UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF PENNSYLVANIA

SHARYN L. SEITZINGER,	)	CIVIL ACTION
	)	
	)	NO. 95-5926
Plaintiff	)	
	)	
vs.	)	
	)	
THE READING HOSPITAL AND MEDICAL CENTER,	)	
	)	
	)	
Defendant	)	

TROUTMAN, S.J.

M E M O R A N D U M

Before the Court in this Title VII action is the defendant's motion to dismiss or for summary judgment. Reading Hospital contends that plaintiff did not file this action within 90 days of receiving a "right-to-sue" letter as required by the statute. In response to the motion, plaintiff Sharyn Seitzinger argues that because there is nothing in the record which establishes when the right to sue letter was received by plaintiff or her former counsel, the motion should be denied for lack of evidence that the complaint was untimely filed.

I. Factual Background and Procedural History

Sharyn Seitzinger alleges that on July 1, 1993, she was terminated from her job as a counselor in the drug and alcohol department of the Reading Hospital Center for Mental Health. She complains of age discrimination and gender-based disparate

treatment in that she was immediately suspended and later forced to resign after she was accused of only one incident of discourteous behavior toward a supervisor. Plaintiff also alleges that similarly situated male employees were counseled and/or progressively disciplined for repeated and more serious performance problems, involving both staff and patients, before the male employees were discharged by the hospital.

Within 180 days of her resignation, plaintiff filed charges with the Pennsylvania Human Relations Commission, (PHRC), and the federal Equal Employment Opportunity Commission, (EEOC). She later withdrew her PHRC charge and her claim was investigated by the EEOC. (Defendant's Motion to Dismiss or for Summary Judgment, (Doc. #7). On March 17, 1995, the EEOC issued a written determination, stating that its investigation had established a violation of the Title VII prohibition against sex discrimination and that the facts did not support the conclusion that age discrimination was a motivating factor in the termination of plaintiff's employment. (See, Plaintiff's Motion to Vacate Order of Dismissal, (Doc. #3), Exh. B).

Thereafter, the EEOC undertook conciliation efforts which were ultimately unsuccessful. In a letter dated May 30, 1995, the EEOC informed plaintiff that, pursuant to her request, the case would not be transferred to the Legal Unit, a "Right-to-Sue" would be issued, and plaintiff could further pursue the matter by instituting a lawsuit within 90 days of receiving the

right-to-sue. (Id., Exh. C). The complaint in instant action was filed on September 19, 1995.

In June, 1996, the action was dismissed by the Court sua sponte pursuant to Fed. R. Civ. P. 4(m), when plaintiff's counsel failed to respond to a notice from the Court to produce proof of service of the complaint. (See, Order dated June 7, 1996, (Doc. #2)).

Late in the summer of 1996, plaintiff herself called chambers to check on the progress of her case. Upon learning that the case was closed, plaintiff wrote to inform the Court that her attorney had been disbarred and, in the months prior to his termination from the practice of law, had informed her that everything necessary to proceed with her court action had been completed. In fact, however, plaintiff's counsel had failed to timely serve the complaint.

Based upon this information and the broad discretion now afforded the Court by Fed. R. Civ. P. 4(m), we reinstated the case and permitted plaintiff an extension of time in which to serve the complaint. (See, Order of October 21, 1996, (Doc. #4)). In so doing, we declined to rely upon defendant's assertion that such extension would be futile, since the complaint was subject to dismissal for having been filed more than 90 days after plaintiff received the right-to-sue letter. Several weeks later, we likewise refused plaintiff's request to broaden our order reinstating the case by explicitly determining

that the action had been timely commenced. (See, Memorandum and Order of November 27, 1996, (Doc. #6)).

On November 25, 1996, plaintiff, now proceeding pro se, filed proof that personal service of the complaint had been effected on November 19, 1996. Defendant subsequently filed the pending motion to dismiss or for summary judgment and plaintiff appropriately responded thereto. The timeliness issue, therefore, is now properly before the Court.

