Oral argument not yet scheduled

No. 22-5093

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Adam Robinson,

Plaintiff-Appellant,

v.

Department of Homeland Security Office of Inspector General,

Defendant-Appellee.

On Appeal from a Final Judgment of the
United States District Court for the District of Columbia
Case No. 20-CV-2021, Judge Christopher R. Cooper

PETITION FOR INITIAL HEARING EN BANC

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RULE 35(b) STATEMENT

The ruling below conflicts with Supreme Court decisions and with other circuits' decisions, and it involves a question of exceptional importance: whether this Court's decision in *King v. Dole*, 782 F.2d 274 (D.C. Cir. 1986), should be overruled.

In *King*, this Court held that 5 U.S.C. § 7703(b)(2)—which provides that a lawsuit "must be filed within 30 days" of a final decision of the Merit Systems Protection Board—is jurisdictional and thus not subject to any exceptions such as equitable tolling. Three decades of Supreme Court precedent have swept away the foundations on which *King* is based. If this Court overrules *King*, as this petition requests, Section 7703(b)(2)'s filing period would present no jurisdictional bar to the district court's consideration of Plaintiff-Appellant Adam Robinson's "mixed" Title VII complaint. Robinson filed his complaint one day late after he "was informed [by the clerk's office] that filing deadlines were not being strictly enforced due to the Covid-19 pandemic." ECF 28-1 at 462.

King analyzed Section 7703(b)(2) in two steps. First, it began with the presumption that statutory filing periods may not be equitably tolled because they limit a court's subject-matter jurisdiction. *King*, 782 F.2d at 275. From that premise, it then concluded that Section 7703(b)(2) does not rebut that presumption because its text—its requirement that suits "must" be filed within 30 days—is "clear and emphatic." *Id.* at 276.

Modern Supreme Court precedent, beginning with the pathmarking decision in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), however, topples *King*'s twin pillars. First, as the Supreme Court reiterated just last month, courts must begin with the presumption that statutory filing periods are nonjurisdictional. *Boechler, P.C. v. Comm'r of Internal Revenue*, ___ S. Ct. ___, ___, 2022 WL 1177496, at *3 (Apr. 21, 2022). They are thus generally subject to equitable tolling absent a clear statement from Congress that the provision was intended to be jurisdictional. *Id.* at *5-*7. Second, the Court has repeatedly held that mandatory language alone, such as "shall" and "must," does not provide that clear statement. *See, e.g.*, *Fort Bend Cnty. v. Davis*, 139 S. Ct. 1843, 1850-51 (2019).

Only the en banc Court can correct *King*'s error. *King* squarely held that Section 7703(b)(2)'s 30-day period is jurisdictional and not subject to equitable tolling, so the district court dismissed Robinson's complaint for lack of jurisdiction under that binding precedent. *King* therefore makes all the difference in this case: Under it, Robinson's case may not proceed under any circumstances. Under the correct rule, however, the district court or this Court would be authorized to equitably toll the time period for filing Robinson's complaint.

JURISDICTION

Whether the running of the 30-day time period in 5 U.S.C. § 7703(b)(2) divested the district court of subject-matter jurisdiction is the issue presented

in this petition. On March 10, 2022, the district court granted the Government's motion to dismiss, disposing of all claims of all parties. Addendum (Add.) 6. On April 1, 2022, Robinson timely filed a notice of appeal. ECF 35. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE CASE

This Court's decision in *King v. Dole*, 782 F.2d 274 (D.C. Cir. 1986), required the district court to dismiss Adam Robinson's complaint for lack of subject-matter jurisdiction. But *King*'s holding—that the 30-day time period in 5 U.S.C. § 7703(b)(2) constrains a court's subject-matter jurisdiction—cannot be squared with modern Supreme Court precedent.

Robinson brought what is known as a "mixed case" before the Merit Systems Protection Board (MSPB), combining a Title VII discrimination claim with a challenge to termination or demotion under the Civil Service Reform Act, 5 U.S.C. § 4303. *See Butler v. West*, 164 F.3d 634, 638 (D.C. Cir. 1999); 5 U.S.C. §§ 7702(a)(1), 7703(b)(2). Section 7703(b)(2) provides that, in "mixed" Title VII, Age Discrimination in Employment Act, and Fair Labor Standards Act actions, a suit "must be filed within 30 days after the date the individual filing the case received notice of the judicially reviewable [MSPB] action."[1]

[1] The phrase "judicially reviewable action" in Section 7703(b)(2) refers to a "decision of the [MSPB]" in "mixed" cases when, as here, the employee does not petition the EEOC for further review. 5 U.S.C. § 7702(a)(3)(A). The initial decision in Robinson's case, of which Robinson received notice, became a "decision of the [MSPB]" on May 20, 2020, 35 days after its

I. Factual background

The following facts are taken from Robinson's complaint and declarations, which the district court considered in granting the Government's motion to dismiss for lack of subject-matter jurisdiction under Rule 12(b)(1). Add. at 4, 5 & n.3; *see Herbert v. Nat'l Acad. of Sci.*, 974 F.2d 192, 197 (D.C. Cir. 1992).

