

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Alice Faye O'Donnell,
Plaintiff-Appellant,

v.

Vencor Inc., aka First Healthcare Corporation dba Kachina Point Health Center; KACHINA POINT HEALTHCARE; DOES, 1 through 25, inclusive; RED, WHITE, AND BLUE ENTITIES, INCLUSIVE,
Defendants-Appellees,

and

Kindred Nursing Center West, LLC,

Defendant.

No. 05-15687
D.C. No.
CV-01-01836-EHC
OPINION

Appeal from the United States District Court
for the District of Arizona
Earl H. Carroll, District Judge, Presiding

Argued and Submitted
August 15, 2006—San Francisco, California

Filed October 10, 2006

Before: William C. Canby, Jr., David R. Thompson, and
Michael Daly Hawkins, Circuit Judges.

Per Curiam Opinion

COUNSEL

Nicholle Harris and Aeryn Heidermann, Law Students, and Willie Jordan-Curtis, Supervising Attorney, University of Arizona, Tucson, Arizona, for the plaintiff-appellant.

Thomas L. Hudson, Phoenix, Arizona, for the defendants-appellees.

OPINION

PER CURIAM:

Pro se plaintiff-appellant Alice Faye O'Donnell ("O'Donnell") appeals the district court's dismissal of her employment discrimination claims as time-barred. O'Donnell asserts that the district court should have applied the doctrines of equitable tolling, equitable estoppel, or laches to excuse her filing her second action after the statute of limitations had expired.

We review de novo whether a claim is barred by a statute of limitations. *See Santa Maria v. Pac. Bell*, 202 F.3d 1170, 1175 (9th Cir. 2000). Because the facts here are undisputed, we review de novo whether to apply equitable tolling. *See id.* We review for an abuse of discretion the district court's decision whether to apply equitable estoppel. *See id.* at 1176. We review de novo whether laches is available as a matter of law and for an abuse of discretion the district court's decision whether to apply laches to the facts. *See In re Beaty*, 306 F.3d 914, 920-21 (9th Cir. 2002).

O'Donnell originally timely filed her first complaint asserting a claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, (“Title VII”), and a claim under the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.*, (“ADEA”). She filed that complaint within ninety days after the issuance of her right-to-sue letter by the EEOC. *See* 42 U.S.C. § 2000e-5(f)(1); 29 U.S.C. § 626(e). The defendants thereafter filed for bankruptcy and an automatic stay was issued. During the pendency of the stay, O'Donnell's first complaint was dismissed without prejudice for failure to prosecute. She did not appeal that dismissal. After the bankruptcy automatic stay was lifted, O'Donnell filed a second complaint against the defendants on September 27, 2001, repeating her Title VII and ADEA claims. In an amendment to that second complaint, which amendment she filed December 1, 2003, O'Donnell advanced new claims under the Equal Pay Act, 29 U.S.C. § 206 (“EPA”). We affirm the district court's dismissal of O'Donnell's Title VII and ADEA claims, but reverse and remand for further proceedings on O'Donnell's EPA claims.

I. Title VII and ADEA Claims

[1] O'Donnell's claims under Title VII and the ADEA are untimely because she filed her second complaint more than ninety days after the EEOC's issuance of her right-to-sue letter. *See* 42 U.S.C. § 2000e-5(f)(1); 29 U.S.C. § 626(e). O'Donnell's second complaint does not “relate back” to her first complaint because her second complaint was not an “amendment” to her first complaint, but rather a separate filing. *See* FED. R. CIV. P. 15(c)(2).

[2] Assuming, *arguendo*, that the doctrine of equitable tolling could be applied to O'Donnell's situation, it would not save her Title VII or ADEA claims. In instances where a complaint is timely filed and later dismissed, the timely filing of the complaint does not “toll” or suspend the ninety-day limitations period. *See Minnette v. Time Warner*, 997 F.2d 1023,

1027 (2d Cir. 1993); *see also Wei v. State of Hawaii*, 763 F.2d 370, 372 (9th Cir. 1985) (per curiam). “In such cases, dismissal of the original suit, even though labeled as without prejudice, nevertheless may sound the death knell for the plaintiff’s underlying cause of action if the sheer passage of time precludes the prosecution of a new action.” *Chico-Velez v. Roche Prods., Inc.*, 139 F.3d 56, 59 (1st Cir. 1998). Contrary to O’Donnell’s assertion, it is irrelevant that the dismissal of her first complaint without prejudice was “involuntary” rather than “voluntary.” *See Wei*, 763 F.2d at 372; *see also* 8 JAMES WM. MOORE, ET AL., MOORE’S FEDERAL PRACTICE § 41.50(7)(b) (3d ed. 1997).

