IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

CHRISTOPHER J. AROTS,	)	
Plaintiff	)	
v.	)	C.A. No. 01-334 GMS
SALESIANUM SCHOOL, INC.,	)	
Defendant.	)	

MEMORANDUM AND ORDER

I. INTRODUCTION

On May 23, 2001, Christopher J. Arots filed a *pro se* complaint against Salesianum School, Inc. ("Salesianum"), alleging employment discrimination in violation of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, *et seq*. Presently before the court is the defendant's Motion to Dismiss or, in the Alternative, for Summary Judgment (D.I. 7). For the following reasons, the court will grant the motion.

II. BACKGROUND

Arots worked as a music teacher at Salesianum School for twenty-three years. On January 13, 2000, the school terminated his employment. The plaintiff alleges that his discharge was motivated by discrimination concerning an unnamed disability. Accordingly, Arots filed a charge with the Equal Employment Opportunity Commission ("EEOC") on August 24, 2000. On December 15, 2000, the EEOC mailed to Arots and to legal counsel for Salesianum a "Dismissal and Notice of Rights" letter stating that any lawsuit arising from the same charge must be filed within ninety days of the receipt of the letter. Salesianum received the letter on December 22, 2000; Arots

maintains that he received the letter on February 23, 2001.

Arots filed the present suit on May 23, 2001. Nearly one year later, Arots had yet to provide notice of the lawsuit to Salesianum. Accordingly, on April 30, 2002, the court ordered Arots to show good cause within twenty days as to why the complaint should not be dismissed without prejudice pursuant to Federal Rule of Civil Procedure 4(m). On May 14, 2002, Arots mailed the Notice and Request for Waiver of Service and Summons to the defendant, which he then filed on May 23, 2002. The notice was defective, however, in that it provided Salesianum with only five days to respond. Moreover, Arots still had not served the defendant with process. Consequently, the court issued a second order on December 9, 2002 requiring Arots to serve the summons and complaint upon the defendant within ten days. Eleven days later, on December 20, 2002, Arots served Salesianum with process.

III. STANDARD OF REVIEW

The defendant moves for dismissal or, in the alternative, summary judgment. Because the court will consider evidence outside the scope of the pleadings, it will treat the present motion as a motion for summary judgment pursuant to Federal Rule of Civil Procedure 56. *See*, *e.g.*, *Public Interest Research Group v. Powell Duffryn Terminals*, 913 F.2d 64, 71 (converting motion to dismiss to motion for summary judgment when additional evidence was submitted). 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 judgment as a matter of law." FED. R. CIV. P. 56(c); *see also Boyle v. County of Allegheny Pa.*, 139 F.3d 386, 392 (3d. Cir. 1998). Thus, summary judgment is appropriate only if the moving party shows there are no genuine issues of material fact that would

permit a reasonable jury to find for the non-moving party. *Boyle*, 139 F.3d at 192. A fact is material if it might affect the outcome of the suit. *Id.* (Citing *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247-48 (1986)). An issue is genuine if a reasonable jury could possibly find in favor of the non-moving party with regard to that issue. *Id.* In deciding the motion, the court must construe all facts and inferences in the light most favorable to the non-moving party. *Id.*; *see also Assaf v. Fields*, 178 F.3d 170, 173-74 (3d Cir. 1999).

IV. DISCUSSION

A. Compliance with the Ninety-Day Statutory Limitations Period

The defendant first moves for summary judgment on the basis that the plaintiff's claim is untimely for failure to file within the prescribed statutory period. For the reasons that follow, the court agrees that the present suit is untimely, and that the plaintiff has not adduced evidence sufficient to warrant tolling of the limitations period.

1. Timeliness of the Plaintiff's Claim

Before bringing a discrimination claim in federal court pursuant to the ADA, the aggrieved party must file a charge of discrimination with the EEOC. If the Commission dismisses the charge, the aggrieved party may sue the employer directly within ninety days of the receipt of the EEOC notification of dismissal. 42 U.S.C. § 2000e-5(f)(1) (2003). This notification comprises a letter of determination ("Dismissal and Notice of Rights") informing the party of his or her right to sue and the ninety-day time period in which to file suit. 29 C.F.R. § 1601.19(a) (2003). When the receipt date of the right to sue letter is in dispute, and there is no evidence pertaining to when the letter was actually received, Rule 6(e) of the Federal Rules of Civil Procedure will control by invoking the presumption of receipt within three days of mailing. *Seitzinger v. Reading Hosp. and Med. Ctr.*, 165