Adam Robinson, an African-American man, worked as a Program Analyst at the Department of Homeland Security's Office of Inspector General. ECF 20 (Amended Complaint) at ¶¶ 5, 16. Robinson was assigned to the ICE Removals project, which identified barriers faced by ICE Officers seeking to remove undocumented detained immigrants. *Id.* at ¶ 16. This project required Robinson to conduct lengthy interviews with ICE officials and record their experiences for further analysis and policymaking. *Id.*

Robinson documented each interview in a Memorandum of Record (MOR) that another program analyst then reviewed and edited before the MOR was finalized and submitted. ECF 20 at ¶¶ 16-17. Lorraine Eide, Robinson's team leader, routinely applied more stringent performance standards to Robinson's MORs as compared to the standards applied to Donna Ruth, Robinson's white, female colleague who also served on the ICE

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issuance. *See* ECF 24-4 at 2, 37; 5 C.F.R. § 1201.113. The parties here do not dispute that Robinson's 30-day period began to run on May 20, 2020. *See* ECF 24-3 at 10; ECF 28 at 12.

Removals project team. *Id.* at ¶¶ 17, 21. Ruth served as a reviewer of Robinson's MORs. ECF 30-3 (Plaintiff's Second Declaration) at 3.[2]

Ruth reviewed a dozen of Robinson's MORs. ECF 30-3 at 4. Instead of conducting her reviews in a standard manner, Ruth inserted a litany of incorrect statements into Robinson's MORs that did not accurately reflect the interviews. *Id.* at 3. Concerned with the integrity of the ICE Removals project and his own professional reputation, Robinson did not finalize and submit the MORs containing the false information added by Ruth. *Id.*

Eide and Donna Mellies (Robinson's supervisor) did not care whether the MORs contained inaccuracies. ECF 30-3 at 3-4. Instead, they worried that Robinson's desire to do his job well might place Ruth's career at risk. *See* ECF 20 at ¶¶ 21-24. So, Mellies punished Robinson by issuing an Opportunity to Demonstrate Adequate Performance—effectively placing him on probation—and ordering him to finalize the inaccurate MORs. ECF 30-3 at 4-5.

Robinson then filed an EEO complaint alleging that he had been discriminated against on the basis of his race and sex. ECF 20 at 2. Mellies continued to evaluate Robinson's work more harshly than Ruth's

[2] The Department objected to Robinson's second declaration, *see* ECF 32, which contains additional facts regarding the merits of Robinson's claims but "no additional evidence" in support of his equitable-tolling argument. Add. 5 n.3. The district court never ruled on that objection, and it dismissed Robinson's complaint on jurisdictional grounds. *See id.*

comparable work. *Id.* at 3, 6. After filing his EEO complaint, Robinson was fired on the pretext that he did not complete his work satisfactorily. *Id.* at 6.

II. Procedural background

In February 2019, Robinson challenged his termination before the MSPB. ECF 20 at ¶ 13. He pursued a "mixed" claim: that the Department (1) terminated him in violation of civil-service standards for performance-based removals under 5 U.S.C. § 4303, and (2) discriminated and retaliated against him under Title VII. *Id.*

On May 20, 2020, the MSPB issued a final decision adverse to Robinson. ECF 24-4 at 37. Under 5 U.S.C. § 7703(b)(2)—which provides the time limit at issue here—Robinson had until June 19, 2020, 30 days later, to seek review of that decision in federal district court. On June 15, 2020, four days before the 30-day filing period would expire, Robinson called the district court clerk's office and an employee there informed him that "filing deadlines were not being strictly enforced due to the Covid-19 pandemic." ECF 28-1 at 462. On the same day, Robinson mailed the complaint to the clerk's office via regular mail. *Id.* On June 20, 2020, Robinson's complaint was filed. ECF 1; *see* Minute Order (May 28, 2021) (correcting an "administrative error" that erroneously stated the filing date as July 24, 2020). Robinson did not obtain counsel until after his complaint was filed. *See* ECF 19.

