

OFFICE OF COMPLIANCE
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Washington, DC 20540-1999

Danielle Simms,)	
Appellant,)	
)	
v.)	Case Number: 13-HS-68 (CV)
)	
The Office of Congressman Raul Grijalva,)	
Appellee)	

Before the Board of Directors: Barbara L. Camens, Chair; Alan V. Friedman; Roberta L. Holzwarth; Susan S. Robfogel; Barbara Childs Wallace, Members.

DECISION OF THE BOARD OF DIRECTORS

This case is before the Board of Directors (“Board”) pursuant to a petition for review filed by Danielle Simms (“Simms” or “Appellant”). Simms filed a claim of discrimination alleging that the Office of Congressman Raul Grijalva (“Appellee” or “Grijalva’s Office”) discriminated against her based on her race when it fired her from her staff assistant position in March 2013, in violation of section 201 of the Congressional Accountability Act (“CAA”). Simms seeks review of the Hearing Officer’s March 10, 2014 Order, dismissing her complaint on the dual grounds of untimeliness and failure to proceed.

For the reasons set forth below, we reverse the decision of the Hearing Officer and remand the claims for further proceedings consistent with this opinion.

I. Background

Simms began working as a staff assistant in Grijalva’s Office on February 4, 2013, and her employment was terminated on March 15, 2013. The reason given by Grijalva’s Office for the termination was that Simms’s Spanish language skills were insufficient for her position. Simms alleges that she was treated differently from other employees, and ultimately terminated, because she is African-American.

After her termination, Simms sought counseling with the Office of Compliance (“OOC” or “Office”) and subsequently completed mediation. At that time, she was represented by two attorneys, Jennifer Bezdicek and Sofia Yazykova. The Office mailed the notice of the end of

Simms's mediation period to Ms. Yazykova on September 17, 2013, and the return receipt was signed on September 19, 2013.

The OOC was closed during the federal government shutdown from October 1-16, 2013. On October 1, the OOC notified the parties in all active cases that its staff would not be available during the shutdown. On November 1, 2013, the OOC sent a follow-up letter to Ms. Yazykova, signed by Executive Director Barbara Sapin, explaining that the processing of Simms's case had been suspended on October 1 and resumed on October 17, and that "the period during which the case was suspended did not count against the processing time for the case[.]"¹

The OOC received Simms's Complaint on December 20, 2013, which was 92 days after Simms's attorney acknowledged receipt of the notification of the end of the mediation period. By that time, Simms was no longer represented by counsel. Instead, she properly designated as her representative her father, Marvin Simms ("Mr. Simms"), who is not an attorney.

On December 23, 2014, the OOC sent Simms a Certification that included the statement, "Due to the suspension of the processing of cases caused by the partial federal government shutdown of October 1 through October 16, the deadline for filing a complaint was extended by 16 days."

On January 7, 2014, Grijalva's Office moved to dismiss the Complaint as untimely. A preliminary scheduling order ("Scheduling Order") was issued on January 9, 2014, setting a telephonic preliminary status conference on January 21, 2014, and stating that "The hearing is tentatively scheduled to be held on **February 18, 2014 at 10 AM**. During the preliminary status conference, parties should be ready to discuss their availability on this date, as well as other dates that comply with Procedural Rules of the Office of Compliance §7.05." (emphasis in original)

The preliminary status conference was rescheduled to January 29, 2014 due to inclement weather. During the status conference, which was held via telephone, Mr. Simms represented that he had not received the Motion to Dismiss, and the Hearing Officer granted Simms additional time to file a response. Grijalva's Office re-sent the motion to Simms, and Simms filed her response on January 31. Grijalva's Office filed a reply on February 5. Later, at the hearing, the parties and the Hearing Officer all agreed that their understanding of the purpose of the February 18 hearing was to discuss the motion to dismiss, not the merits of the Complaint.