[3] Here, the ninety-day limitations period had run before the defendants filed for bankruptcy and the automatic stay was issued. At that point, there was no longer any time left in the ninety-day limitations period to equitably toll. Therefore, equitable tolling would not save O’Donnell’s Title VII or ADEA claims.

[4] The district court did not abuse its discretion in not applying equitable estoppel based on O’Donnell’s alleged reliance on the defendants’ notice of the bankruptcy automatic stay. “Equitable estoppel focuses primarily on the actions taken by the defendant in preventing a plaintiff from filing suit” *Santa Maria*, 202 F.3d at 1176. “A finding of equitable estoppel rests on the consideration of a non-exhaustive list of factors, including: (1) the plaintiff’s actual and reasonable reliance on the defendant’s conduct or representations, (2) evidence of improper purpose on the part of the defendant, or of the defendant’s actual or constructive knowledge of the deceptive nature of its conduct, and (3) the extent to which the purposes of the limitations period have been satisfied.” *Id.* Equitable estoppel is not warranted here because there is no “evidence of improper purpose on the part of the defendant, or of the defendant’s actual or constructive knowledge of the deceptive nature of its conduct.” *Id.*

[5] The defendants' motion to dismiss based on the statute of limitations is not barred by laches despite its filing over two years after O'Donnell's second complaint. To successfully establish laches, a party must show that (1) there was inexcusable delay in the assertion of a known right and (2) the party asserting laches has been prejudiced. *See Miller v. Glenn Miller Prods., Inc.*, 454 F.3d 975, 997 (9th Cir. 2006). Here, O'Donnell was not prejudiced by the delay because she had timely notice of the statute of limitations defense from the defendants' answer and the delay was reasonable because it was due to multiple stays entered while the parties pursued settlement talks and O'Donnell sought an attorney.

[6] We, therefore, affirm the district court's dismissal of O'Donnell's Title VII and ADEA claims as untimely.

II. Equal Pay Act Claims

O'Donnell's EPA claims, by contrast, are timely because (1) the December 1, 2003 amendment asserting the EPA claims "relates back" to the second complaint filed September 27, 2001; and (2) equitable tolling applies, making the second complaint timely under the EPA statute of limitations.

[7] A later pleading "relates back" to the original pleading if the claims in the later pleading "arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." FED. R. CIV. P. 15(c)(2). Although O'Donnell first raised her EPA claims in the December 1, 2003 amendment, the facts alleged in O'Donnell's second complaint filed September 27, 2001 in support of her Title VII and ADEA claims — that her hours had been given to a male van driver, that a part-time male driver with less seniority had been promoted and paid a higher salary, and that she was required to perform more tasks for less pay than male van drivers — also form the basis for the EPA claims she asserted in her December 1, 2003 amendment. Because the allegations and type of evidence necessary for O'Donnell to succeed on

her EPA claims are identical to what she alleged in her second complaint, *see* 29 U.S.C. § 206(d)(1) (specifying that jobs are equal if their performance requires “equal skill, effort, and responsibility” and they are performed under “similar working conditions”), the December 1, 2003 amendment “relates back” to the second complaint which O’Donnell filed September 27, 2001. *See In re Markus*, 313 F.3d 1146, 1150-51 (9th Cir. 2002); *In re Dominguez*, 51 F.3d 1502, 1510 (9th Cir. 1995). Moreover, the second complaint gave the defendants adequate notice of the substance of O’Donnell’s EPA claims and thus the defendants cannot show prejudice from the addition of the EPA claims arising out of the same facts. *See Santana v. Holiday Inns, Inc.*, 686 F.2d 736, 739 (9th Cir. 1982).

[8] Because O’Donnell’s assertion of her EPA claims relates back to the time she filed her second complaint, her EPA claims were timely filed if the statute of limitations for those EPA claims was equitably tolled. We hold that it was.