The Department moved to dismiss for lack of subject-matter jurisdiction under Rule 12(b)(1). Add. 4. It relied on this Court's decision in *King v. Dole*,

782 F.2d 274 (D.C. Cir. 1986), which held that Section 7703(b)(2)'s 30-day time period is jurisdictional. *Id.*

The district court granted the Department's motion to dismiss. Add. 8; ECF 33. The court reasoned that, under *King*, it "lack[ed] jurisdiction" because Robinson filed suit one day late. Add. 5. The court acknowledged that "*King* has been subject to some criticism" from other circuits after the Supreme Court's decision in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), which held that filing periods in suits against the government are presumptively nonjurisdictional and subject to equitable exceptions, such as equitable tolling. Add. 6. The district court held, however, that "unless and until the D.C. Circuit overrules *King*," it was "bound to follow it" and dismiss Robinson's complaint for lack of subject-matter jurisdiction. *Id.*

After a federal court finds it lacks jurisdiction, "the only function remaining to the court is that of announcing the fact and dismissing the cause." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (quotation marks omitted). Yet, the district court did not stop after it held that it lacked jurisdiction. It went on to say that if it could disregard *King*, Robinson would not be entitled to equitable tolling because he assumed the risk of an untimely delivery when he chose to mail the complaint to the clerk's office. Add. 6-7. The court reasoned that Robinson could not rely on the clerk's office employee's statement to excuse the late filing because he mailed the complaint on the same day that he called the clerk's office, and the clerk's office cannot extend statutory deadlines. Add. 7. The court never addressed

the possibility that Robinson was entitled to tolling because he was misled by the employee's statement that deadlines were not being strictly enforced in light of COVID-19. *See* Add. 7; *see also Smith v. Holder*, 806 F. Supp. 2d 59, 63-64 (D.D.C. 2011) (equitably tolling a filing period in a Title VII case against the government when a pro se plaintiff failed to timely file her complaint after misunderstanding instructions on a courthouse sign); *Montgomery v. Comm'r. of Social Sec.*, 403 F. Supp. 3d 331, 341 (S.D.N.Y. 2018) (equitably tolling a filing period because a clerk told the plaintiff that she could come back the "next week" to file her complaint).[3]

REASONS FOR GRANTING EN BANC REVIEW

Under *King v. Dole*, 782 F.2d 274 (D.C. Cir. 1986), the district court had no choice but to dismiss Robinson's complaint for lack of subject-matter jurisdiction. A panel of this Court would also be bound by *King*. But intervening Supreme Court precedent has made *King* untenable. The Court should therefore grant en banc review and overrule *King*.

[3] The district court did not expressly rule on the tolling question. Instead, after it dismissed the complaint for lack of subject-matter jurisdiction under *King*, it denied the Department's motion in the alternative for summary judgment, *see* Add. 8, which argued that Robinson was not entitled to equitable tolling. ECF 24-3 at 10-11.

I. *King* should be overuled because it is at odds with subsequent Supreme Court precedent.

A. If the issue in *King* came to this Court anew, a long line of post-*King* Supreme Court precedent would require this Court to hold that Section 7703(b)(2) is nonjurisdictional and subject to equitable tolling.

Two developments in Supreme Court precedent. Two doctrinal shifts in the years since *King* require that it be cast aside.

First, under the modern precedent, a statutory time limit or other procedural requirement is not jurisdictional unless Congress has "clearly state[d]" that it is. *United States v. Kwai Fun Wong*, 575 U.S. 402, 409 (2015) (quoting *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153 (2013)). This clear-statement rule grew out of the Supreme Court's recent "endeavor[] … to 'bring some discipline' to the use of the term 'jurisdictional,'" by pressing "a stricter distinction between truly jurisdictional rules, which govern 'a court's adjudicatory authority,' and nonjurisdictional 'claim-processing rules,' which do not." *Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012) (internal citations omitted). A jurisdictional rule tells a court which class of cases it may decide or which category of persons over whom it may exercise authority. *Fort Bend Cnty. v. Davis*, 139 S. Ct. 1843, 1848 (2019). Nonjurisdictional claim-processing rules, on the other hand, simply "requir[e] that [] parties take certain procedural steps at certain specified times." *Id.* at 1849 (quoting *Henderson v. Shinseki*, 562 U.S. 428, 435 (2011)). As described below, this distinction carries doctrinal and practical

significance—including, for filing deadlines, whether or not equitable exceptions, such as tolling, apply. *See Boechler, P.C. v. Comm'r of Internal Revenue*, ___ S. Ct. ___, ___, 2022 WL 1177496, at *3 (Apr. 21, 2022).

Second, this clear-statement rule dovetails with a change in Supreme Court precedent governing equitable tolling. In *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), the Supreme Court broke with its "ad hoc" approach to determining which time limits in suits against the government are subject to equitable tolling. The prior approach, the Court said, had "the disadvantage of continuing unpredictability without the corresponding advantage of greater fidelity to the intent of Congress." *Id.* at 95. Thus, the Court held that "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." *Id.* at 95-96.