The hearing was held as originally scheduled on February 18, 2014. Mr. Simms appeared via telephone from Arizona, but Simms herself did not appear. Mr. Simms represented during the hearing that Simms had a job interview that day, and stated that he and Simms had not been informed that the hearing would proceed on February 18 until Mr. Simms received a phone call from the Hearing Officer's representative on February 14, 2014. During the hearing, Grijalva's

¹ We note that the November 1 letter was not included in the record, but we take administrative notice that it was an official Office of Compliance communication that was sent to Simms's representative.

Office moved to dismiss the Complaint on the additional ground of failure to prosecute, based on Simms's failure to appear at the hearing.

The Hearing Officer dismissed the Complaint on March 10, 2014, on the grounds of both untimeliness and failure to prosecute. Specifically, the Hearing Officer held that "Because the filing deadlines prescribed by the CAA in § 1404 are jurisdictional to the Office of Compliance, and Complainant untimely filed the present complaint, I cannot reach the merits of the Complaint," and dismissed the Complaint under section 5.03(b) of the Procedural Rules of the Office of Compliance ("Procedural Rules"). He also held that "Complainant failed to proceed with the instant action when on February 18, 2014 she failed to appear at the hearing scheduled for that day," and dismissed the Complaint under section 5.03(c) of the Procedural Rules. This appeal followed.

II. Standard of Review

The Board's standard of review for appeals from a Hearing Officer's decision requires the Board to set aside a decision if the Board determines the decision to be: (1) arbitrary, capricious, an abuse of discretion, or otherwise not consistent with law; (2) not made consistent with required procedures; or (3) unsupported by substantial evidence. 2 U.S.C. §1406(c). The Board reviews *de novo* the legal conclusions that led to the Hearing Officer's determinations. *Katsouros v. Office of the Architect of the Capitol*, Case Nos. 07-AC-48 (DA, RP), 09-AC-10 (DA, FM, RP), 2011 WL 332311, at *3 (Jan. 21, 2011).

III. Analysis

By his Order of March 10, 2014, the Hearing Officer dismissed the case with prejudice without holding a hearing on the merits of Simms's Complaint, on the grounds that the Complaint was untimely and that Simms failed to proceed with her case when she failed to appear at the February 18 hearing.

Dismissal On Grounds of Untimeliness Was Not Consistent With Law

The Hearing Officer erred as a matter of law when he held that the time limits for OOC administrative proceedings under the CAA are jurisdictional. We analyzed this issue in depth in *Perez v. Office of Representative Sheila Jackson-Lee*, Case No. 04-HS-21 (CV, RP), 2005 WL 6236947 (June 29, 2005). In *Perez*, the petitioner filed her complaint 8 days after the end of the 90-day period. After reviewing our own precedent and federal case law, we held that "the purposes, language, and legislative history of the Congressional Accountability Act of 1995 demonstrate clearly that the presumption of equitable tolling is properly applied to the limitations periods for the filing and processing of administrative proceedings maintained under the statute." *Id.* at *9.

The Hearing Officer's finding that "the filing deadlines prescribed by the CAA in § 1404 are jurisdictional to the Office of Compliance" is thus directly contrary to the Board's precedent.²

The question of whether or not the Executive Director of the OOC had the authority to extend the filing deadline is not before us, and we decline to decide that question at this time. Either way, however, dismissal on grounds of untimeliness was improper in this case. If the deadline was properly extended, then the Complaint was not untimely. Even if such authority did not exist, Simms's two-day delay in filing should have been excused under the principle of equitable tolling.

