

Freddie M. WILSON, Plaintiff-Appellant,
v.

SECRETARY, DEPARTMENT OF VET-
ERANS AFFAIRS, on Behalf of VET-
ERANS CANTEEN SERVICES, et al.,
Defendants-Appellees.

No. 95-30060
Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

Aug. 23, 1995.

Former employee brought Title VII action against government agency. The United States District Court for the Western District of Louisiana, Donald E. Walter, J., dismissed claim on ground that, because employee's request for appeal of Equal Employment Opportunity Commission (EEOC) decision was untimely, employee failed to exhaust administrative remedies. Employee appealed. The Court of Appeals held that: (1) letter to EEOC in which employee discussed information related to claim was not "appeal" of dismissal, and (2) overseas mail delays did not entitle employee to equitable tolling of time limit for filing appeal.

Affirmed.

1. Federal Courts ⇨776

Court of Appeals exercises de novo review of grant of summary judgment. Fed. Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

2. Administrative Law and Procedure ⇨413

Court of Appeals will reverse agency's interpretation of its regulations only if decision is arbitrary or capricious.

Synopsis, Syllabi and Key Number Classification
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The Synopsis, Syllabi and Key Number Classification constitute no part of the opinion of the court.

3. Civil Rights ⇨347

Former employee's letter to Equal Employment Opportunity Commission (EEOC), in which she discussed information related to her claim, was not "appeal" of EEOC decision, for purposes of determining whether she timely filed appeal; employee failed to comply with regulation requiring appeal on certain form indicating what was being appealed, and letter did not state that employee was appealing EEOC's decision. 29 C.F.R. § 1614.403(a).

See publication Words and Phrases for other judicial constructions and definitions.

4. Civil Rights ⇨347

Employee who alleged that overseas mail delays caused her appeal to be untimely was not entitled to equitable tolling of 30-day time limit for filing appeal of decision by Equal Employment Opportunity Commission (EEOC); employee's attorney could have acted for employee, and employee failed to explain why she did not notify her attorney of her intent to appeal in event of unfavorable decision or why she did not communicate via telephone or facsimile machine. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000c et seq.; 29 C.F.R. §§ 1614.402(b), 1614.604(c).

5. Civil Rights ⇨346

Complaining party in Title VII case bears burden of providing justification for application of equitable tolling principles. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000c et seq.; 29 C.F.R. § 1614.604(c).

6. Civil Rights ⇨347

Employee's claim for equitable tolling of 30-day time limit for filing appeal of decision

by Equal Employment Opportunity Commission (EEOC) is not necessarily precluded by employee's inability to satisfy one of three equitable bases for tolling set forth in *Chappel v. Emco Machine Works Co.*, i.e., pendency of suit between same parties in wrong forum, employee's unawareness of facts giving rise to claim because of employer's intentional concealment of them, and EEOC's misleading employee about nature of her rights; *Chappel* did not hold that those three were the only bases for tolling. 29 C.F.R. § 1614.604(c).

7. Civil Rights § 347

Notice to employee's attorney of Equal Employment Opportunity Commission (EEOC) decision constituted notice to employee for purpose of equitable tolling of time limit for filing appeal. 29 C.F.R. § 1614.402(b).

Appeal from the United States District Court for the Western District of Louisiana.

Before SMITH, EMILIO M. GARZA and PARKER, Circuit Judges.

PER CURIAM:

Freddie Wilson filed an action against Jesse Brown, Secretary of the Department of

1. Form 573 is the EEOC's "Notice of Appeal/Petition" form. 29 C.F.R. § 1614.403(a). Under the applicable regulations, "[t]he complainant should use EEOC Form 573, Notice of Appeal/Petition, and should indicate what he or she is appealing." *Id.*

Section 1614 became effective on October 1, 1992. 57 Fed.Reg. 12634 (1992). Wilson filed her complaint on December 17, 1991, before that section became effective. The EEOC should, therefore, have processed her complaint under the previous § 1613. *Id.* However, the time limit for appeal under

Veterans Affairs, James Donohoe, Director of Veterans Canteen Services, and Charles Lizyness, alleging violations of Title VII of the Civil Rights Act, 42 U.S.C. § 2000e (1988), and claims under the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680 (1988). The district court issued an order dismissing both claims or in the alternative granting summary judgment against Wilson. She appeals the court's ruling on the Title VII claim. We affirm.

I

On December 17, 1991, Wilson filed a formal complaint with the Equal Employment Opportunity Commission ("EEOC"), alleging that her supervisor had sexually harassed her during her employment with the Department of Veterans Affairs. The EEOC found her application untimely and dismissed her complaint. Wilson's attorney received notice of the EEOC decision on May 3, 1993, and mailed a copy to Wilson in Germany. Wilson received the decision on May 25, 1993, and mailed a letter to the EEOC on May 28, 1993, discussing information relating to her claim. On June 7, 1993, Wilson's attorney submitted a Form 573 to the EEOC, requesting an appeal of the Agency's decision.¹ The EEOC found that the notice violated the thirty-day time limit on such appeals and denied the appeal.² Subsequently, Wilson

§ 1613 is twenty days as compared to the thirty-day limit allowed by § 1614. 29 C.F.R. §§ 1613.233, 1614.402. Under § 1613, even Wilson's letter of May 28 would have been late; accordingly, we defer to the EEOC's decision to apply the more lenient regulations to Wilson's appeal.