Together, these two lines of precedent require that filing deadlines against the government be treated as nonjurisdictional claim-processing rules, subject to equitable tolling, absent a clear congressional command to the contrary.

Applying the modern precedent to Section 7703(b)(2). Section 7703(b)(2)'s text demonstrates that, like most filing deadlines, it is a "quintessential claims processing rule[]," *Wong*, 570 U.S. at 410, because it speaks to what a litigant must do rather than what a court must do. *Fort Bend Cnty.*, 139 S. Ct. at 1850-51. Section 7703(b)(2) states simply that a lawsuit "must be filed within 30 days" of the MSPB's decision. Like most time limits,

this one is "important" and "framed in mandatory terms." *Wong*, 575 U.S. at 410.

But that is not enough to render a time limit jurisdictional. Instead, "Congress must do something special," *id.*, such as "define a federal court's jurisdiction over [a type of] claim[] generally, address its authority to hear untimely suits, or in [some] way cabin its usual equitable powers." *Id.* at 411; *cf.* 26 U.S.C. § 6213(a) (providing that "[t]he Tax Court *shall have no jurisdiction* to enjoin any action or proceeding or order any refund under this section unless a timely petition for a redetermination of the deficiency has been filed …") (emphasis added). Thus, by using only "mundane statute-of-limitations language," such as "must" or "shall," and by speaking only to the obligations of the prospective litigant, Congress did nothing special in Section 7703(b)(2). *See Wong,* 575 U.S. at 410-11. So, its 30-day limit is a nonjurisdictional claim-processing rule subject to equitable tolling under *Irwin*. *See Boechler*, ___ S. Ct. at ___, 2022 WL 1177496, at *5-7.

B. By contrast to the inquiry demanded by the Supreme Court precedent, *King* began its analysis from the wrong premise and, as a result, arrived at the wrong conclusion. *King* first observed that, "[g]enerally, statutory time limits for filing petitions for judicial review are *not* subject to enlargement." *King v. Dole*, 782 F.2d 274, 275 (D.C. Cir. 1990) (quoting *Brown v. Nat'l Highway Traffic Safety Admin.*, 673 F.2d 544, 545 (D.C. Cir. 1982)) (emphasis added). This presumption against equitable tolling runs headlong into *Irwin*. *See Irwin*, 498 U.S. at 95-96.

Armed with this erroneous premise, *King* then relied on the "clear and emphatic language" of Section 7703(b)(2)—its use of "must"—to conclude that its 30-day filing period is jurisdictional. *King*, 782 F.2d at 276. But, as already shown, in the years after *King*, "emphatic" mandatory language is not nearly enough to transform a filing deadline into a constraint on a court's subject-matter jurisdiction. *See Irwin*, 498 U.S. at 94-95; *see also Boechler*, ___ S. Ct. at ___, 2022 WL 1177496, at * 5; *Fort Bend Cnty.*, 139 S. Ct. at 1851; *Wong*, 575 U.S. at 410-11; *Henderson*, 562 U.S. at 439; *Holland v. Florida*, 560 U.S. 631, 647 (2010); *Kontrick v. Ryan*, 540 U.S. 443, 454-55 (2004). This Court has made the same point, explaining that a statute requiring that a claim "'shall be submitted within 6 years after the accrual of the claim'" was nonjurisdictional because it was "not stated in jurisdictional terms." *Menominee Indian Tribe of Wis. v. United States*, 614 F.3d 519, 524 (D.C. Cir. 2010).

II. The issue presented is important, and this petition is an ideal vehicle for considering it.

A. Whether Section 7703(b)(2)'s time limit is jurisdictional is a question "of considerable practical importance for judges and litigants." *Henderson v. Shinseki*, 562 U.S. 428, 434 (2011). "The distinction" between claim-processing and jurisdictional rules, "matters. Jurisdictional requirements cannot be waived or forfeited, must be raised by courts sua sponte, and, as relevant to this case, do not allow for equitable exceptions," such as tolling. *Boechler, P.C. v. Comm'r of Internal Revenue*, ___ S. Ct. ___, ___, 2022 WL 1177496, at * 3 (Apr.

21, 2022); *see Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006). Thus, when a federal court concludes that it lacks jurisdiction, "the court must dismiss the complaint in its entirety"—regardless of the stage of litigation. *Arbaugh*, 546 U.S. at 514. But if a statutory procedure is a nonjurisdictional claim-processing rule, litigants can rely on equitable exceptions to excuse their noncompliance. *See Boechler*, ___ S. Ct. at ___, 2022 WL 1177496, at *3; *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982).