F.3d 236, 239 (3d Cir. 1999). Furthermore, without evidence regarding the plaintiff's receipt of the right to sue notice, any attempt to file suit even one day after the expiration of the ninety-day time period must result in dismissal. *Mosel v. Hills Department Store, Inc*., 789 F.2d 251, 253 (3d Cir. 1986) (citing cases); *see also Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147, 152 (1984) (*per curiam*) ("Procedural requirements established by Congress for gaining access to federal courts are not to be disregarded by courts out of a vague sympathy for particular litigants.").

In this case, it is undisputed that the EEOC issued and mailed the Dismissal and Notice of Rights letter on December 15, 2000. The defendant received the letter on December 22, 2000. By contrast, Arots maintains that he received the letter on February 23, 2001. Because he offers no evidence in support of this bare assertion, however, Rule 6(e), presuming receipt after three days from the mailing date, must be applied. Therefore, the presumed date of receipt is December 18, 2000, or three days after the mailing date of December 15, 2000. Because the present suit was filed nearly 180 days after the presumed receipt of the right to sue letter, it is apparent that the action is untimely.

2. Equitable Tolling of the Statutory Period

Although not raised by the *pro se* plaintiff, the court will consider whether equitable tolling of the ninety-day statutory period is appropriate in this case. It is well-established that federal courts should invoke the equitable tolling doctrine 'only sparingly.' *United States v. Midgley*, 142 F.3d 174, 179 (3d Cir. 1999) (quoting *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96 (1990)). In the Third Circuit, equitable tolling may be appropriate in certain limited contexts: (1) if the defendant actively misled the plaintiff; (2) if the plaintiff was prevented, in some extraordinary way, from asserting his rights; (3) if the plaintiff timely asserted his rights mistakenly in the wrong forum;

(4) if the claimant received inadequate notice of his right to file a suit; (5) if a motion for appointment of counsel is pending; or (6) if the court misled the plaintiff into believing that he had done everything required of him. *Jones v. Morton*, 195 F.3d 153, 159 (3d Cir. 1999). In each of these contexts, the party seeking equitable tolling must have demonstrated reasonable diligence in investigating and filing his claims. *New Castle County v. Halliburton NUS Corp*., 111 F.3d 1116, 1126 (3d Cir. 1997).

In his answer to the defendant's motion, the plaintiff reports that, after being discharged from his job, he fell into a serious depression and became alcoholic and suicidal. Pl.'s Response to Def.'s Motion for Summary Judgment (D.I. 11) at 1. Arots also explains that he waited to receive his pension check before filing suit. *Id*. at 2. These facts, although unfortunate, do not establish an extraordinary barrier to the plaintiff's ability to assert his rights in a timely manner. In this circuit, "mental incompetence is not *per se* a reason to toll the statute of limitations." *Lake v. Arnold*, 232 F.3d 360, 371 (3d Cir. 2000) (citing *Barren by Barren v. United States*, 839 F.2d 987 (3d Cir. 1988)). Tolling may be warranted if the mental incompetence motivated the injury which the plaintiff seeks to remedy – for example, when a mentally incompetent plaintiff seeks tolling to allow him to sue for his involuntary commitment during the entire limitations period. *Id*. (citing *Eubanks v. Clarke*, 434 F. Supp. 1022 (E.D. Pa. 1977)). From the bare facts asserted by the plaintiff, there appears to be no such relationship between his depression and alcoholism and the injury he seeks to redress, as these hardships occurred after his discharge from Salesianum. In any case, Arot's conclusory and unsupported statements, without more, do not support a finding that equitable tolling is warranted. *See*, *e.g.*, *Boos v. Runyan*, 201 F.3d 178, 185 (2d Cir. 2000) ("[The plaintiff's] conclusory and vague claim, without a particularized description of how her condition adversely

affected her capacity to function generally or in relationship to the pursuit of her rights, is manifestly insufficient to justify any further inquiry into tolling.").

