IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

MICHAEL RAY SPURLOCK, JR.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	**No. 12-2947-SHM/tmp**
SYNTHES (USA),	)	
	)	
Defendant.	)	
	)	

REPORT AND RECOMMENDATION

Before the court by order of reference is defendant Depuy Synthes Sales, Inc.'s ("Depuy Synthes"), improperly sued as Synthes (USA), Motion to Dismiss, filed on February 26, 2013. (ECF No. 5.) After *pro se* plaintiff Michael Ray Spurlock, Jr. ("Spurlock") failed to file a timely response to Depuy Synthes's motion, the court entered an Order to Show Cause on April 8, 2013, directing Spurlock to a file a response within twenty days.[1] On April 26, 2013, Spurlock filed a one-paragraph response. Depuy Synthes filed a reply on May 6, 2013. For the reasons below, it is recommended that Depuy Synthes's motion be granted.

I. PROPOSED FINDINGS OF FACT

Spurlock began working as a trauma consultant for Depuy

[1]Local Rule 12.1(b) requires that a party file a memorandum in opposition to a motion to dismiss within twenty-eight days after the motion is served.

Synthes in September 2009. In July 2011, Depuy Synthes terminated Spurlock's employment, identifying his poor work performance record as the reason for his termination. However, Spurlock maintains that he was discharged in retaliation for reporting his supervisor for sexual harassment to the human resources department on June 29, 2011. Specifically, Spurlock asserts that his supervisor persistently showed and sent Spurlock sexually explicit text messages and emails. Following his termination, Spurlock filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") on March 19, 2012. In his charge, Spurlock alleged Depuy Synthes engaged in discrimination on the basis of his sex (male) and retaliatory termination in violation of Title VII of the Civil Rights Act of 1964. In the charge of discrimination form, Spurlock provided the following address as his mailing address: 211 Cornwall, Memphis, Tennessee 38138.

On July 26, 2012, the EEOC closed its investigation and issued Spurlock a Dismissal and Notice of Rights ("RTS notice"), informing Spurlock that any lawsuit pursuant to the reported discrimination must be commenced within ninety days. The RTS notice was postmarked July 26, 2012, and mailed to the 211 Cornwall address Spurlock previously provided to the EEOC.[2] However, Spurlock did not receive the RTS notice at the 211 Cornwall address because,

[2]Spurlock attached a copy of the envelope showing the postmark date of July 26, 2012, to his complaint and his response to the motion to dismiss.

sometime after he filed the charge but before the EEOC mailed the RTS notice, he moved to 8954 Greenleaves Drive, Germantown, Tennessee 38139. Spurlock did not provide the EEOC with his updated address.

The Postal Service forwarded the RTS notice to Spurlock at his new address sometime in early August 2012. Spurlock commenced the instant lawsuit by filing a complaint in the District Court for the Western District of Tennessee on October 31, 2012 - ninety-seven days after the EEOC mailed the RTS notice. In his complaint alleging retaliation and sex discrimination, Spurlock indicated that he received his RTS notice from the EEOC on July 26, 2012. (Compl. ¶ 8.) However, in his response to the court's show cause order, Spurlock maintains that he did not actually receive the RTS notice until ten days after it was sent by the EEOC because the RTS notice was sent to his former address.[3]

Depuy Synthes now moves for dismissal of the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), alleging that the complaint fails to state a claim for relief because it is time barred by the ninety-day statute of limitations. Depuy Synthes also moves for dismissal pursuant to Rule 12(b)(4) and (b)(5).

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[3]Spurlock's response, in its entirety, states as follows: "This document is proof that the claim I made shouldn't be dismissed; 90 days was the deadline. Clearly it was (returned) sent to the wrong address and it took 10 days to receive it from the post office. I filed the claim with 8 days to spare []. Thank you for your attention to this matter."