[9] Limitations periods are “customarily subject to ‘equitable tolling.’ ” *Irwin v. Dep’t of Veterans Affairs*, 498 U.S. 89, 95 (1990), unless tolling would be “inconsistent with the text of the relevant statute,” *United States v. Beggerly*, 524 U.S. 38, 48 (1998). Equitable tolling is generally applied in situations “where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary’s misconduct into allowing the filing deadline to pass.” *Irwin*, 498 U.S. at 96 (footnotes omitted). However, the Supreme Court in *Young v. United States*, 535 U.S. 43, 50-51 (2002), also applied equitable tolling in the situation where, as here, a bankruptcy petition erected an automatic stay under 11 U.S.C. § 362 which prevented the claimant from taking steps to protect her claim.

[10] Here, the defendants created the situation which impeded O’Donnell from pursuing her EPA claims, and they cannot now claim to be prejudiced by the application of equi-

table tolling. See *Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147, 152 (1984) (“absence of prejudice is a factor to be considered in determining whether the doctrine of equitable tolling should apply once a factor that might justify such tolling is identified”). Because nothing in the EPA precludes equitable tolling of the limitations period, *Young*, 535 U.S. at 47, we hold that the period of time commencing upon the issuance of the automatic stay and ending thirty days after notice of termination of the stay, see 11 U.S.C. § 108(c)(2), must be excluded from the applicable EPA limitations period, which is two years for a general violation and three years for a “willful” violation, 29 U.S.C. § 255(a). See also *United States v. Ibarra*, 502 U.S. 1, 4 n.2 (1991) (“Principles of equitable tolling usually dictate that when a time bar has been suspended and then begins to run again upon a later event, the time remaining on the clock is calculated by subtracting from the full limitations period whatever time ran before the clock was stopped.”).

[11] Each discriminatory paycheck O'Donnell received constitutes a separate violation of the EPA with a cause of action accruing (and the running of the limitations period commencing) upon the receipt of the discriminatory paycheck. See *Bazemore v. Friday*, 478 U.S. 385, 395 (1986) (Brennan, J., concurring in part, joined by all other members of the Court) (“Each week’s paycheck that delivers less to a [disadvantaged class member] than to a similarly situated [favored class member] is a wrong actionable under Title VII”); *Bartelt v. Berlitz Sch. of Languages of Am., Inc.*, 698 F.2d 1003, 1007 (9th Cir. 1982) (describing 29 U.S.C. § 255 as rendering employer who commits willful violation under EPA liable for back pay for up to three years before suit is filed); *Rural Fire Prot. Co. v. Hepp*, 366 F.2d 355, 361-62 (9th Cir. 1966) (finding that cause of action accrued at end of each pay period when minimum and maximum wage provisions of 29 U.S.C. §§ 206, 207 violated). Therefore, although the EPA violations may have been continuing, the continuing violation doctrine does not permit O'Donnell to recover back

pay for discriminatory pay periods outside the applicable statute of limitations period. *See Pollis v. New Sch. for Soc. Research*, 132 F.3d 115, 118-19 (2d Cir. 1997); *Knight v. Columbus*, 19 F.3d 579, 582 (11th Cir. 1994); *Ashley v. Boyle's Famous Corned Beef Co.*, 66 F.3d 164, 168 (8th Cir. 1995) (en banc), *abrogation on other grounds recognized by Madison v. IBP, Inc.*, 330 F.3d 1051, 1056-57 (8th Cir. 2003); *Brinkley-Obu v. Hughes Training, Inc.*, 36 F.3d 336, 351 (4th Cir. 1994); *Gandy v. Sullivan County*, 24 F.3d 861, 865 (6th Cir. 1994); *E.E.O.C. v. McCarthy*, 768 F.2d 1, 3 n. 4 (1st Cir. 1985).

[12] We therefore reverse the district court's dismissal of O'Donnell's EPA claims and remand for further proceedings to determine whether the defendants violated the EPA and, if so, to determine the applicable statute of limitations and the period and amount of back pay recoverable. *See* 29 U.S.C. § 255(a).

**AFFIRMED IN PART, REVERSED AND
REMANDED IN PART.**