IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

TONY A. WILSON,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil Action No. 99-896 JJF
	:	
PINKERTON, INC., DENNIS R. BROWN, DAVID MERKOVICH, KENNETH E. FORD, DAVE STEBBINS, ANTHONY DAUNORAS, REID ADAMS, and LEN KUMINSKI,	:	
	:	
Defendants.	:	

Tony A. Wilson, Jacksonville, Florida.

Pro Se Plaintiff.

David E. Brand, Esquire of PRICKETT, JONES & ELLIOT, P.A., Wilmington, Delaware.
Of Counsel: James A. Rothschild, Esquire of ANDERSON, COE & KING, LLP, Baltimore, Maryland.

Attorneys for Defendant Pinkerton, Inc.

OPINION

March 23, 2004

Wilmington, Delaware

Farnan, District Judge.

Presently before the Court is Defendant's Motion To Dismiss. (D.I. 32.) For the reasons discussed, the Court will deny the Motion.

BACKGROUND

Plaintiff filed the instant lawsuit on December 16, 1999, alleging employment discrimination. The initial Complaint was never served on any of the eight Defendants. The Court granted Plaintiff leave to proceed in forma pauperis on February 22, 2002. (D.I. 5.) Plaintiff filed an Amended Complaint on April 4, 2002, which was served on Defendant Pinkerton, Inc. ("Pinkerton"). The Court entered an Order on January 15, 2003, setting the fact discovery deadline for March 20, 2003, and scheduled a status conference for March 27, 2003. Plaintiff failed to appear at the status conference. On April 4, 2003, the Court entered an Order directing Plaintiff to provide a written explanation for his failure to respond to Pinkerton's discovery requests and failure to appear at the March 27 status conference. On April 5, 2003, Plaintiff informed the Court by letter (the "April 5th letter") that his failure to appear at the status conference was due to the fact that he did not receive a copy of the Court's January 15, 2003, Order. In addition, in the April 5th letter Plaintiff stated that he responded to Pinkerton's discovery requests on March 24, 2003, and supplemented his

responses on April 4, 2003.

On August 7, 2003, Pinkerton sent Plaintiff a notice of deposition, scheduling Plaintiff's deposition for September 4, 2003, via Federal Express. Plaintiff's wife refused receipt of the notice. (D.I. 33 at Ex. B.) Pinkerton subsequently re-noticed the deposition by registered mail. However, the registered mail was returned with stamps indicating that the mail was unclaimed. Id. at Ex. C. Plaintiff did not appear at the deposition Pinkerton scheduled for September 4, 2003. By an October 8, 2003, Memorandum Order (D.I. 30), the Court granted Pinkerton's request to file a motion to dismiss for failure to prosecute.

DISCUSSION

I. Parties' Contentions

Pinkerton contends that the Court should grant its Motion to Dismiss with prejudice because Plaintiff has failed to prosecute his claim, appear at his deposition, or cooperate in Pinkerton's efforts in discovery. Pinkerton also contends that the numerous periods of extended inactivity in this case warrant dismissal for failure to prosecute. In addition, Pinkerton contends that Plaintiff has not served the seven individually named Defendants with the Amended Complaint, and thus, the Court should dismiss those Defendants pursuant to Rule 4(m) and 41(b).

Plaintiff responds that his failure to attend the status

conference was attributable to the fact that he did not receive the Court's Order scheduling the conference. Plaintiff contends that he has not requested discovery from the Defendants because there was a motion to dismiss pending before the Court. Plaintiff maintains that he believed it was improper to request discovery while a motion to dismiss was pending. Further, Plaintiff contends that he did serve the individually named Defendants by filing the U.S. Marshall-285 forms with the Clerk of the Court.

II. Applicable Legal Principles

Dismissal with prejudice is a harsh remedy "only appropriate in limited circumstances." Adams v. Trustees of the New Jersey Brewery Employees' Pension Trust Fund, 29 F.3d 863, 870 (3d Cir. 1994). Courts should be cautious in granting dismissals "'[b]ecause an order of dismissal deprives a party of its day in court[.]'" Id. (quoting Scarborough v. Eubanks, 747 F.2d 871, 875 (3d Cir. 1984)). Third Circuit precedent requires courts to evaluate six factors when determining whether a complaint should be dismissed with prejudice for failure to prosecute. Among these factors are:

> (1) the extent of the party's personal responsibility; (2) the prejudice to the adversary caused by the failure to meet scheduling orders and respond to discovery; (3) a history of dilatoriness; (4) whether the conduct of the party or the attorney was willful or in bad faith; (5) the effectiveness of sanctions other than dismissal, which entails an analysis of alternative sanctions; and (6) the meritoriousness of the claim or defense.

Poulis v. State Farm Fire & Cas. Co., 747 F.2d 863, 868 (3d Cir. 1984)(emphasis in original). When evaluating the Poulis factors, courts should resolve doubts in favor of deciding a case on the merits. Adams, 29 F.2d at 870. However, each factor need not be present in order for dismissal to be warranted. Ware v. Rodale Press, Inc., 322 F.3d 218, 222 (3d Cir. 2003)(citing Hicks v. Feeney, 850 F.2d 152, 156 (3d Cir. 1988)).

III. Decision

A. Whether The Court Should Dismiss Pinkerton For Failure To Prosecute

With respect to the first Poulis factor, the Court finds that any delays or failures to comply with discovery obligations or court orders are in most instances attributable to Plaintiff. Because Plaintiff is proceeding pro se, any failure to prosecute cannot be blamed on inattentive counsel. See Emerson v. Thiel College, 296 F.3d 184 (3d Cir. 2002).