2. The Commission used May 3—the date when Wilson's attorney received notice of the denial of her application—and June 7—the date that Wilson's attorney filed the Form 753 with the EEOC—to establish that she had not appealed within the thirty-day limit.

brought this action under Title VII of the Civil Rights Act and the Federal Tort Claims Act. The Secretary moved for summary judgment, arguing that because Wilson's request for appeal had been untimely, she had failed to exhaust her Title VII administrative remedies, thereby barring her from bringing an action in district court. The Secretary also argued that the district court lacked subject matter jurisdiction over the FTCA claim. The district court granted the motion for summary judgment on the Title VII claim, and it dismissed the FTCA claim with prejudice. Wilson now appeals.

II

[1] Wilson contends that the district court should not have granted summary judgment on her Title VII claim, arguing that the Agency erroneously dismissed her appeal because (1) her letter of May 28 was a notice of appeal filed within the statute of limitations, and (2) alternatively, equitable considerations entitle her to a tolling of the statute. We exercise de novo review of the grant of a summary judgment. *Duffy v. Leading Edge Prods., Inc.*, 44 F.3d 308, 312 (5th Cir.1995). Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits if any show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c).

Wilson argues that the EEOC incorrectly decided that her appeal was untimely. "If an EEOC charge is untimely filed, a suit based upon the untimely charge should be dismissed." *Barrow v. New Orleans S.S. Ass'n*, 932 F.2d 473, 476-77 (5th Cir.1991); *Templeton v. Western Union Tel. Co.*, 607 F.2d 89, 91 (5th Cir.1979) (per curiam); see also *Na-*

tional Ass'n of Gov't Employees v. Serv., 40 F.3d 698, 711 (5th Cir.1994) ("[C]ourts have no jurisdiction over Title VII claims as to which the party has not exhausted administrative remedies.").

[2] We will reverse an agency action of its regulations only if the action is arbitrary or capricious. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 443 U.S. 286, 2866, 443 (1983) ("The scope of review 'arbitrary and capricious' standard and a court is not to substitute its own for that of the agency."); *Wilson v. States Dep't of Agric.*, 991 F.2d 1215 (5th Cir.1993) (looking "at the agency's decision to determine if it was reasonable, arbitrary or capricious in manner." *Id.*, — U.S. —, 114 S.Ct. 649 (1994). "A decision is arbitrary or capricious only when it is 'so arbitrary or capricious only when it is 'so that it could not be ascribed to a rational view or the product of agency action.'") *Wilson*, 991 F.2d at 1215 (quoting *Vehicle Mfrs. Ass'n*, 463 U.S. at 467 at 2867). "The agency decision must have a rational basis, and it does not matter whether the decision was made." *Wilson*, 991 F.2d at 1215.

[3] Wilson argues that her Title VII claim was not exhausted by her appeal to the EEOC on May 28 was an appeal under the statute of limitations. EEOC regulations provide that:

The complainant, agent, grievant, individual class claimant (hereinafter "complainant") must file an appeal with the Director, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 19848, Washington, D.C. 20547, by personal delivery or facsimile. The complainant should use EEOC

such less forgiving the claimant in preserving *v. Department of* 89, 96, 111 S.Ct. (1990); *see also* *Cir. v. Brown*, 466 1723, 1726, 80 (riam) ("One who t invoke equitable ck of diligence."); 904, 906 (5th Cir. ice to warrant eq-

ite all "due dili- lelays caused her Such delays, she umstance beyond entitle her to eq- ms to have acted she provides no n. She fails to have notified her peal in the event the EEOC. She e could not have communicated via hine. Because it meliorate the her untimely D.C. Circuit that rant tolling. *See* 91 (D.C.Cir.1990) ys to Philippines :cuse lack of dili-

tent, we question as delays to Willing, because her ded for her. No- tituted notice to 96, 111 S.Ct. at 314.402(b) ("If the

complainant is represented by an attorney of record, then the 30-day time period . . . shall be calculated from the receipt of the required document by the attorney."), and Wilson offers no explanation for her attorney's failure to protect her rights. Accordingly, Wilson's counsel's inaction does not warrant an extension of the limitations period. *See Irwin*, 498 U.S. at 96, 111 S.Ct. at 458 (refusing to toll a 30 day statute of limitations in a Title VII case, where the plaintiff was late in filing because his attorney had been out of the office when the EEOC notice was received,

and holding that "principles of equitable tolling . . . do not extend to what is at best a garden variety claim of excusable neglect"). Wilson has filed to meet her burden to show that the EEOC should have applied equitable tolling to her appeal; therefore, the district court properly granted summary judgment to the Secretary.

III

For the foregoing reasons, we AFFIRM the judgment of the district court.