In *Perez* we addressed the two "principal grounds" for applying equitable tolling: where a defective pleading has been filed within the statutory period, or where the complainant was induced or tricked into missing the deadline by his adversary's misconduct, 2005 WL 6236947, at *9 (citing *Irwin*, 498 U.S. at 96). However, we did not limit the doctrine to those grounds, and the courts have applied it much more broadly. Indeed, the Federal Circuit has held that equitable tolling is not "limited to a small and closed set of factual patterns," and has "rejected the approach of looking to whether a particular case falls within the facts specifically identified in *Irwin* or one of our prior cases." *Mapu v. Nicholson*, 397 F.3d 1375, 1380 (Fed. Cir. 2005). Rather, courts acting in equity have emphasized "the need for flexibility" and "for avoiding mechanical rules," and have proceeded on a "case-by-case basis." *Sneed v. Shinseki*, 737 F.3d 719, 726 (Fed. Cir. 2013), citing *Holland v. Florida*, 560 U.S. 631 (2010).

The Federal Circuit has held broadly that "Equitable tolling applies where the litigant proves: '(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing.'" *Arctic Slope Native Ass'n, Ltd. V. Sebelius*, 699 F.3d 1289, 1295 (Fed. Cir. 2012) (quoting *Holland*, 560 U.S. 631). It is therefore appropriate to consider whether Simms was pursuing her rights diligently and whether the OOC's extension constituted "extraordinary circumstances" that prevented her timely filing.

We find that the unique circumstances of this case warrant the application of equitable tolling to Simms's Complaint. The November 1, 2013 letter from the Executive Director clearly stated that "the period during which the case was suspended did not count against the processing time for the case[.]" It was reasonable for Simms to rely on this language to conclude that she had an additional 16 days in which to file her Complaint. The Hearing Officer did not address this letter at the hearing or in his Order, and we recognize that Simms did not submit a copy of it in evidence and that the OOC did not place a copy in the administrative file, so the Hearing Officer

² The Hearing Officer cites to a different Board decision, *Taylor v. U.S. Senate Budget Comm.*, Case No. 10-SN-31 (CFD), 2012 WL 769764, at *3 (Feb. 14, 2012), and in a parenthetical, characterizes that decision as "Board settling issue of untimeliness to determine whether it had jurisdiction to decide appeal." However, in *Taylor* we did not address the question of whether the time limits are jurisdictional or subject to equitable tolling, and we did not reject the appeal for untimeliness, but rather declined to review the Hearing Officer's decision based on other grounds specific to the unique circumstances of that case.

did not have a copy available to him. However, Simms referenced the letter in her opposition to the motion to dismiss, and explained that she and her attorney interpreted it as granting her an extension of time for filing her Complaint. Because the letter was an official communication from the OOC, and its language could reasonably be interpreted as granting Simms an extension, her reliance on the letter was reasonable.

Courts have held that misleading letters and representations from the EEOC regarding time limits for filing Title VII complaints can justify the application of equitable tolling to excuse untimely filings. *See, e.g., Page v. U.S. Indus., Inc.*, 556 F.2d 346, 351 (5th Cir. 1977) (equitable tolling applied where a misleading letter from the EEOC led plaintiff to believe her filing deadline was extended, because plaintiff “was entitled to rely on this seemingly authoritative statement by the agency presumed to know the most about these matters”); *Bracey v. Helene Curtis, Inc.*, 780 F. Supp. 568 (N.D. Ill. 1992) (equitable tolling applied where EEOC letter containing erroneous date misled plaintiff into filing one day past the statutory deadline); *Browning v. AT&T Paradyne*, 120 F.3d 222 (11th Cir. 1997) (equitable tolling applied where plaintiff filed 18 days late after an EEOC investigator gave her attorney inaccurate information about the statute of limitations).

This is true even when the agency’s practice is found to have been in error, because, as one court held, “we will not visit the effects of EEOC’s erroneous practice on [the plaintiff] who was misled by terminating her right to judicial examination of her employer’s conduct.” *Zambuto v. Am. Tel. & Tel. Co.*, 544 F.2d 1333, 1336 (5th Cir. 1977). *See also Roberts v. Arizona Bd. of Regents*, 661 F.2d 796, 799 (9th Cir. 1981) (court is “unwilling to allow the EEOC’s violation of its own procedural regulations to redound to [the plaintiff’s] detriment”); *Jackson v. Richards Med. Co.*, 961 F.2d 575, 587 (6th Cir. 1992) (“In cases where the Commission has erroneously led a charging party to believe the administrative process was not complete, thus causing that party to miss the deadline for filing a complaint, courts have consistently applied principles of equitable tolling to prevent the party from being penalized for the Commission’s mistakes”).