Second, the Court finds that Pinkerton is minimally prejudiced by Plaintiff's failure to efficiently prosecute his case. Pinkerton's claim of prejudice is based upon the fact that the alleged events occurred in 1997, and therefore, Pinkerton contends that it will be unfairly prejudiced because it must defend against events that took place seven years ago. (D.I. 33 at 10.) Although the Court recognizes the difficulty in litigating cases involving events long past, the Court concludes that such prejudice alone does not substantially weigh in favor

of dismissal because Pinkerton does not assert that Plaintiff's delay resulted in incurable burdens and costs, or caused it to suffer the "irretrievable loss" of key evidence. Adams, 29 F.3d at 873-74.

Looking to the third and fourth Poulis factors, the Court observes that there is evidence of dilatoriness[1]; however, the Court cannot find that Plaintiff's actions were, for the most part, willful or in bad faith. Although the Court is mindful that Plaintiff is not relieved of his obligations under the Federal Rules or from complying with court orders merely because he is proceeding pro se, in this case, Plaintiff has offered reasonable explanations for two of the most egregious instances of non-compliance. Plaintiff's explanation for his failure to appear at the Rule 16 conference on March 20, 2003, was that he did not receive notice of the hearing. Taken at face value, this is not evidence of bad faith or willfulness. Next, even though Plaintiff's failure to appear at his deposition appears to be the result of his refusal to accept delivery of Pinkerton's noticing

[1] There are substantial periods of inactivity following Plaintiff's filing of his initial complaint on December 16, 1999. Following the Court's grant of in forma pauperis status on February 22, 2002, there was no activity until April 4, 2002, when Plaintiff filed his Amended Complaint. Between August 21, 2002, and April 10, 2003, Plaintiff again took no action in the prosecution of his case. It was not until the Court, in an April 4, 2003, Order directed Plaintiff to provide a written explanation for his failure to appear at the status conference and failure to participate in discovery that Plaintiff took any affirmative steps toward the prosecution of his case.

of his deposition (D.I. 28, 33 at Ex. C), evaluating Plaintiff's actions in favor of deciding this case on the merits, see Adams, 29 F.2d at 870, the Court cannot find that Plaintiff's failure to appear at his deposition, the date and time of which he had no knowledge of, was "the type of willful or contumacious behavior which [can be] characterized as 'flagrant bad faith[.]'" Id. at 875 (quoting Scarborough v. Eubanks, 747 F.2d 871, 875 (3d Cir. 1984)).

Next, the Court concludes that the fifth factor weighs in favor of dismissal. Because the Court granted Plaintiff in forma pauperis status, an assessment of attorneys' fees and costs against Plaintiff for his failure to cooperate in discovery is not feasible. Emerson, 296 F.3d at 191. Further, on the undeveloped record in this case, the Court is unable to craft an appropriate evidentiary sanction for Plaintiff's delays.

Turning to sixth factor, the Court cannot reach a determination of whether the meritoriousness of the parties' claims or defenses weighs in favor or against dismissal. As Pinkerton states in its papers, at this stage of the proceedings the undeveloped record prevents any such findings. (D.I. 33 at 11.)

After weighing the Poulis factors, the Court concludes that the factors weigh against dismissal. Although the Court finds that Plaintiff is responsible for the delays in this case, that

there is a history of dilatoriness, and that there is an absence of alternative sanctions, the Court concludes that the presumption against dismissal requires the Court to deny the instant motion. The Court's findings that Pinkerton will not suffer unfair prejudice and that Plaintiff did not act willfully or in bad faith in failing to cooperate with the Court's orders or the Federal Rules, persuades the Court that the harsh penalty of dismissal with prejudice is inappropriate at this time. In the Third Circuit, "[d]ismissal must be a sanction of last, not first, resort." Poulis, 747 F.2d at 869. And, as Plaintiff has represented to the Court that he will agree with Pinkerton to a mutually acceptable time for his deposition and fully comply with his obligations under the Federal Rules and Court orders, the Court will grant him a final opportunity to properly prosecute his case.

B. Whether The Court Should Dismiss The Individual Defendants

Plaintiff contends that he filed with the Clerk of the Court U.S. Marshall-285 forms for each Defendant; however, the Court's docket reveals that Plaintiff only served Defendant Pinkerton. Rule 4(m) of the Federal Rules of Civil Procedure provides that "[i]f service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that

defendant . . .; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period." Fed. R. Civ. P. 4(m).

Because the Court has no evidence that Plaintiff properly served the individual Defendants with his Amended Complaint, the Court directs Plaintiff to provide the Court with evidence of his return of the U.S. Marshall-285 forms to the Clerk or to show good cause for his failure to serve each Defendant. If Plaintiff does not provide the evidence of his return of the U.S. Marshall-285 forms or demonstrate good cause for failure to serve, the Court will dismiss the individual Defendants.

In sum, the Court concludes that dismissal is not warranted at this time; however, failure of the Plaintiff to diligently pursue his claims in the future will be evaluated against the backdrop of the circumstances the Court has reviewed here.

An Order consistent with this Opinion will be entered.

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	:	
Defendants.	:	

O R D E R

At Wilmington, this 23rd day of March 2004, for the reasons discussed in the Opinion issued this date;

NOW THEREFORE, IT IS HEREBY ORDERED that Defendant's Motion To Dismiss (D.I. 32) is **DENIED**.

JOSEPH J. FARNAN, JR.
UNITED STATES DISTRICT JUDGE