

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MORRIS HOLENDER :
 :
 v. : CIVIL ACTION
 :
 : NO. 05-CV-5956
 MUTUAL INDUSTRIES :
 NORTH INC. :

SURRICK, J.

OCTOBER 20, 2006

MEMORANDUM & ORDER

Presently before the Court is Defendant's Motion To Dismiss Plaintiff's Complaint Pursuant To Federal Rule of Civil Procedure 12(h)(3) (Doc. No. 10).¹ For the following reasons, the Motion will be treated as a motion for summary judgment and will be granted.

I. BACKGROUND

Plaintiff's Complaint alleges that on or about July 10, 2005, Plaintiff Morris Holender, a 59 year-old male, interviewed for a position with Defendant Mutual Industries North Inc. ("Mutual") as a customer service representative. (Doc. No. 1 ¶¶ 13-14.) During the interview, Mutual's representative, Edmund Dunn, asked Plaintiff the following question: "I am not allowed to ask you these questions under law, but if I were to ask you these questions, but remember that I am not allowed to ask you, . . . what year did you graduate from high school?" (*Id.* ¶ 16.) Reluctantly, Plaintiff responded that he graduated from high school in 1965. (*Id.* ¶ 18.) Dunn then informed Plaintiff that Mutual was looking to fill the position shortly and that he would contact Plaintiff after his references were checked. (*Id.* ¶ 19.) Mutual never contacted Plaintiff's

¹ Plaintiff's Complaint was filed on November 14, 2005. Defendant filed on Answer to the Complaint on March 8, 2006. This Motion was filed on July 7, 2006.

references, nor did they contact him about the position. (*Id.* ¶ 20).

On or about August 23, 2005, Plaintiff submitted a charge form to the Philadelphia office of the Equal Employment Opportunity Commission (“EEOC”), along with a written statement describing the details of the incident with Mr. Dunn. (Doc. No. 10 at Ex. B.) On October 19, 2005, the EEOC sent Plaintiff’s attorney a letter requesting additional information about Plaintiff’s “inquiry” regarding his allegations of age discrimination. (*Id.* at Ex. C.) That letter stated, in pertinent part:

[B]efore the EEOC can formally docket this matter as a charge and begin its investigatory and/or mediation process, certain additional/supporting information from you/your client is required. . . .On receipt of the completed questionnaires (or equivalent information), the EEOC will review your response to determine whether or not this inquiry should be formalized as a charge. The EEOC will advise you of that decision and of what additional steps (if any) you/your client must take in order to complete this part of the EEOC’s processing.

(*Id.* at Ex. C.) Even though Plaintiff was represented by counsel, there was no response to the EEOC’s requests. (*Id.* at 2.) As a result, the EEOC never filed a formal charge or began an investigation. Despite this, Plaintiff filed this action on November 14, 2005, alleging that Mutual violated his rights under the ADEA. (Doc. No. 1.)

II. LEGAL STANDARD

Mutual has filed a Motion to Dismiss Plaintiff’s Complaint pursuant to Federal Rule of Civil Procedure 12(h)(3), arguing that the Court lacks subject matter jurisdiction over this case as a result of Plaintiff’s failure to file a proper charge with the EEOC.² We will, nevertheless, treat

² Federal Rule of Civil Procedure 12 (h)(3) states: “Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.” Fed. R. Civ. P. 12 (h)(3).

Mutual's Motion as one for summary judgment under Federal Rule of Civil Procedure 56. In *Anjelino v. New York Times Co.*, 200 F.3d 73 (3d Cir. 2000), the Third Circuit determined that the exhaustion of administrative remedies requirement under the ADEA is "in the nature of a statute of limitations" and "does not affect the District Court's subject matter jurisdiction." *Id.* at 87 (citing *Hornsby v. U.S. Postal Serv.*, 787 F.2d 87, 89 (3d Cir. 1986) (internal citations omitted)). The *Anjelino* Court concluded that "the characterization either of lack of exhaustion or of untimeliness as a jurisdictional bar is particularly inapt" in these cases and that district courts should consider exhaustion and timeliness defenses under Rule 12(b)(6) or under Rule 56 "to the extent that the court considers evidence beyond the complaint." Since we consider evidence beyond the Complaint we will, as did the court in *Anjelino*, treat Defendant's Motion as a motion for summary judgment.³

Summary judgment is appropriate "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). A genuine issue of material fact exists only when "the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The party moving for summary judgment bears the initial burden of demonstrating that there are no facts supporting the non-moving party's legal position. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24 (1986). Once the

³ We note that Plaintiff has addressed the Motion as a "Motion for Summary Judgment." (Doc. No. 12.) As such, we will consider the exhibits attached to Defendant's Motion, including the charge he filed with the EEOC and the EEOC's response letter.

moving party carries this initial burden, the nonmoving party must set forth specific facts showing that there is a genuine issue for trial. Fed.R.Civ.P. 56(e); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (explaining that the nonmoving party “must do more than simply show that there is some metaphysical doubt as to the material facts”). “The nonmoving party . . . ‘cannot rely merely upon bare assertions, conclusory allegations or suspicions’ to support its claim.” *Townes v. City of Phila.*, Civ. A. No. 00-CV-138, 2001 U.S. Dist. LEXIS 6056, at *4 (E.D. Pa. May 11, 2001) (quoting *Fireman's Ins. Co. v. DeFresne*, 676 F.2d 965, 969 (3d Cir.1982)). Rather, the party opposing summary judgment must go beyond the pleadings and present evidence through affidavits, depositions, or admissions on file to show that there is a genuine issue for trial. *Celotex*, 477 U.S. at 324. When deciding a motion for summary judgment, the court must view facts and inferences in the light most favorable to the nonmoving party. *Anderson*, 477 U.S. at 255; *Siegel Transfer, Inc. v. Carrier Express, Inc.*, 54 F.3d 1125, 1127 (3d Cir. 1995). We will not resolve factual disputes or make credibility determinations. *Siegel Transfer, Inc.*, 54 F.3d at 1127.