II. PROPOSED CONCLUSIONS OF LAW

As a preliminary matter, the court notes that Spurlock is proceeding as a *pro se* litigant. Pleadings filed by *pro se* litigants are to be "construed more liberally than pleadings drafted by lawyers." Williams v. Browman, 981 F.2d 901, 903 (6th Cir. 1992); see also Herron v. Kelly, No. 1:10CV1783, 2013 WL 3245326, at *5 (N.D. Ohio June 26, 2013) (affording liberal interpretation to a *pro se* plaintiff's pleading). However, "*pro se* plaintiffs are not automatically entitled to take every case to trial," Pilgrim v. Littlefield, 92 F.3d 413, 416 (6th Cir. 1996), and "the lenient treatment of *pro se* litigants has limits." Baker v. Boyd, No. 5:11CV-P59-R, 2013 U.S. Dist. LEXIS 901874, at *2 (W.D. Ky. May 3, 2013) (quoting Pilgrim, 92 F.3d at 416) (internal quotation marks omitted). One of these limits includes the requirement that *pro se* plaintiffs comply with applicable statutes of limitations. See Simpson v. G4S Secure Solution (USA), Inc., No. 12–2875–STA–tmp, 2013 WL 2014493, at *4 (W.D. Tenn. May 13, 2013) (citing Williams v. Sears, Roebuck & Co., 143 F. Supp. 2d 941, 945 (W.D. Tenn. 2001)) ("The 90–day filing period applies to all plaintiffs, including those who act pro se . . . ."); see also Sanford v. Ohio Dep't of Mental Retardation and Developmental Disabilities, No. 1:12-CV-2970, 2013 WL 3243624, at *4 (N.D. Ohio June 25, 2013) (quoting Baldwin Cnty. Welcome Ctr. v. Brown, 466 U.S. 147, 152 (1984)) ("Procedural requirements established by

Congress for gaining access to the federal courts are not to be disregarded by courts out of vague sympathy for particular litigants.") (internal quotation marks omitted).

In pertinent part, Title VII of the Civil Rights Act of 1964 provides that if the EEOC investigates and dismisses a charge of discrimination, then it "shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge by the person claiming to be aggrieved . . . ." 42 U.S.C. § 2000e-5(f)(1). Under Federal Rule of Civil Procedure 6(d), three days are added to this ninety-day period. Further, "the Sixth Circuit allots two days for postal delivery of an RTS notice beyond the three day period allowed by Federal Rule of Civil Procedure 6(e)." Graham-Humphreys v. Memphis Brooks Museum of Art, Inc., 209 F.3d 552, 558, n.9 (6th Cir. 2000). Beyond these well-settled extensions, courts in the Sixth Circuit strictly apply the ninety-day statute of limitations for Title VII claims. See Peete v. Am. Std. Graphic, 885 F.2d 331, 331 (6th Cir. 1989) (affirming order that found complaint filed ninety-one days after plaintiff actually received his RTS notice was time-barred by one day). "Where, as here, a defendant raises a statute of limitations defense, dismissal is proper under Rule 12(b)(6) if it is apparent from the face of the complaint that the statute of limitations has run." Reed v. Ohio State Univ. Med. Ctr., No. 2:12–cv–241, 2012 WL

5378379, at *4 (S.D. Ohio Oct. 31, 2012); see also DRFP, LLC v. Republica Bolivariana De Venez., No. 2:04-CV-00793, 2013 WL 2096652, at *17 (S.D. Ohio May 14, 2013) (quoting Cataldo v. U.S. Steel Corp., 676 F.3d 542, 547 (6th Cir. 2012)) ("[S]ometimes the allegations in the complaint affirmatively show that the claim is time-barred. When that is the case . . . dismissing the claim under Rule 12(b)(6) is appropriate.") (alteration in original) (internal quotation marks omitted).