II. Applicable Legal Standards

In general, when considering motions to dismiss for failure to state a claim upon which relief can be granted, the Court must accept as true all the factual averments in plaintiffs' well-pleaded complaint; the Court must construe the complaint in a light most favorable to plaintiffs; and the Court must determine whether, "under any reasonable reading of the pleadings, the plaintiff[s] may be entitled to relief." Colburn v. Upper Darby Township, 838 F.2d 663, 665-666 (3d Cir. 1988) (citing, Estate of Bailey by Oare v. County of York, 768 F.2d 503, 506 (3d Cir. 1985)). The Court is not, however, required to accept the truthfulness of opinions, legal conclusions or deductions derived from the actual allegations of fact. Government Guarantee Fund v. Hyatt Corporation, 955 F. Supp. 441 (D. Virgin Islands 1997).

In disposing of a Rule 12(b)(6) motion to dismiss, the Court is ordinarily limited to considering the sufficiency of the

claims based upon the pleadings alone, and, "if matters outside the pleadings are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56 and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Fed. R. Civ. P. 12(b)(6). Such rule, however, is not absolute. Rather, in deciding a Rule 12(b)(6) motion the Court may likewise consider "matters of public record, exhibits attached to the complaint and items appearing in the record of the case." Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1384, n. 3 (3rd Cir. 1994).

With respect to this action, however, we do not need to consider whether it is permissible to go beyond the pleadings in order to reach the substance of defendant's Rule 12(b)(6) motion, since defendant has, in the alternative, requested summary judgment.

A motion for summary judgment may be filed by a defending party at any time after commencement of an action and shall be granted when there are no genuine issues of material fact in dispute and the movant is entitled to judgment as a matter of law. Fed.R.Civ.P 56(b), (c).

To support denial of summary judgment, an issue of fact in dispute must be both genuine and material, i.e., one upon which a reasonable factfinder could base a verdict for the non-moving party and one which is essential to establishing the

claim. Anderson v. Liberty Lobby, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed. 2d 202 (1986). The Court is not permitted, when considering a motion for summary judgment, to weigh the evidence or make determinations as to the credibility thereof. Our sole function, with respect to the facts, is to determine whether there are any disputed issues and, if there are, to determine whether they are both genuine and material. Id.

The Court's consideration of the facts, however, must be in the light most favorable to the party opposing summary judgment and all reasonable inferences from the facts must be drawn in favor of that party as well. Tigg Corp. v. Dow Corning Corp, 822 F.2d 358 (3d Cir. 1987).

In order to obtain a summary judgment, the proponent of the motion has the initial burden of identifying, from the sources enumerated in Rule 56, evidence which demonstrates the absence of a genuine issue of material fact. When confronted by a properly supported motion for summary judgment, the opposing party is required to produce, from the same sources, some contrary evidence which could support a favorable verdict. Thus,

> [T]he mere existence of some evidence in support of the non-moving party will not be sufficient to support a denial of a motion for summary judgment; there must be enough evidence to enable a jury to reasonably find for the non-moving party on the issue.

Petrucelli v. Bohringer and Ratzinger, 46 F.3d 1298, 1308 (3rd Cir. 1995).

Additionally, where the plaintiff bears the burden of proof on the issue which is the subject of the summary judgment

motion and is confronted by the defendant's argument that the facts do not support the claim, the plaintiff must identify evidence of record sufficient to establish every element essential to the claim. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed. 2d 265 (1986). Equimark Commercial Finance Co. v. C.I.T. Financial Services Corp., 812 F.2d 141 (3d Cir. 1987).

In order to defeat summary judgment, the party opposing the motion may not rest upon mere denials of the facts identified by the movant as supportive of its position, nor upon the vague and amorphous argument that the record somewhere does or will contain facts sufficient to support its claims. Childers v. Joseph, 842 F.2d 689 (3d Cir. 1987). Instead, the party resisting the motion for summary judgment is required to identify specifically the evidence of record which supports the claim and upon which a verdict in its favor may be based. Id.

As noted, defendant seeks either dismissal of the complaint or summary judgment. Plaintiff has responded to defendant's motion with an opposing affidavit and her own references to matters outside of the pleadings. We conclude, therefore, that plaintiff has had appropriate notice and opportunity to respond to a motion for summary judgment. Thus, we will proceed under Rule 56(c) and will consider the entire record before the Court in ruling on defendant's motion.

