo Armored Servs. Corp.*, 936 F.2d 522, 525 (11th Cir. 1991) (primary fault for failed delivery was EEOC's failure to mail a copy to plaintiff's attorney); *Lewis v. Conners Steel Co.*, 673 F.2d 1240, 1242-43 (11th Cir. 1982) (plaintiff must be afforded at least the opportunity to show that he actually did notify EEOC of his correct and current address).

B. Timely Filing of a Complaint

Once a defendant alleges that a complaint is untimely filed, the burden falls on the plaintiff to show otherwise. *See Green v. Union Foundry Co.*, 281 F.3d 1229, 1233-34 (11th Cir. 2002) (citing *Jackson v. Seaboard Coast Line R.R. Co.*, 678 F.2d 992, 1010 (11th Cir. 1982)). Because it is well settled that employment discrimination filing periods are generally subject to equitable doctrines, *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 113-14 (2002), a litigant who fails to satisfy the timely filing requirement may under appropriate circumstances be relieved of that failure, so untimely filing is not necessarily dispositive. The time limit for filing a complaint is, like a statute of limitations, subject to waiver, estoppel, and equitable tolling. *See Mikhailine v. Web Sci Techs., Inc.*, 8 OCAHO no. 1033, 513, 519 (1999).

Equitable remedies are, however, sparingly applied, and do not extend to the "garden variety

claim of excusable neglect.” *Irwin v. Dep’t of Veterans’ Affairs*, 498 U.S. 89, 96 (1990). As explained in *Sandvik v. United States*, 177 F.3d 1269, 1271 (11th Cir. 1999), it is up to the litigant to show that timely filing was prevented by “extraordinary circumstances that are both beyond his control and unavoidable even with diligence.” See also *Jackson v. Astrue*, 506 F.3d 1349, 1353-54 (11th Cir. 2007) (there must be a showing that extraordinary circumstances stood in the way of timely filing). Equitable tolling thus does not operate to avoid the consequences of one’s own negligence.

IV. DISCUSSION AND ANALYSIS

Hajiani did not attest to specific facts sufficient to avoid the general rule respecting delivery of a determination letter because he did not even assert either that he was unacquainted with Ramon G. or that Ramon G. was not authorized to pick up mail from his post office box address. A party seeking to avoid the rule has the burden of overcoming what appears to be a legal delivery. See, e.g., *Todd v. Holder*, 872 F. Supp. 2d 1284, 1289-90 (N.D. Ala. 2012) (equitable tolling was not warranted where letter was delivered to complainant’s post office box and signed for by someone else). Hajiani showed no facts that would warrant a finding that the letter was not properly delivered to the address he provided to OSC.

Even assuming *arguendo* for purposes of this motion, moreover, that the filing period did not begin to run until February 7, 2012, Hajiani’s complaint would still have had to be filed by May 7, 2012 in order to be timely filed within ninety days of the date Hajiani acknowledged receiving OSC’s second letter. The record reflects that Hajiani’s complaint was filed on June 18, 2012, and his exhibit showing delivery of a package to someone named Bobby Shearer at P.O. Box 8530 does not establish that the package was received by OCAHO, which has no post office box number and no employee named Bobby Shearer.

This is not a case like *Wong-Opasi v. Tennessee Board of Regents*, 8 OCAHO no. 1037, 583, 584, 586 (1999), where the complainant did everything she reasonably could have done to make a timely filing by addressing the envelope properly to this agency and mailing it in good time. The envelope in that case was misdirected and delivered to the offices of a different agency despite having the correct information on its face. But for the error in delivery, Wong-Opasi’s complaint would have been timely filed, but the envelope was not forwarded until the time had run. Under these circumstances the delay was held to be outside the complainant’s control.

In Hajiani’s case, however, there is no showing that the envelope was properly addressed in the first place, and in addition, there is no evidence that it was ever actually received by anyone at this agency or at any other agency at this address on the date Hajiani claims it was received. The burden of proof falls squarely on the complainant to establish that grounds exist for equitable

tolling. See *Udala v. N.Y. State Dep't of Educ.*, 4 OCAHO no. 633, 390, 397 (1994); see also *Outler v. United States*, 485 F.3d 1273, 1280 (11th Cir. 2007). Circuit precedent requires a showing not only of “extraordinary circumstances,” but also of “circumstances that are beyond the petitioner’s control and unavoidable even with diligence.” *Downs v. McNeil*, 520 F.3d 1311, 1319 (11th Cir. 2008); *Johnson v. Fl. Dep't of Corrs.*, 513 F.3d 1328, 1332 (11th Cir. 2008). Far from showing extraordinary circumstances, this record reflects what can at best be characterized as a garden variety claim of excusable neglect. As explained in *Olson v. Mobil Oil Corp.*, 904 F.2d 198, 201 (4th Cir. 1990), “[t]he repose that statutes of limitations provide will be lost if their applicability is ‘up for grabs’ in every case.”

Equitable tolling is appropriate in a very narrow set of limited circumstances. See *Irwin*, 498 U.S. at 96; cf. *Baldwin Cnty. Welcome Ctr. v. Brown*, 466 U.S. 147, 152 (1984). Those circumstances are not present here. The complaint is untimely filed and equitable tolling is not warranted based on this record. Hajiani’s belated assertion that he never received the original motion to dismiss is insufficient to preclude dismissal because the only issue presented by that motion has been known to him since the answer was filed, and has been the subject of ongoing inquiries and filings for the last several months.

ORDER

The complaint in this matter is dismissed as untimely filed.

SO ORDERED.

Dated and entered this 16th day of July, 2013.

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 sixty