Accordingly, even if we were to find that the Executive Director did not have the authority to extend the deadline, we would not penalize Simms for the OOC’s mistake. Simms reasonably relied on information from the OOC that her filing deadline had been extended. She exercised due diligence in filing her Complaint only two days after the original deadline, well within the expanded 16-day period. The shutdown of the federal government, resulting in the closure of the OOC for 16 days, and the letter advising Simms of the resulting extension, qualify as “extraordinary circumstances” for purposes of equitable tolling. Although the Hearing Officer may not have had the letter itself in the record before him, equity requires that we reverse the dismissal on grounds of untimeliness.

Dismissal for Failure to Proceed Was Improper

A Hearing Officer in an OOC administrative proceeding may dismiss a complaint with prejudice if a complainant “fails to proceed with an action.” Procedural Rules § 5.03(c). However, dismissal on this basis “should be used only as a last resort.” *English-Speaking Union v. Johnson*, 353 F.3d 1013, 1021 (D.C. Cir. 2004). “Because disposition of claims on the merits is favored... the harsh sanction of dismissal for failure to prosecute is ordinarily limited to cases involving egregious conduct by particularly dilatory plaintiffs, after ‘less dire alternatives’ have been tried without success.” *Noble v. U.S. Postal Serv.*, 71 F. App’x 69 (D.C. Cir. 2003). *See also Devlin v. Office of the Architect of the Capitol*, Case No. 06-AC-20 (RP), 2007 WL 5914211, at *2 (Apr. 25, 2007) (in determining whether to dismiss for want of prosecution, the trier of fact should “weigh the court’s need to manage its own docket, the public interest in expeditious resolution of litigation, and the risk of prejudice to the defendants against the policy favoring disposition of cases on their merits and the availability of less drastic sanctions”); *Brown v. Merit Sys. Prot. Bd.*, 455 F. App’x 982, 983 (Fed. Cir. 2011) (interpreting similar MSPB rule regarding dismissal for failure to prosecute, and holding that “the severe sanction of dismissal should not be imposed unless it is clearly warranted”); *Camps v. C & P Tel. Co.*, 692 F.2d 120, 124 (D.C. Cir. 1981) (“a single act of misconduct by a lawyer or a *pro se* litigant should not ordinarily result in dismissal of his case”).

Dismissal for failure to prosecute was too harsh a sanction for Simms’s failure to appear at the February 18, 2014 hearing. Her designated representative participated in the hearing, and the parties had an opportunity to argue their positions regarding the motion to dismiss. Simms’s failure to appear did not cause any delay in the proceedings; there is no evidence in the record of bad faith or prior misconduct by Simms; Grijalva’s Office was not prejudiced; and less dire sanctions were available. Moreover, there is no evidence that the Hearing Officer had warned Simms of the possible consequences of her failure to appear. “Absent such advance warning, dismissal to drive a lesson home, we think, is more akin to overkill than judicial discretion.” *Camps*, 692 F.2d at 125. We therefore find that dismissal on this basis was an abuse of discretion under the circumstances of this case.

ORDER

For the foregoing reasons, pursuant to section 406(e) of the CAA and section 8.01(d) of the Procedural Rules, the Board sets aside the Hearing Officer’s decision in this matter, as it is not consistent with law and constitutes an abuse of discretion. The Board reverses dismissal of Appellant’s race discrimination claim. The case is remanded for further proceedings consistent with this opinion.

It is so ORDERED.

Issued, Washington, DC, July 30, 2014