III. LEGAL ANALYSIS

Defendant argues that Plaintiff failed to properly comply with the ADEA’s requirement that claimants file a written charge with the EEOC alleging unlawful discrimination with the EEOC at least sixty (60) days before commencing a civil action for age discrimination.⁴

⁴ 29 U.S.C. § 626(d) states, in pertinent part:

(d) Filing of charge with Commission; timeliness; conciliation, conference and persuasion

No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed—

Plaintiff, citing *Rabzak v. County of Berks*, 815 F.2d 17 (3d Cir. 1987), responds that he did, in fact, file a proper “Charge of Discrimination” with the EEOC along with a sworn statement detailing the incident in question. “A communication to the EEOC in or reduced to writing, including an intake questionnaire, may constitute a charge if it is ‘of a kind that would convince a reasonable person that the grievant has manifested an intent to activate the Act’s machinery.’” *Gulezian v. Drexel Univ.*, Civ. No. 98-3004, 1999 WL 153720, at *3 (E.D. Pa. Mar. 19, 1999) (quoting *Bihler v. Singer Co.*, 710 F.2d 96, 99 (3d Cir. 1983)). Plaintiff’s filings with the EEOC would appear to satisfy this requirement. However, “courts have held that intake questionnaires or other communications do not constitute a charge where the EEOC advises the grievant that he will need to provide further information and get back in touch with the agency to complete a formal charge and commence an investigation.” *Gulezian*, 1999 WL 153720, at *3 (citing *Diez v. Minn. Mining and Mfg. Co.*, 88 F.3d 672, 677 (8th Cir. 1996)). This is particularly true where the plaintiff is represented by counsel. *See Zysk v. FFE Minerals USA Inc.*, 225 F. Supp. 2d 482, 489 (E.D. Pa. 2001) (“We agree with those cases suggesting that a represented or a sophisticated plaintiff should be held to a higher standard with respect to his/her need to pursue all claims in a

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- (1) within 180 days after the alleged unlawful practice occurred; or
 - (2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination proceedings under State law, whichever is earlier.

Upon receiving such a charge, the Commission shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference and persuasion.

29 U.S.C. § 626(d).

timely manner.”).

In this case, the record demonstrates that the EEOC sent Plaintiff’s attorney a letter indicating that the EEOC would not file a formal charge until Plaintiff completed and returned questionnaires concerning his claim. Plaintiff and/or his attorney completely disregarded this letter. They failed to fill out the questionnaires provided to them by the EEOC and failed to supply the EEOC with any additional information. To permit Plaintiff’s claim to proceed under these circumstances would seriously undermine the entire purpose of the ADEA’s administrative process. *See Diez*, 88 F.3d at 676 (“The purpose of distinguishing questionnaires meant to activate the machinery of the ADEA from those that are merely preliminary to a charge is not to keep plaintiffs out of court, but to assure that the ADEA works as it is supposed to.”). The intentional failure of Plaintiff and his counsel to comply with the EEOC’s request “frustrates a major goal of the ADEA, which is to encourage pre-litigation resolution of claims.” *Id.* at 676-77.

We are, of course, sensitive to the fact that parties seeking redress under the ADEA are often unrepresented during the administrative process. In such cases, a claimant’s pro se status must be taken into consideration. However, that is not the case here. Plaintiff was represented by counsel when he filed his initial papers. The EEOC’s letter requesting additional information and advising that Plaintiff’s filing would not be formalized as a charge until the EEOC had received the additional information was addressed to his attorney. The result of the failure to provide the additional information was that no charge was ever filed and there was no administrative process. Clearly, Plaintiff did not properly comply with the administrative exhaustion requirements of §626(d). Accordingly, the Motion for Summary Judgment will be

granted in favor of Defendant.

An appropriate Order follows.

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MORRIS HOLENDER	:	
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v.	:	
	:	NO. 05-CV-5956
MUTUAL INDUSTRIES NORTH INC.	:	
	:	

ORDER

AND NOW, this 20th day of October, 2006, upon consideration of Defendant's Motion To Dismiss Plaintiff's Complaint Pursuant To Federal Rule of Civil Procedure 12(h)(3), (Doc. No. 10), which the Court has treated as a Motion for Summary Judgment under Rule 56, and all papers submitted in support thereof and in opposition thereto, it is ORDERED that the Motion is GRANTED. Judgment is entered in favor of Defendant Mutual Industries North, Inc., and against Plaintiff Morris Holender.

IT IS SO ORDERED.

BY THE COURT:

/s/ R. Barclay Surrick

U.S. District Court Judge