Because of these consequences, courts have given considerable attention to whether a statute's time limit or similar procedural provision is jurisdictional. The Supreme Court has signaled the importance of the question by granting review on it at least fifteen times since *Irwin*.[4] This Court has also taken an interest in the issue.[5]

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[4] *See Arellano v. McDonough*, 142 S. Ct. 1106 (Feb. 22, 2022) (granting certiorari); *Boechler*, ___ S. Ct. at ___, 2022 WL 1177496, at *3; *Fort Bend Cnty. v. Davis*, 139 S. Ct. 1843, 1846 (2019); *Hamer v. Neighborhood Hous. Servs. of Chi.*, 138 S. Ct. 13, 16-17 (2017); *United States v. Kwai Fun Wong*, 575 U.S. 402, 405 (2015); *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 149 (2013); *Gonzalez v. Thaler*, 565 U.S. 134, 137 (2012); *Henderson*, 562 U.S. at 431; *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 157 (2010); *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133-34 (2008); *Bowles v. Russell*, 551 U.S. 205, 206-07 (2007); *Arbaugh*, 546 U.S. at 503; *Eberhart v. United States*, 546 U.S. 12, 13 (2005); *Scarborough v. Principi*, 541 U.S. 401, 412 (2004); *Kontrick v. Ryan*, 540 U.S. 443, 447 (2004); *Becker v. Montgomery*, 532 U.S. 757, 760 (2001).

[5] *See, e.g.*, *M.M.V. v. Garland*, 1 F.4th 1100, 1109 (D.C. Cir. 2021); *Jackson v. Modly*, 949 F.3d 763, 776 & 776 n.14 (D.C. Cir. 2020); *Auburn Reg'l Med. Ctr. v. Sebelius*, 642 F.3d 1145, 1150-51 (D.C. Cir. 2011), *rev'd and remanded*, 568 U.S. 145, 161 (2013), *and vacated*, 509 F. App'x 1 (D.C. Cir. 2013); *Menominee Indian Tribe of Wis. v. United States*, 614 F.3d 519, 523 (D.C. Cir. 2010); *Brookens*

B. District courts in this Circuit often hear "mixed cases," such as this one. In the last five years, they have dismissed at least three as jurisdictionally barred by Section 7703(b)(2) in reliance on *King*. Add. 1; *Ahuruonye v. U.S. Dep't of Interior*, 312 F. Supp. 3d 1, 22 (D.D.C. 2018); *Brookens v. Acosta*, 297 F. Supp. 3d 40, 49 (D.D.C. 2018), *aff'd sub nom. Brookens v. Dep't of Lab.*, 2018 WL 5118489 (D.C. Cir. Sept. 19, 2018). And other potential litigants have likely been harmed by the rule in *King*. Attorneys may well discourage their clients from filing otherwise valid claims beyond Section 7703(b)(2)'s 30-day period because they realize dismissal is inevitable under *King*, even when equitable tolling or another equitable exception could be available.

C. Overruling *King* would enhance inter-circuit harmony. *See* Fed. R. App. P. 35(b)(1)(B). Every circuit that has considered the question presented here with fresh eyes post-*Irwin* has held that Section 7703(b)(2)'s filing period is nonjurisdictional. *See Nunnally v. MacCausland*, 996 F.2d 1, 3-4 (1st Cir. 1993); *Blaney v. United States*, 34 F.3d 509, 513 (7th Cir. 1994); *Williams-Scaife v. Dep't of Def. Dependent Schs.*, 925 F.2d 346, 348 (9th Cir. 1991); *Montoya v. Chao*, 296 F.3d 952, 957 (10th Cir. 2002); *but see Dean v. Veterans Admin. Reg'l Off.*, 943 F.2d 667, 670 (6th Cir. 1991) (holding that Section 7703(b)(2) is jurisdictional based on earlier precedent but noting that "[i]f we were writing on a clean slate, we might well be persuaded" otherwise). And this Court has not shied away from overruling prior jurisdictional decisions in

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v. Dep't of Lab., 2018 WL 5118489, at *1 (D.C. Cir. Sept. 19, 2018) (affirming *Brookens v. Acosta*, 297 F. Supp. 3d 40, 42 (D.D.C. 2018)).

light of the modern Supreme Court precedent. *Jackson v. Modly*, 949 F.3d 763, 776 & 776 n.14 (D.C. Cir. 2020) (overruling a "long-held rule in our circuit" that 28 U.S.C. § 2401(a)'s time for commencing certain actions against the United States is jurisdictional in light of *Wong*). The Court should do the same here.

D. Because *King* makes Section 7703(b)(2) jurisdictional, any decision that is dismissed in reliance on *King* presents an ideal vehicle for overturning it. Here, as the district court held, *King*—and *King* alone—required dismissal of the complaint. And unless this Court overrules *King*, there is no chance that Robinson will have his claims heard on their merits.