In his answer, Arots also states that he thought he had filed suit within the statutory time frame. *See*, *e.g.*, Pl.'s Response to Def.'s Motion at 2 ("I was told how much time I had to file a law suit by federal court, and I met the time line."). If this bare statement may be construed as an assertion that his right to sue notice was insufficient, this argument fails as well. By following Rule 6(e), which is appropriately applied when the date of receipt is in dispute without supporting evidence, Arots is presumed to have received adequate notice of the time constraint through the right to sue letter. The plaintiff offers no evidence to rebut this presumption.

Likewise, if by his statements Arots intends to suggest that the court misled him into believing that he had done everything required of him, this argument is unsupported. The court has issued no orders or opinions addressing the timeliness of the plaintiff's claims prior to the present memorandum. There is no evidence, or even suggestion, other than the plaintiff's vague assertions, that any employee of the court misled him into believing that he had complied with the statutory deadline. Thus, the court will not found its decision on any such implication.

Finally, the court considers the plaintiff's *pro se* status. Equitable tolling is more appropriate when the litigant is inexperienced and proceeding *pro se. Ricciardi v. Consolidated Rail Corp.*, 2000 WL 1456736, at *4 (E.D.Pa. 2000) (citing *Kocian Getty Refining & Marketing Co.*, 707 F.2d 748, 755 (3d Cir. 1983)). Nonetheless, a plaintiff's *pro se* status does not, alone, justify the application of equitable principles to excuse the failure to meet procedural requirements. Indeed, "[a]lthough . . . conformity with procedural rules should be viewed liberally when a litigant is acting *pro se*, the rules are not suspended simply because the litigant is unrepresented by counsel. The *pro*

se complainant must exercise reasonableness and good faith in prosecution of his claims." *Carter v. Three Unknown Police Officers*, 112 F.R.D. 48, 52 (D. Del. 1986); *see also McNeil v. United States*, 508 U.S. 106, 113 (1993) ("We have never suggested that procedural rules in ordinary civil litigation should be interpreted so as to excuse mistakes by those who proceed without counsel."). In this case, there is no evidence that Arots encountered any undue hardship in filing the suit, or that any of the other considerations for equitable tolling are present. Furthermore, as discussed below regarding the plaintiff's extremely untimely service of process upon the defendants, it seems apparent that Arots did not exercise due diligence in pursuing his claims. Therefore, despite the plaintiff's *pro se* status, tolling of the statutory guidelines is not warranted.

B. Timeliness of Service of the Complaint and Summons

The defendant also moves for summary judgment on the basis that the complaint was not timely served. Because the court has found that the present action must be dismissed for other reasons, it need not address this alternative argument at length. The court notes, however, that the plaintiff failed to serve the summons and complaint upon the defendant until December 20, 2002, approximately fifteen months after the expiration of the 120-day period, and only after two court orders requiring the plaintiff to show good cause for his failure to timely serve and ordering him to effect service. When considered in light of the plaintiff's failure to timely file suit, the court finds, unequivocally, that the present action must be dismissed. *See*, *e.g.*, *Fernandez v. I.R.S.*, 1994 WL 591556 (D.N.J. 1994) (dismissing *pro se* complaint for failure to serve within 120-day period); *Momah v. Albert Einstein Med. Ctr.*, 159 F.R.D. 66, 69-70 (E.D. Pa. 1994) (dismissing complaint served one day after expiration of 120-day period when defendant hospital had conducted business "in the broad light of day" and plaintiff had been employed there); *Parker v. State of Delaware*, 2000

WL 291537, at *2 (D. Del. 2000) (dismissing complaint when plaintiff failed to serve defendants within 120-day period and noting that "[e]xtension is particularly inappropriate in the present case because plaintiffs failed to file their complaint within the 90-day 'right to sue' period for Title VII and ADA actions.").

VI. CONCLUSION

Although he received adequate notice of his right to sue and the associated time constraint, the plaintiff failed to file suit within the prescribed statutory period, and he did not present evidence to warrant equitable tolling of the limitations period. Furthermore, Arots failed to timely serve the summons and complaint upon the defendant. As such, the present action must be dismissed.

THEREFORE, IT IS HEREBY ORDERED that:

1. The defendant's Motion to Dismiss or for Summary Judgment (D.I. 7) is GRANTED.

2. Judgment be and is hereby entered in favor of the defendant.

3. The Clerk of the court is directed to close this case.

Dated: June 17, 2003

Gregory M. Sleet
UNITED STATES DISTRICT JUDGE