

OFFICE OF COMPLIANCE
LA 200, John Adams Building, 110 Second Street, S.E.
Washington, D.C. 20540-1999

CHARLES A. HUGHES, III,)	
Appellant/Employee,)	
)	
v.)	Case No. 98-SN-56 (RP)
)	
THE OFFICE OF THE UNITED STATES)	
SENATE SERGEANT AT ARMS,)	
Appellee/Employer.)	
)	

Before the Board of Directors: Glen D. Nager, Chair; Virginia A. Seitz, Member.

DECISION OF THE BOARD OF DIRECTORS

Appellant, Charles A. Hughes, III (Hughes), appeals from the decision of the Hearing Officer dismissing his complaint for failure to comply with the time requirements of section 402(a) of the Congressional Accountability Act (CAA or Act), 2 U.S.C. § 1402(a). The Board concludes that Hughes failed to comply with the time limits in the Act and that the Hearing Officer did not abuse her discretion when she denied him equitable tolling of those time limits. The Board thus affirms the judgment of the Hearing Officer.

I. a.

According to Hughes, the facts are as follows: Hughes worked for almost 28 years in the Senate Services Department, a print shop/bindery, within the Office of the Senate Sergeant at Arms (SSA). Sworn Statement of Charles A. Hughes (April 21, 1999) (Statement) at ¶¶ 2, 3. Hughes alleges that, on several occasions, he complained to SSA management, human resources personnel, and congressional offices about his Department's mismanagement, illegal acts, and unsafe working conditions, including violations of the OSHAct, as made applicable by the CAA. Transcript (tr.) at 20-21, 27, 50, 51; Statement at ¶ 3. As a result, he asserts, on October 2, 1997, he was suspended without cause; on October 20, 1997, he was removed from his job as night shift supervisor and isolated in a day job without duties; and on November 12, 1997, he was officially notified that he would be terminated, effective December 19, 1997, and therefore took retirement. Statement at ¶ 3.

Hughes acknowledges that he had a general familiarity with the CAA and the Office of Compliance (Office). He had received a memorandum about the CAA in 1995 and had been mailed brochures about the Office. He saved some of these materials in case he needed them, but

did not read them in detail. Tr. at 46-47; Statement at ¶ 4. In addition, Hughes had experience in filing workplace grievances through other channels. Tr. at 27, 50-52, 57-58. Hughes had taken seminars in labor and employment law provided for SSA supervisors, tr. at 54, but he had declined to attend a seminar on the CAA because it was scheduled outside of his normal work hours, tr. at 45.

Hughes claims that, in October 1997, fearing that he was about to be fired, he telephoned the Office to "get a brief idea of what they were set up to do" and was told that he should speak to an Office counselor. Tr. at 21. He met with a counselor on or about October 20, 1997 for about 45 minutes. Statement at ¶ 6. According to Hughes, he told the counselor that he needed help and that he thought that he was about to be terminated. Id. He brought documentation of his complaints of workplace violations and described incidents which he believed constituted, inter alia, safety violations and illegal discrimination. Tr. at 23. The counselor allegedly told Hughes that he had "a weak discrimination case," tr. at 27, 45; and that there was nothing that the Office could do for him, tr. at 31; Statement at ¶ 6. The counselor tried several times to explain to Hughes what he considered technicalities about the Act, which he did not understand. Tr. at 30, 31, 45. The counselor gave Hughes a copy of the Procedural Rules of the Office (Procedural Rules or Rules). Tr. at 36. Hughes kept this copy of the Rules, but did not read it until more than a year later. See tr. at 41, 53. Hughes does not recall the counselor explaining how to make a formal request for counseling; describing the processes and time limits for counseling and mediation; providing him with a form to file requesting formal counseling; or otherwise inquiring whether he wished to initiate the counseling process. Tr. at 31; Statement at ¶ 6.

Hughes alleges that approximately two weeks later he spoke to the counselor briefly by telephone to arrange to pick up the materials he had left with her. Tr. at 32-34; Statement at ¶ 8. He maintains that he told her that he had additional reason to believe that he was about to be fired. Tr. at 32-33; Statement ¶ 8. Hughes came to the Office about ten days later and the counselor handed him his papers, again stating that he had a weak discrimination case. Tr. at 33-34. She did not provide him with additional information about his rights under the CAA or the Office's processes. Tr. at 34; Statement at ¶ 8.

