IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ANTHONY DUPREE, JR.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 03-930 GMS
	)	
UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 27 and ALLEN FAMILY FOODS, INC.,	)	
	)	
Defendants.	)	

MEMORANDUM

I. INTRODUCTION

On October 6, 2003, Anthony DuPree, Jr. ("DuPree") filed a *pro se* complaint against the United Food and Commercial Workers Union, Local 27 ("United Food"), and Allen Family Foods Inc. ("Allen Foods") (collectively, the "defendants"), alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e, *et seq*. Presently before the court are the defendants' Motions for Summary Judgment (D.I. 31, 34). For the following reasons, the court will grant the motions.

II. BACKGROUND

DuPree worked as an assistant supervisor of the Tray Pack department at Allen Foods for about thirty days. On March 7, 2002, Allen Foods terminated his employment for gross misconduct. DuPree asserts that he was terminated because of his race. DuPree filed a charge against Allen Foods with the Department of Labor of the State of Delaware on March 7, 2002. On March 19, 2002, DuPree filed a charge with the Equal Employment Opportunity Commission ("EEOC"). On June 10, 2003, the EEOC mailed to DuPree and to legal counsel for Allen Foods a "Dismissal and

Notice of Rights" letter stating that any lawsuit from the same charge must be filed within ninety days of the receipt of the letter[1]. Allen Foods received the letter on or about June 14, 2003. Dupree asserts that he received the letter on July 7, 2003.

DuPree filed his complaint on October 6, 2003. On October 1, 2004 and October 4, 2004 Allen Foods and United Food filed their respective motions for summary judgment. DuPree has not filed an answer to the defendants' motions, despite the court's November 29, 2004 Order requiring DuPree to file an answer brief by December 20, 2004. The court, therefore, will decide the defendants' motions for summary judgment on the present record.

III. STANDARD OF REVIEW

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©; *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).

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[1] United Food did not receive the letter from the EEOC because DuPree's charge with the EEOC was filed only against Allen Foods and not against United Food.

IV. DISCUSSION

The defendants first move for summary judgment on the basis that DuPree'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.

A. Timeliness

Before bringing a discrimination claim in federal court pursuant to Title VII, 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. *Arots v. Salesianum Sch., Inc.*, No. 01-334 GMS, 2003 WL 21398017, at * 2 (D. Del. June 17, 2003) (citing *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 June 10, 2003. The defendant received the letter on or about June 14, 2003. By contrast, DuPree maintains that he received the letter on July 7, 2003. 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 June 13, 2003, or three days after the mailing date of June 10, 2003. Because the present suit was filed 115 days after the presumed receipt of the right to sue letter, it is apparent that the action is untimely.

B. Equitable Tolling

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. Dep't 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 addition, the court cannot even consider equitably tolling the statute of limitations unless the plaintiff exercised due diligence in pursuing his claim. *See, e.g., Baldwin*, 466 U.S. at 151; *cf Wilson v. Dep't. of Veterans Affairs*, 65 F.3d 402, 404 (5th Cir. 1995) (stating that "we have generally been much less

forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights") (internal citations and quotations omitted)

Equitable tolling is particularly appropriate when the litigant is inexperienced and proceeding *pro se*. *Ricciardi v. Consolidated Rail Corp.*, No. CIV. A. 98-3420, 2000 WL 1456736, at *4 (E.D. Pa. Sept. 29, 2000) (citing *Kocian v. 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, the record is void of any equitable considerations which would allow the court to toll the ninety day statute of limitations period. There is no evidence that DuPree encountered any undue hardship in filing the suit, or that any of the other considerations for equitable tolling are present. It also seems apparent from the record that DuPree did not exercise due diligence in pursuing his claims. For example, DuPree did not file an answer brief to the defendants' motions, despite the court's November 29, 2004 Order requiring him to file an answer brief by December 20,

2004.[2] Therefore, even though DuPree is a *pro se* plaintiff, tolling of the statutory guidelines is not warranted.

Thus, although he received adequate notice of his right to sue and the associated time constraint, the court concludes that DuPree failed to file suit within the prescribed statutory period, and he did not present evidence to warrant equitable tolling of the limitations period. As such, the defendants are entitled to summary judgment and present action must be dismissed.[3]

Dated: January 7, 2005

Gregory M. Sleet
UNITED STATES DISTRICT JUDGE

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[2] Indeed, the court gave DuPree additional time in which to file an answer brief to the defendants' motions. DuPree's answer brief to Allen Foods' motion was originally due on October 15, 2004, and his answer brief to United Food's motion was originally due on October 18, 2004.

[3] The defendants have moved for summary judgment for additional reasons. However, since the court has found that the present case must be dismissed because DuPree's complaint is untimely, it need not address the defendants' additional arguments.

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Defendants.	)	

ORDER

For the reasons stated in the court's Memorandum of this same date, IT IS HEREBY ORDERED that:

1. Allen Foods' Motion for Summary Judgment (D.I. 34) is GRANTED.

2. United Food's Motion for Summary Judgment (D.I. 31) is GRANTED.

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

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

Dated: January 7, 2005

Gregory M. Sleet
UNITED STATES DISTRICT JUDGE