III. Discussion

The only basis for summary judgment, at present, is defendant's contention that plaintiff failed to commence this action within ninety days of receiving a right-to-sue letter from the EEOC as required by 42 U.S.C. §2000e-5(f)(1). The record is very sparse with respect to when plaintiff or her attorney, who filed the complaint on September 19, 1995, received the right to sue letter.

It is undisputed that although the right to sue letter bears the date of May 30, 1995, it was not mailed until June 15, 1995. (Exh. A to Defendant's Motion to Dismiss or, in the Alternative, for Summary Judgment, (Doc. #7); Exh. A to Plaintiff's Response to Defendant's Motion to Dismiss or Motion for Summary Judgment, (Doc. #8)). Moreover, plaintiff asserts that she "does not recall receiving a right to sue letter directly from the Economic Opportunity Commission," (Affidavit attached to Doc. #8, ¶2). Nevertheless, the right to sue letter itself is addressed directly to plaintiff at the same address at which she has been receiving notices from the Court since this action was reactivated, and defendant submitted an unexecuted certified mail return receipt sticker bearing the same address and the date of June 15, 1995. (Doc. #7, Exh. A).

In the absence of an affidavit from either plaintiff's former counsel or a member of his staff indicating when the letter was received, an executed certified mail return receipt form, or any other evidence of the date of delivery of the document, there is nothing in the record which conclusively

establishes when plaintiff's counsel received the right-to-sue letter, and when, or whether, plaintiff herself received it directly from the EEOC.

Plaintiff suggests that since the copy of the right-to-sue letter submitted by defendant is stamped "Received Jun 19 1995" it would be appropriate to presume that her attorney likewise received the right to sue letter on that date. Plaintiff also asserts that since the envelope in which the right to sue letter had been sent to her attorney bears a yellow change of address sticker with the date "06/17/95", along with the attorney's handwritten new address, the Court might reasonably presume that delivery of the letter to the attorney was delayed until at least June 19, 1995.[1]

As defendant points out, however, where the record does not conclusively establish the date of receipt of a right-to-sue letter, the Court is obliged to rely upon Fed. R. Civ. P. 6(e), which provides that

> Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the paper or notice is served upon the party by mail, 3 days shall be added to the prescribed period.

In accordance with this rule and Baldwin County Welcome Center v. Brown, 466 U.S. 147, 104 S.Ct. 1723, 80 L.Ed. 2d 196,

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1. Plaintiff received her entire file from her former attorney in the spring of 1996, after the attorney informed plaintiff that he could no longer represent her, as he was leaving the practice of law. (Doc. #8, Affidavit of Sharyn L. Seitzinger at ¶4, 6).

200, n. 1 (1984), the only permissible presumed date of receipt of the right-to-sue letter by plaintiff or her attorney is June 18, 1995, three days after the right-to-sue letter was mailed. It is not permissible, as plaintiff suggests, to rebut the Rule 6(e) presumption of mail delivery within three days by substituting a plausible alternative presumption. Rather, as the Supreme Court noted in Baldwin County, the presumption mandated by the Federal Rules of Civil Procedure is controlling absent specific evidence of the date of delivery. See, also, Mosel v. Hills Department Store, Inc., 789 F.2d 251 (3rd Cir. 1986). Consequently, the last date for timely filing of the instant action was September 18, 1995, ninety days after the presumed delivery date of the letter to plaintiff or to her attorney. Since the complaint was not docketed until September 19, 1997, plaintiff's Title VII claim is time-barred.

Although this result may appear harsh to the plaintiff, and, indeed, incomprehensible, in light of our earlier decision to extend the time for service of the complaint, these seemingly contrary decisions may be understood in terms of the Court's broad discretion to extend time for service of civil complaints pursuant to Rule 4(m) and our lack of discretion, in a Title VII action, "in the absence of a recognized equitable consideration [to] extend the limitations period by even one day." Mosel, 789 F.2d at 253 (Citations and internal quotation marks omitted).

Regardless of the arguments of plaintiff and defendant in support of and in opposition to extending the time limit for

service, and in support of extending and clarifying the order permitting plaintiff an extension of time in which to effect service of the complaint, a conclusive determination of the timeliness of this action was not possible in connection with the motion to extend time for service. The record was incomplete at that time, and neither party had then had a full and fair opportunity to present to the Court a definitive record with respect to the timeliness issue. Although it now appears that it is not possible to develop such a record, there was no way for the Court to properly determine that at the time this action was reinstated.