On November 12, 1997, Hughes received notice that he would be terminated. Nonetheless, he had no further contact with the Office for over a year. He did not inform the Office of his forced retirement or inquire further about counseling or mediation. Tr. at 42. During the intervening period, he consulted by telephone or in person with approximately a dozen attorneys, taking with him to meetings the copy of the Procedural Rules that the counselor had given him. Tr. at 36; Statement at ¶ 9. But Hughes asserts that he did not read the Rules during that period and did not learn about the time limits for making claims under the Act until he met with his present attorney on or about November 18, 1998. See tr. at 41.

Apparently at the suggestion of his present attorney, Hughes met again with the Office counselor on November 24, 1998. Tr. at 38; Statement at ¶ 9. At that meeting, Hughes was given and filled out a form entitled, "Formal Request for Counseling." Statement at ¶ 11. Hughes was also given another copy of the Procedural Rules. Hughes and the counselor

reviewed a memorandum that Hughes' attorney had prepared describing Hughes' previous contact with her. Statement at ¶ 10. The counselor took issue with the memorandum's characterization of their prior meeting as formal counseling, stating, according to Hughes, "you didn't make a claim; it was up to you and you didn't make a claim." Tr. at 38. Hughes avers that, if the counselor had given him the counseling request form at his first meeting with her, he would have completed the paperwork "just to get the help." Tr. at 39.

On November 27, 1998, the Office mailed Hughes a Notification of End of Counseling Period," by certified mail, return receipt requested. Office Of Compliance Certification (April 2, 1999) (Certification) at ¶ 2. Hughes acknowledged receipt on November 30, 1998 and requested mediation on December 1, 1998. *Id.* at ¶ 2-3. Hughes testified that he read the Procedural Rules for the first time as he was preparing for mediation. Tr. at 41. Hughes received a Notification of the End of Mediation on January 5, 1999. *Id.* at ¶ 4. When mediation failed, Hughes filed a complaint with the Office.

I. b.

In his complaint, Hughes alleged that the SSA violated section 207(a) of the CAA, ("Prohibition Of Intimidation Or Reprisal"), 2 U.S.C. § 1317(a), by forcing him to retire in reprisal for his complaints about violations of the OSHA Act, as made applicable by the CAA. The SSA moved to dismiss the complaint on the ground that Hughes had failed to request counseling within 180 days after the date of the alleged violation, as required by section 402(a) of the Act, 2 U.S.C. § 1402(a). After considering the pleadings, Hughes' sworn statement and testimony, and the briefs and argument of counsel, the Hearing Officer granted the motion and dismissed the complaint with prejudice. Memorandum of Decision and Order Dismissing the Complaint, (Decision) No.98-SN-56 (RP) (May 3, 1999) at 1.

The Hearing Officer concluded that Hughes did not comply with the time requirements of the Act because more than 180 days had elapsed between the events giving rise to his retirement on December 19, 1997, and his November 24, 1998 request for counseling. *Id.* at ¶ 1.b. She found that, despite his timely initial contact with the Office on October 20, 1997, Hughes failed to "follow through on counseling, mediation, and procedures outlined in the material given to him." *Id.* at ¶ 1.c.

The Hearing Officer rejected Hughes' argument that the October 20, 1997 meeting with the counselor was a request for counseling as contemplated by section 402(a) of the Act. *Id.* at ¶ 2. Rather, she found that "he came to the Office of Compliance seeking advice . . . and left feeling discouraged about the 'technicalities' of the Act." *Id.* at ¶ 2. b. She further concluded that Hughes "did not behave as if he had initiated a counseling process." *Id.* at ¶ 2. c. She pointed out that, by his own admission, Hughes had failed to read the written materials the counselor had given him or to contact the Office, except to pick up his documents, for over a year after his initial October 1997 meeting: "He did not notify the Office that he wished to pursue any matters which he had discussed on October 20, 1997 until he filed a request for counseling on

November 24, 1998.” Id.

The Hearing Officer also concluded that there was no legal or equitable basis for tolling the limitations periods in the Act. Id. at ¶ 3. She found that Hughes was educated and capable of comprehending what rights were available to him, was generally informed about his rights under the Act, and was able to pursue those rights. Id. at ¶ 3. a-c. And she determined that the limitations period could not be equitably tolled because “[t]he Office of Compliance did not mislead Mr. Hughes or fail in its duties to him.” Id. at ¶ 3. d.

II

The Hearing Officer concluded that, even assuming the facts asserted by Hughes were true, he had failed to satisfy the time requirements of the CAA and that the limitations periods in the Act should not be tolled. We must decide whether these conclusions are “arbitrary, capricious, an abuse or discretion, or otherwise not consistent with law.” 2 U.S.C. § 1406(c)(1).