Given the wide range of MSPB decisions to which Section 7703(b)(2) applies, the issue presented here—whether Section 7703(b)(2)'s filing period is a jurisdictional bar or a nonjurisdictional claim-processing rule—is not going away. This Court should provide an answer now—before the *King* rule does any further harm.

CONCLUSION

This petition for initial hearing en banc should be granted.

Respectfully submitted,

/s/Brian Wolfman

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May 6, 2022

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ADAM ROBINSON, Plaintiff, v. **DEPARTMENT OF HOMELAND SECURITY OFFICE OF INSPECTOR GENERAL**, Defendant.	Case No. 20-cv-2021 (CRC)

MEMORANDUM OPINION

The U.S. Department of Homeland Security ("DHS") sacked plaintiff Adam Robinson for poor performance of his job as a Program Analyst in its Office of Inspector General ("OIG"). Am. Compl. ¶¶ 5–6, ECF No. 20. Robinson challenged his firing before the Merit Systems Protection Board ("MSPB"), but an administrative law judge sided with the agency. Robinson now seeks review of the MSPB's decision. In this "mixed" case, he contends that his termination was contrary to the federal civil service standards for performance-based removals set forth in 5 U.S.C Chapter 43, and that it was both discriminatory and retaliatory under Title VII of the Civil Rights Act of 1964. Am. Compl. ¶ 18.

DHS has moved to dismiss Robinson's suit as untimely filed. See Motion to Dismiss at 6–7, ECF No. 24-3. Alternatively, it seeks summary judgment, arguing that the MSPB's decision was lawful and that Robinson cannot prove discrimination or retaliation. The Court agrees that Robinson missed the deadline to file his complaint. Because this filing deadline is jurisdictional and may not be enlarged, the Court lacks the power to review his claims and must, accordingly, dismiss the case.

I. Background

Mr. Robinson, who is African American, began working in DHS's Office of Inspector General in 2016. Opp'n at 1, ECF No. 28; Def's Ex. 1 at 2 ("MSPB Decision"). From December 2017 until his removal in 2019, Robinson served as a Program Analyst in the OIG's Office of Inspections and Evaluations. MSPB Decision at 2. He was assigned to a project which focused on investigating factors that made it difficult for the agency to remove undocumented immigrants after a final order of removal had been issued. Id. at 4; Am. Compl. ¶ 16. The team assigned to the project included Robinson, Senior Inspector Donna Ruth, Team Lead Inspector Lorraine Eide, and Chief Inspector Tatyana Martell. Opp'n at 1. Robinson reported directly to Eide and Martell, but technically his first-line supervisor was Supervisory Program Analyst Carrie Mellies. Meilles was not assigned to the same project as Robinson, so she received feedback on his performance from other managers, including Ms. Eide. MSPB Decision at 2, 4.

In March 2018, Eide began to express concerns to Mellies about the timeliness and accuracy of Robinson's work. MSPB Decision at 5–6. Mellies proceeded to hold a series of meetings with Robinson about his job performance. Id. at 6. In June 2018, Mellies issued Robinson an Opportunity to Demonstrate Acceptable Performance ("ODAP") memorandum. Am. Compl. ¶ 8. The OPAP indicated that Robinson's performance was "unacceptable" on three of seven critical job elements. MSPB Decision at 6. The ODAP gave Robinson 30 days to demonstrate acceptable performance. A week later, Robinson countered with an EEO complaint against Mellies and Eide alleging discrimination based on race and sex. Id. ¶ 9. At the end of the 30-day ODAP improvement period, Mellies concluded that Robinson had failed to demonstrate acceptable performance in the same three categories previously identified as needing improvement. MSPB Decision at 8. Accordingly, on August 8, 2018, Robinson was

issued a notice of proposed removal, and on February 1, 2019, he was formally removed from federal service. Am. Compl. ¶¶ 11, 12.

Robinson timely appealed his removal to the MSPB. Robinson claimed that the performance standards imposed in the ODAP were unduly rigid and unfair by comparison to similar employees. Id. ¶ 19. He also complained that the 30-day improvement period was too short, and that he was not provided the necessary training to meet the standards. Id. ¶ 20. Finally, Robinson contended that his removal was discriminatory because no white or female program analysts were held to the same high standards, and retaliatory because Mellies evaluated his work after she learned that she was named in his EEO complaint. Id. ¶¶ 10, 21–25.

An MSPB administrative law judge upheld Robinson's removal. She found substantial evidence to support the agency's conclusion that Robinson's performance during the ODAP period was deficient. MSPB Decision at 10–11, 22–24. She also found that 30 days was long enough to enable Robinson to demonstrate improved performance. Id. at 16. In support of these findings, the ALJ noted that one of Robinson's main responsibilities was to draft a "memorandum of record" or "MOR" after conducting an internal interview, and that OIG policy required MORs to be completed within three business days. Id. The ALJ found that when his ODAP was issued, Robinson had thirteen MORs that were partially drafted or outstanding, and during the ODAP improvement period eight were submitted late, two contained inaccuracies, and one was not submitted at all. Id. at 7, 18, 23. Finally, the ALJ found that Robinson had not established his claims of discrimination or retaliation by a preponderance of the evidence. Id. at 26–27. The MSPB Decision became final on May 20, 2020. Id. at 36.