It is well-established in the Sixth Circuit that actual receipt of an RTS notice is not required before the ninety-day limitations period begins to run. Reed, 2012 WL 5378379 at *3; see also Hunter v. Stephenson Roofing, Inc., 790 F.2d 472, 474 (6th Cir. 1986) ("We are not inclined toward an inflexible rule requiring actual receipt of notice by a claimant before the time period begins to run."). Rather, there is a "rebuttable presumption that the plaintiff receives the right to sue notification within five (5) days of the EEOC mailing the notice." Smith v. Huerta, No. 12-cv-02640-JTF-dkv, 2013 WL 3242492, at *2 (W.D. Tenn. June 25, 2013); see also Graham-Humphreys, 209 F.3d at 557 (citing Banks v. Rockwell Int'l N. Am. Aircraft Operations, 855 F.2d 324, 325–27 (6th Cir. 1988)) ("The Sixth Circuit has resolved that notice is given, and hence the ninety-day limitations term begins running, on the fifth day following the EEOC's mailing of an RTS notification to the claimant's record residential address, by

virtue of a presumption of actual delivery and receipt within that five-day duration, unless the plaintiff rebuts that presumption with proof that he or she did not receive notification within that period."). To ensure timely, actual receipt of the RTS notice, a claimant "has the responsibility to provide the Commission with notice of any change in address and with notice of any prolonged absence from that current address so that he or she can be located when necessary during the Commission's consideration of the charge." 29 C.F.R. § 1601.7(b) (2010). Thus, a claimant cannot rebut the presumption of actual receipt within that five day period by asserting that he did not timely receive the RTS notice due to his own failure to inform the EEOC of a change of address. See Pearison v. Pinkerton's, Inc., 90 F. App'x 811, 813 (6th Cir. 2004) ("The EEOC's direction of the RTS letter to [plaintiff's] former address was caused by the failure of [plaintiff] to properly notify the EEOC of his correct mailing address. This did not stop the running of the ninety-day time limit provided in 42 U.S.C. § 2000e-5(f)(1)."); Reed, 2012 WL 5378379, at *3 ("If a claimant receives an RTS notice outside the presumed five-day mailing period because he or she failed to inform the EEOC of a change in address, the actual date of receipt is irrelevant and the ninety-five day time limit applies."); cf. Penrod v. Wansack, No. 3:11–cv–004, 2011 WL 2143028, at *1 (S.D. Ohio Apr. 4, 2011) report and recommendation adopted, No. 3:11-cv-004, 2011 WL 2142963 (S.D. Ohio May 31, 2011)

(finding claimant rebutted presumption of actual receipt when EEOC mailed RTS notice to wrong address *and* EEOC failed to respond to claimant's previous attempts to update her address).

Satisfying the ninety-day statute of limitations is not a jurisdictional prerequisite to filing a complaint, but rather a requirement that is subject to waiver, estoppel, and equitable tolling. Zipes v. Trans. World Airlines, Inc., 455 U.S. 385, 393 (1982); see also Sebelius v. Auburn Reg'l Med. Ctr., 133 S. Ct. 817, 819 (2013) (quoting Zipes, 455 U.S. at 394) (reiterating a statute establishing a filing deadline "does not speak in jurisdictional terms") (internal quotation marks omitted). A statute of limitations may be tolled based on equitable considerations. Snow v. Napolitano, No. 10-02530, 2013 U.S. Dist. LEXIS 97487, at *5 (W.D. Tenn. July 11, 2013). However, federal courts sparingly use equitable tolling, Peterson v. Klee, No. 2:12–cv–11109, 2013 WL 2480687, at *4 (E.D. Mich. June 10, 2013), and the doctrine is available only in "compelling cases that justify a departure from established procedures." Warith v. Amalgamated Transit Union Local Chapter 268, No. 1:13 CV 985, 2013 WL 2443780, at *3 (N.D. Ohio June 4, 2013) (citing Puckett v. Tenn. Eastman Co., 889 F.2d 1481 (6th Cir. 1989)). The doctrine of equitable tolling "allows courts to toll a statute of limitations when a litigant's failure to meet a legally-mandated deadline unavoidably arose from circumstances beyond that litigant's