To initiate a timely proceeding under the CAA, an employee must request counseling within 180 days of the alleged violation of the Act. 2 U.S.C. §1402(a). The Hearing Officer found, and Hughes acknowledges, that the complaint at issue arises from a counseling request that was filed substantially more than 180 days after the alleged violations of the Act. On November 12, 1997, Hughes received official notice that he would be terminated. See Statement at ¶ 3. Assuming that to be the date of the violation, see Delaware State College v. Ricks, 449 U.S. 250, 258 (1980), Hughes had to request counseling by May 11, 1998. This complaint arises from a formal request for counseling which Hughes made on November 24, 1998, see Certification at ¶ 2 - i.e., 197 days too late.¹

Hughes asserts, however, that he timely requested counseling under the Act on October 20, 1997, and that this request should toll the Act's time limits so as to make timely the complaint arising out of his November 24, 1998 request for counseling. In making this assertion, Hughes acknowledges that he failed to pursue the mandatory processes of the Act after his October 20, 1997 meeting with the counselor. He did not seek mediation within fifteen days of the end of the thirty-day counseling period; a fortiori, he did not file a complaint with the Office or a civil action within ninety days of the end of a mediation period arising out of that alleged request for counseling. See 2 U.S.C. §§ 1403, 1404. But he attributes his omissions to the Office's failure to provide him with the necessary information at the October 20, 1997 meeting with the counselor and, on that basis, maintains that he is entitled to equitable tolling of the time limit to request counseling for a period of close to a year. We find no abuse of discretion in the Hearing Officer's conclusion that Hughes is not entitled to toll the time limits in the Act for so long a period.

¹ The conclusion that the counseling request was untimely holds true even if the limitations period were deemed to commence running on the date of Hughes' retirement, December 19, 1998.

Preliminarily, we note that the October 20, 1997 date precedes the date of the principal violation of the Act alleged by Hughes - his wrongful forced retirement in lieu of termination. Thus, Hughes could not at this meeting have initiated counseling on his claim that he was unlawfully forced to retire.

Hughes attempts to avoid this problem by asserting that counseling was "ongoing" throughout the thirty-day period and therefore that he was still in counseling on November 12, 1997, when the notice of termination occurred. This argument is difficult to square with Hughes' failure later to inform the counselor that he had in fact been forced to retire, especially in light of the Act's clear purpose to ensure that parties utilize the Act's mechanisms to adjust their disputes.

For purposes of decision, however, we will assume without deciding that Hughes requested counseling on October 20, 1997; we also assume without deciding that Hughes may invoke the doctrine of equitable tolling under the Act;² and we assume without deciding that the Office's alleged conduct might support some period of equitable tolling.³ Nonetheless, on the facts proffered by Hughes, he is not entitled to equitable tolling of the Act's time limits for a period long enough to make timely his November 24, 1998 request for counseling, because Hughes plainly failed to exercise due diligence to protect his rights during the period at issue.

Even where a plaintiff has some justification for a late filing, he does not receive a limitless extension of the applicable limitations period. Rather, it is well established that a plaintiff seeking equitable tolling of a limitation period is obligated to act with due diligence to protect his or her rights. See Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 96 (1990) ("We have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights."), citing Baldwin County Welcome Center

² Equitable tolling is applied under some statutes and not others. Compare Irwin v. Dep't of Veterans Affairs, 498 U.S. 89 (1990) (approving the application of equitable tolling against the government in Title VII case) to United States v. Brockamp, 519 U.S. 347 (1997) (disapproving the application of equitable tolling against the government in tax refund case).

³ Hughes assumes that the Office's alleged conduct mandates equitable tolling. A plaintiff is not always entitled to equitable tolling simply because he or she receives incorrect or incomplete information from a government agency employee. See, e.g., Kelly v. Nat'l Labor Relations Board, 79 F.3d 1238, 1248-49 (1st Cir. 1996) (although agency failed to inform employee that regulations placed responsibility on charging party for service of process and erroneously instructed her attorney that agency would serve process, attorney's reliance on oral advice of low level employee was not reasonable in light of clear requirement of written regulation); Jarrett v. U.S. Sprint Communications Co., 22 F.3d 256, 260 (10th Cir. 1994) (district court clerk's office failure to notify plaintiff that filing fee must be paid with a specified time insufficient to toll statute: "[i]n this circuit, a Title VII time limit will be tolled only if there has been active deception of the claimant regarding procedural requirements.>").

v. Brown, 466 U.S. 147, 151 (1984)).⁴ Thus, the litigant who seeks to rely on equitable tolling "must sue as soon after the statute of limitations has expired as he obtains the information or would have done so had he been reasonably diligent." Wolin v. Smith Barney Inc., 83 F.3d 847, 852 (7th Cir. 1996) (emphasis added). See id. at 853 ("in a case of equitable tolling the plaintiff must be continuously diligent and sue (if he is beyond the statutory period) as soon as it is practicable for him to do so.").⁵