Robinson, proceeding pro se at the time, filed suit in this Court on June 20, 2020. (More on that date later.) He renews his arguments before the MSPB that his removal ran afoul of federal civil service protections and was both discriminatory and retaliatory under Title VII.

II. Analysis

DHS moves to dismiss Robinson's suit under Rule 12(b)(1) on the grounds that he did not file his complaint before the applicable deadline and, as a result, the Court lacks subject matter jurisdiction. Mot. at 6. Robinson, now represented by counsel, opposes dismissal, claiming that the complaint was timely. Because the Court agrees with the government, it will not reach the other grounds advanced for dismissal and summary judgment.

Under 5 U.S.C. § 7703(b)(2), a plaintiff seeking judicial review of a MSPB final decision must file his civil action no later than 30 calendar days after the MSPB decision becomes final. This deadline is jurisdictional and therefore may not be enlarged. King v. Dole, 782 F.2d 274, 275–76 (D.C. Cir. 1986); see Brookens v. Acosta, 297 F. Supp. 3d 40, 45 (D.D.C. 2018), aff'd sub nom. Brookens v. Dep't of Lab., No. 18-5129, 2018 WL 5118489 (D.C. Cir. Sept. 19, 2018); Ahuruonye v. United States Dep't of Interior, 312 F. Supp. 3d 1, 22 (D.D.C. 2018) (same).

Because the MSPB decision became final on May 20, 2020, Robinson had until June 19, 2020 to file his complaint in this Court. Referencing the Court's official docket, the government points out that Robinson's complaint was not filed until June 20, 2020—one day after the deadline. Mot. at 7; see ECF No. 1 (showing the filing date June 20, 2020 for Robinson's initial complaint); see also Minute Order of 5/28/2021 (order correcting the docket and setting June 20, 2020 as the filing date in response to notification from the Clerk's office that the originally docketed filing date of July 24, 2020 was in error). Robinson does not contest that June 19, 2020 was the applicable deadline. Opp'n at 12. Nor does he dispute that the deadline is jurisdictional.

He instead contends that, contrary to the June 20 date indicated on the docket, the complaint was in fact delivered to the Clerk's office, and therefore filed, on June 17, 2020, two days before the deadline. Id. ("Plaintiff transmitted his action on June 15, 2020 to the Court via standard mail with a delivery date of June 17, 2020.").

Robinson is correct that under Federal Rules of Civil Procedure, "[a] paper is filed by . . . delivering it to the clerk." Morrison v. Nielsen, 325 F. Supp. 3d 62, 66 (D.D.C. 2018) (citing Moore v. Agency for Int'l Dev., 994 F.2d 874, 876 (D.C. Cir. 1993)).[1] Yet, the only proof he offers for a July 17 delivery date is his own declaration stating that "the complaint itself was in fact *mailed* on June 15, 2020." Pl's Exhibit E (Declaration of Adam Robinson), ECF No. 28-1 (emphasis added). Mailing obviously is not the same thing as delivery or receipt. And Robinson has provided no evidence—in the form of tracking information, a delivery receipt, a date stamp, or any other record or attestation—indicating that the complaint was delivered to or received by the Clerk's office before June 20, 2020 as reflected on the docket.[2] The record before the Court thus shows that the earliest possible date of receipt by the Clerk's Office was June 20, 2020, one day after the deadline for Robinson to file had expired. Accordingly, under King v. Dole, the Court lacks jurisdiction to hear the case and must dismiss it.[3]

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[1] The "prison mailbox rule," which deems filing to occur upon mailing, offers an exception to the general delivery rule governing deadlines. See Morrison, 325 F. Supp 3d at 66. But it is available only to pro se litigants who are incarcerated. Id.

[2] Robinson does point to the June 17, 2020 check for the filing fee that accompanied his complaint. Pl's Ex. E, ECF No. 28-1. However, the date of the check does not establish when the Clerk's office received it. If anything, a check dated two days after the purported mailing date (and only two days before the deadline) is consistent with a late delivery date of June 20.