Moreover, upon review of the entire record of this matter, it is not entirely clear that plaintiff cannot actually establish the date of receipt of the right-to-sue letter. We note, in the first instance, that in her motion to extend time for service, plaintiff asserted that she had contacted her attorney "early in Sept." of 1995 because she "wanted to make sure he filed the complaint on time. He assured me he had." (Doc. #3 at 13). Later, however, after receiving the file from her attorney, she expressed the fear that her counsel had missed the filing deadline. (Id. at 28). These statements support the inference that plaintiff herself was fully aware of the time limit on filing her claim and believed that the complaint should have been filed "early" in September. Plaintiff's inquiry of her attorney in early September, 1995, is consistent with plaintiff's notification by letter dated May 30, 1995, from the EEOC

informing her that the right-to-sue would be issued. (Id., Exh. C). Notably, plaintiff did not state that she asked whether or when her attorney had received the right-to-sue. Thus, when she spoke to her attorney in September, 1995, she obviously believed that the 90 day time period measured from the date the right-to-sue notice was received had expired or was about to expire.

In addition, although plaintiff makes reference in her affidavit to a July 2, 1995, letter from her attorney informing her of his receipt of the right-to-sue notice, that letter is not attached as an exhibit to her brief in opposition to defendant's motion. Plaintiff has made it impossible to determine, therefore, whether the attorney referred to the date of his receipt of the EEOC letter.

Finally, although plaintiff asserts that she cannot "recall" receiving the right to sue letter from the EEOC, she does not affirmatively state that she did not receive it. In her motion for extension of time to serve the complaint, plaintiff noted the size of her paper file on this case. (Doc. #3 at 5). It is reasonable to infer that if a document as important as the right-to-sue were missing from plaintiff's own file, she would, at the least, have stated in her affidavit that she has no record of having received it directly from the EEOC.

In a very similar situation, in which several plaintiffs sought to avoid dismissal of their Title VII claims as untimely by claiming no recollection of when they received their right-to-sue letters, the court noted that

> There is a presumption under Federal Rule of Civil Procedure 6(e), that the plaintiffs received the letters three days after the EEOC mailed them...and the plaintiffs' inconclusive contrary quasi-denials fail to rebut that presumption. Thus, the defendants are entitled to judgment as a matter of law against plaintiffs.

Norris v. Lee, No. 93-0441, 1994 WL 517951 at 3, (E.D. Pa. Sept. 20, 1994)(Citation omitted). Similarly, in this case, we conclude that defendant has presented sufficient evidence that the right-to-sue letter was mailed on June 15, while plaintiff has not met her summary judgment burden of coming forward with sufficient evidence to rebut the Rule 6(e) presumption that she received the it three days after it was mailed by the EEOC. Rather, plaintiff has asserted in her affidavit nothing more than a vague and inconclusive suggestion that she might not have received the right-to-sue notice. Since evidence of the actual receipt of the right-to-sue letters by either plaintiff or her attorney, if such evidence exists anywhere, is entirely under plaintiff's control, it is apparent that plaintiff can completely frustrate the 90 day statutory limitation on civil actions unless the Rule 6(e) presumption is followed. This is precisely the result that the Supreme Court refused to countenance in Baldwin County and that the Court of Appeals for the Third Circuit so strongly disapproved in Mosel. In accordance with relevant precedent, therefore, we have no choice but to conclude that the right-to-sue letter issued to plaintiff and copied to her attorney by the EEOC were presumptively received by them within three days of the June 15, 1995, mailing of the notices.

Finally, we note that defendant's motion includes argument to the effect that there is no basis for extending the 90 day time limit for filing a complaint under principles of equitable tolling. Since plaintiff did not address that contention in her response to the motion, we might assume her tacit acquiescence to defendant's position in this regard. Nevertheless, plaintiff seemed to assert equitable tolling arguments in her request that the Court amplify the October 21, 1996, order reinstating the case by affirmatively stating that it was not time-barred. Thus, we find it appropriate to include a brief discussion of principles of equitable tolling.