In the circumstances here, we agree with the Hearing Officer that it was not reasonable for Hughes to sleep on his claims for close to a year. Hughes is well educated and capable. He had a copy of the Office's Rules. There, in relatively straightforward language, the processes of the Act are explained and the time limits are clearly set forth. See Rule § 2.03. The Rules further explain that once the employee has formally requested counseling, the employee has the responsibility for going forward at all times. See Rule 2.03(k) ("*Duty to Proceed*. An employee who initiates a proceeding under this part shall be responsible at all times for proceeding, regardless of whether he or she has designated a representative."). Yet, for a period of almost a year after his last contact with the Office and after his retirement, Hughes failed to make any inquiry whatsoever about his case. He did not notify the Office of his notice of termination or forced retirement; he did not inquire about further counseling; he did not ask about mediation.

⁴ See also Flight Attendants Against UAL Offset (FAAUO) and United Air Lines, Inc. v. Comm'r of Internal Revenue, 165 F.3d 572, 576 (7th Cir. 1999) ("It is . . . vital that a party who wants to appeal to the doctrine of equitable tolling to excuse a late filing show . . . that he tried diligently to file within the deadline or as soon afterwards as possible.").

⁵ Equitable tolling adjusts the rights of two innocent parties. It is for that reason, in part, that the doctrine tolls the limitation period only for the time deemed reasonably necessary to act. Cada v. Baxter Healthcare Corp., 920 F.2d 446, 452 (7th Cir. 1990). Accord Early v. Bankers Life and Casualty Co., 959 F.2d 75, 81 (7th Cir. 1992) (assuming that the agency gave plaintiff misleading information, the question is whether he filed as early as he realistically could given that misinformation); Luckett v. Rent-A-Center, 53 F.3d 871, 873 (7th Cir. 1995) (denying equitable tolling despite the court's failure to notify the plaintiff that her suit had been dismissed, because "we do not think that waiting fourteen months to hear from the court can be deemed reasonable"); Jarrett, 22 F.3d at 260 (denying equitable tolling to a pro se litigant who sought to pay a filing fee five months after her request for appointment of counsel had been denied, even though the clerk's office had failed to notify her of the appropriate time limit); Catawba Indian Tribe of South Carolina v. United States, 982 F.2d 1564, 1572 (Fed. Cir. 1993) (even if ignorance of meaning of law could be grounds for tolling a limitations period, once the Tribe should have known of government's mistaken interpretation, further equitable tolling was unavailable); Demers v. General Dynamics, 779 F.2d 95, 99 (1st Cir. 1985) (no tolling when the grievant failed for three years to investigate whether the union was prosecuting his claim); Chappell v. Emco Machine Works Co., 601 F.2d 1295, 1303 (5th Cir. 1979) (no tolling when employee waited five months to ask EEOC whether state employment commission employee had filed her EEOC complaint).

He did not even consult the brochures or the Rules in his possession. If, as he states, Hughes believed that he was engaged in counseling under the Act, at some reasonable time after the thirty-day counseling period, Hughes had a duty to inform the Office of his forced retirement or to make an inquiry about proceeding further under the Act or to look at the Rules. He failed to do so.⁶

Accordingly, even assuming that Hughes initiated counseling on October 20, 1997, it was not reasonable for him to fail to take any action to pursue his claims under the CAA for almost a year. He therefore was not entitled to equitable tolling of the time limits in the Act for that period. See Lockett, 53 F.3d at 873 (unreasonable delay when plaintiff waits 14 months to hear from the court); Jarrett, 22 F.3d at 260 (failure to pay filing fee within five months unreasonable delay); Demers, 779 F.2d at 99 (failure to investigate union prosecution of claim for three years unreasonable delay).

For these reasons, the Hearing Officer's conclusions that Hughes failed to satisfy the time limits in the Act and that Hughes was not entitled to equitable tolling of those limits were neither unlawful nor an abuse of discretion. 2 U.S.C. § 1406. The judgment of the Hearing Officer is affirmed.

IT IS SO ORDERED.

⁶ Hughes also apparently consulted with numerous lawyers about his claim. The failure of the many lawyers that Hughes consulted to spot the applicable limitations period does not justify equitable tolling. See Blumberg v. HCA Management, 848 F.2d 642, 644 (5th Cir. 1988) (difficulty in obtaining counsel does not toll period); Stallcop v. Kaiser Found. Hosp., 820 F.2d 1044, 1050 (9th Cir. 1987) (no tolling where employee "gained the means of knowledge" by consulting three attorneys during applicable limitations period).