[3] Following the filing of DHS's reply brief, Robinson's counsel filed a document entitled "Errata" accompanied by a "corrected" opposition brief (in which he includes arguments not presented in the first opposition), a Statement of Facts in Genuine Dispute (which he had neglected to file previously), and a second, expanded declaration from Mr. Robinson dated after

The Court notes that King has been subject to some criticism. See Brookens, 297 F. Supp. 3d at 47–49 (collecting cases); see also Becton v. Pena, 946 F. Supp. 84, 86 (D.D.C. 1996) (noting courts outside of the D.C. Circuit have concluded, following the Supreme Court's decision in Irwin v. Dep't of Veterans Affairs, 498 U.S. 89 (1990), that § 7703(b)(2)'s 30-day time limit is not jurisdictional and can be equitably tolled). But as Judge Kelly recently explained, unless and until the D.C. Circuit overrules King, this Court is bound to follow it. Brookens, 297 F. Supp. 3d at 49.[4]

Even if the Court were free to disregard King, Robinson still would not clear the high bar for equitable tolling. "Courts apply equitable tolling sparingly . . . and only in extraordinary and carefully circumscribed instances." Miller v. Downtown Bid Servs. Corp., 281 F. Supp. 3d 15, 20 (D.D.C. 2017) (internal quotation marks and citations omitted). "Generally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." Young v. Sec. & Exch. Comm'n, 956 F.3d 650, 655 (D.C. Cir. 2020). "When a deadline is missed as a result of a 'garden variety claim of excusable neglect' or a 'simple miscalculation,' equitable tolling is not justified." Menominee Indian Tribe of Wis. v. United States, 764 F.3d 51, 58 (D.C. Cir. 2014) (quoting Holland v. Florida, 560 U.S. 631, 651 (2010)).

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the submission of DHS's reply. The government fairly objects to these filings as improper. The Court need not weigh in, however, because Robinson's new declaration offers no additional evidence to support his contention that the complaint was timely filed.

[4] The Court need not grapple with the continued validity of King in any case because Robinson did not question King's applicability in his opposition brief. See Opp'n at 12–13. Arguments not raised in opposition to a motion are waived. Wannall v. Honeywell, Inc., 775 F.3d 425, 428 (D.C. Cir. 2014).

Again, Robinson says he mailed the complaint—via standard mail—on June 15, 2020, four days before the deadline. Even if that is so, he still assumed the risk that the pleading would not arrive on time. As the Supreme Court commented in applying another jurisdictional deadline, "a civil litigant who *chooses* to mail a notice of appeal assumes the risk of untimely delivery and filing." Houston v. Lack, 487 U.S. 266, 275 (1988) (emphasis in original). Robinson's pro se status at the time does not change the result. See United States v. Lawson, 608 F. Supp. 2d 58, 62 (D.D.C. 2009) ("[A] failure to meet the statutory deadline due to pro se representation is not a circumstance in which it is appropriate to toll the statute of limitations."); Oladokun v. Corr. Treatment Facility, 309 F.R.D. 94, 98 (D.D.C. 2015) (pro se litigants "are not excused from following procedural rules"); see also Miller, 281 F. Supp. 3d at 19 ("[C]ourts have strictly construed the [ninety]-day statute of limitations in Title VII cases, even where the plaintiff is proceeding pro se."). Nor does the Covid-19 pandemic provide Robinson an excuse. He attests that he contacted the Clerk's Office on June 15 and was informed "that filing deadlines were not being strictly enforced due to the Covid-19 pandemic." Pl's Ex. E (Declaration of Adam Robinson). But that purported call came on the same day he says he mailed the complaint—June 15—so he cannot claim that reliance on the Clerk's Office statement caused him to delay mailing. See Miller, 281 F. Supp. 3d at 21 (misunderstanding a filing deadline is not a basis for equitable tolling). And obviously the Clerk's Office lacks the authority to extend statutory deadlines.

On this record, then, the Court would find no basis for enlarging the deadline even if equitable tolling were available.

III. Conclusion

For the foregoing reasons, the Court will grant Defendant's Motion to Dismiss and deny its Motion for Summary Judgment. A separate Order shall accompany this memorandum opinion.

CHRISTOPHER R. COOPER
United States District Judge

Date: March 10, 2022

CERTIFICATE OF COMPLIANCE

This document complies with Federal Rule of Appellate Procedure 32(g)'s type-volume limitation. In compliance with Rule 35(b)(2)(A), it contains 3,809 words, excluding the parts of the petition exempted by Rule 32(f) and Circuit Rule 32(e)(1), and the petition has been prepared in proportionally spaced typeface using Palatino Linotype, 14-point, in Microsoft Word.

/s/Brian Wolfman
Brian Wolfman
Counsel for Plaintiff-Appellant

CERTIFICATE OF SERVICE

I certify that, on May 6, 2022, this petition was filed using the Court's CM/ECF system. All participants in the case are registered CM/ECF users and will be served electronically via that system.

/s/Brian Wolfman
Brian Wolfman
Counsel for Plaintiff-Appellant