As stated by the Court of Appeals in Oshiver v. Levin, Fishbein, Sedran & Berman, the 90 day time limit for filing a Title VII claim in district court may be extended for equitable reasons in three situations:

> (1) where the defendant has actively misled the plaintiff respecting the plaintiff's cause of action; (2) where the plaintiff in some extraordinary way has been prevented from asserting his or her rights; (3) where the plaintiff has timely asserted his or her rights mistakenly in the wrong forum.

38 F.3d at 1387 (Citations omitted). See, also, Irwin v. Dept. of Veteran's Affairs, 498 U.S. 89, 11 S.Ct. 453, 112 L.Ed.2d 435 (1990).

The Court's research has disclosed not a single instance in which the 90 day time limit for filing a civil action asserting a Title VII claim was extended by application of equitable tolling principles where the conduct of plaintiff's

counsel was the reason that the case was not timely filed.[2] The dereliction of plaintiff's chosen representative, even when egregious, is not an appropriate circumstance for equitable tolling. See, e.g., Wilson v. Dept. of Veterans Affairs, 65 F.3d 402 (5th Cir. 1995); Merrill v. Cintas Corp., Civ. A. No. 95-2423-GLR, 1996 WL 650951 (D. Kan. Nov. 5, 1996); Andree v. Center for Alternative Sentencing, No. 92 Civ. 616 (TPG), 1993 WL 362394 (S.D. N.Y. Sept. 14, 1993). In order to relieve plaintiff of the consequences of her counsel's lapse through equitable tolling, the defendant, which bears no responsibility for the late filing of plaintiff's complaint, would necessarily be disadvantaged. Equity, however, is invoked to prevent or remedy injustice to an innocent party and may not be used to favor one party over another where both are equally faultless with respect to the issue at hand such as, in this case, strict enforcement or enlargement of the 90 day limitation on filing a Title VII civil action after a right-to-sue notice is received.

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2. In Fellows v. Earth Construction, Inc., 794 F. Supp. 531 (D. Vt. 1992), the court initially denied defendant's motion for summary judgment based upon the filing of a Title VII complaint more than 90 days after delivery of the right-to-sue notice by holding that the excusable neglect of plaintiff's counsel was a sufficient reason for applying equitable tolling. Upon reconsideration, however, the court reversed its earlier decision, noting that it had made "a significant error" in concluding that excusable neglect was an appropriate standard upon which to apply equitable tolling to extend the limitations period. Fellows v. Earth Construction, Inc., 805 F. Supp. 223, 224 (D. Vt. 1992).

IV. Summary

Defendant has presented evidence in this case that the EEOC mailed a right-to-sue letter to both plaintiff and her counsel on June 15, 1995. Despite having every opportunity to do so, plaintiff has provided no evidence concerning receipt of the right-to-sue letter by plaintiff herself or by her counsel. Thus, it is apparently impossible to establish conclusively when either plaintiff or her counsel received such letters. Indeed, there is, and apparently will be, no evidence whether plaintiff actually received the right-to-sue letter mailed directly to her. Under such circumstances, it is appropriate to invoke the presumption of receipt within three days of mailing pursuant to Fed. R. Civ. P. 6(e). There is insufficient evidence to rebut that presumption, and, to the extent such evidence exists, it is within plaintiff's control and she has failed to produce it.

It is appropriate, therefore, to conclude that the complaint in this action should have been filed no later than September 18, 1995, 93 days after the right-to-sue notice was mailed by the EEOC. Since the complaint in this action this action was filed on September 19, 1995, it was untimely and must be dismissed. An appropriate order follows.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF PENNSYLVANIA

SHARYN L. SEITZINGER,	)	CIVIL ACTION
	)	
	)	NO. 95-5926
Plaintiff	)	
	)	
vs.	)	
	)	
THE READING HOSPITAL AND MEDICAL CENTER,	)	
	)	
	)	
Defendant	)	

TROUTMAN, S.J.

O R D E R

And now, this day of August, 1997, upon consideration of Defendant's Motion to Dismiss or for Summary Judgment, (Doc. #7, Part #1 & Part #2), and plaintiff's response thereto, **IT IS HEREBY ORDERED** that the motion is **GRANTED**.

IT IS FURTHER ORDERED that the above-captioned action is **DISMISSED with prejudice.**

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S.J.