control." Plummer v. Warren, 463 F. App'x 501, 504 (6th Cir. 2012) (quoting Robertson v. Simpson, 624 F.3d 781, 783 (6th Cir. 2010)) (internal quotation marks omitted). However, a claimant's failure to update his address is well within his own control, and thus insufficient to trigger the applicability of the doctrine of equitable tolling. See Banks, 855 F.2d at 326 (declining to equitably toll the statute of limitations when claimant failed to update his address with the EEOC, and noting "a cardinal maxim of equity jurisprudence is that he who comes into equity must come with clean hands"); Hunter, 790 F.2d at 475 ("Our holding is that plaintiff did not receive EEOC notice promptly because he did not notify the EEOC of a change of address and that he may not therefore claim that this ninety day time period is equitably tolled."); cf. Baur v. Crum, 882 F. Supp. 2d 785, 793 (E.D. Pa. Mar. 30, 2012) (applying doctrine of equitable tolling to plaintiff's complaint when plaintiff updated her address with EEOC and EEOC mistakenly sent RTS notice to claimant's old address).

In the instant case, the EEOC mailed the RTS notice on July 26, 2012, to the address Spurlock provided in his charge of discrimination. Factoring in the presumptive five-day mailing period, the ninety-day statute of limitations on Spurlock's Title VII claim ran on October 29, 2012. Therefore, the complaint, filed on October 31, 2012, is time barred. Spurlock asserts in his response brief that he did not actually receive the RTS notice

until ten days after July 26. However, because he received the RTS notice outside the five-day mailing period due to his failure to inform the EEOC of his change of address, "the actual date of receipt is irrelevant and the ninety-five day time limit applies." Reed, 2012 WL 5378379, at *3; see also Pearison, 90 F. App'x at 813 (applying ninety-five day limit despite delayed actual receipt of RTS notice due to failure to update address). As for the doctrine of equitable tolling, Spurlock has not argued for the application of that doctrine. In any event, the court submits the doctrine of equitable tolling does not apply in the instant case. See Banks, 855 F.3d at 326 (refusing to equitably toll statute of limitations when plaintiff failed to update address with EEOC causing delayed receipt of RTS notice); Hunter, 790 F.2d at 475 (same). Spurlock could have provided the EEOC with an updated address, but did not. Moreover, after actually receiving his RTS notice, Spurlock had ample time to file his complaint before the limitations period expired, but failed to do so. Spurlock's actions, or more specifically inactions, do not warrant the application of equitable tolling. See Brown, 466 U.S. at 151 ("One who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence."). Thus, the court submits that Spurlock's complaint is time barred and recommends the complaint be dismissed under Rule

12(b)(6).[4]

III. RECOMMENDATION

For the reasons above, it is recommended that Depuy Synthes's motion to dismiss be granted and Spurlock's complaint be dismissed with prejudice.

Respectfully submitted,

s/ Tu M. Pham
TU M. PHAM
United States Magistrate Judge

July 22, 2013
Date

NOTICE

WITHIN FOURTEEN (14) DAYS AFTER BEING SERVED WITH A COPY OF THIS REPORT AND RECOMMENDED DISPOSITION, A PARTY MAY SERVE AND FILE WRITTEN OBJECTIONS TO THE PROPOSED FINDINGS AND RECOMMENDATIONS. A PARTY MAY RESPOND TO ANOTHER PARTY'S OBJECTIONS WITHIN FOURTEEN (14) DAYS AFTER BEING SERVED WITH A COPY. FED. R. CIV. P. 72(b)(2). FAILURE TO FILE OBJECTIONS WITHIN FOURTEEN (14) DAYS MAY CONSTITUTE A WAIVER OF OBJECTIONS, EXCEPTIONS, AND FURTHER APPEAL.

[4]Because Spurlock's failure to timely file his complaint is sufficient grounds for the court to dismiss the complaint under Rule 12(b)(6), the court need not address the remaining arguments raised in the instant motion.