

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

MALIA SOMONA CHRISP,)
)
Plaintiff,)
)
v.) 1:18cv542
)
THE UNIVERSITY OF NORTH)
CAROLINA-CHAPEL HILL,)
)
Defendant.)

MEMORANDUM ORDER

THOMAS D. SCHROEDER, Chief District Judge.

Plaintiff Malia Somona Chrisp brings this action against Defendant The University of North Carolina-Chapel Hill alleging race discrimination, age discrimination, and retaliation. (Doc. 15.) Before the court is Defendant's motion to dismiss pursuant to Rules 12(b)(1), 12(b)(2), 12(b)(4), 12(b)(5), and 12(b)(6) of the Federal Rules of Civil Procedure. (Doc. 23.) The motion is fully briefed (Docs. 25, 27, 36) and is ready for decision. For the reasons set forth below, Defendant's motion will be granted to the extent it is based on failure of proper service, and the complaint will be dismissed without prejudice.

I. BACKGROUND

The allegations of the complaint, along with the contents of documents of which the court takes judicial notice,¹ viewed in the

¹ The court may consider documents outside the pleadings without converting a motion to dismiss into one for summary judgment if those

light most favorable to Chrisp, show the following:

Chrisp, a North Carolina resident, is an African American woman who began employment with The University of North Carolina-Chapel Hill ("UNC-Chapel Hill") as an Accounting Technician on or about September 24, 2012. (Doc. 15 ¶¶ 2, 15.) In April 2016, Chrisp, who was 51 years of age, asked her supervisor about a recent job posting and was told that she did not have the skills or qualifications for the position. (Doc. 15-1 at 1.) The job was reposted in August 2016, and on November 7, 2016, "a new employee was hired (white, younger female in her mid-30)."² In addition to being passed-over for the job, Chrisp alleges that her supervisor did not allow her to attend training sessions or similar activities that would help advance her career. (Doc. 15 ¶ 20.) When Chrisp raised concerns that she had been discriminated against in the hiring decision, UNC-Chapel Hill's Human Resources personnel told her "if you're not happy here, maybe you should find work somewhere else." (Doc. 15 ¶ 21.)

documents are "integral to and explicitly relied on in the complaint" and their authenticity is unchallenged. Copeland v. Bieber, 789 F.3d 484, 490 (4th Cir. 2015) (quoting Phillips v. LCI Int'l, Inc., 190 F.3d 609, 618 (4th Cir. 1999)). Chrisp has attached four documents to her fourth amended complaint that support her claims and are explicitly relied upon (Docs. 15-1 through 15-4), and their authenticity is not challenged. At times, the dates in Chrisp's Fourth Amended Complaint conflict with the attached exhibits. The court will rely on the dates provided in the exhibits and will note when conflicting dates occur.

² In her Fourth Amended Complaint, Chrisp alleges that these events occurred in or around October and November of 2017 and that the hired employee was "approximately 25 years of age." (Doc. 15 ¶¶ 18-20.)

On February 13, 2017, Chrisp filed a charge of race discrimination and age discrimination with the Equal Employment Opportunity Commission ("EEOC") based on UNC-Chapel Hill's alleged discriminatory acts. (Doc. 15-1.)³ On July 13, 2017, Chrisp filed an additional charge of discrimination based on retaliation, alleging that following her charge of race and age discrimination she had been "subjected to an ongoing pattern and practice or [sic] retaliatory treatment and harassment by [her] immediate supervisor." (Doc. 15-2 at 1.) EEOC mailed Chrisp a "Dismissal and Notice of Rights" letter regarding her race and age discrimination charges on July 31, 2017, informing her that she must file a lawsuit within 90 days of receipt of the notice. (Doc. 15-1 at 3.) On October 10, 2017, Chrisp filed an amended charge with the EEOC, alleging that UNC-Chapel Hill's discriminatory acts also violated "Chapter 7A-759(b1) of the North Carolina General Statutes."⁴ (Doc. 15-3 at 1.) On May 15, 2018, Chrisp received a "Dismissal and Notice of Rights" letter from the EEOC informing her that the EEOC was closing its file on her charges and giving her notice of her right to sue. (Doc. 15-4.)

On June 22, 2018, Chrisp, proceeding *pro se*, filed this action with a complaint (Doc. 2), which was subsequently amended on

³ Chrisp's Fourth Amended Complaint alleges that this charge was filed with the EEOC on or around December 15, 2017. (Doc. 15 ¶ 9.)

⁴ Chrisp's Fourth Amended Complaint alleges that this amended charge was filed with the EEOC on November 10, 2017. (Doc. 15 ¶ 12.)

November 14, 2018 (Doc. 5 - First Amended Complaint), December 6, 2018 (Doc. 6 - Second Amended Complaint), and July 15, 2019 (Doc. 9 - Third Amended Complaint). Chrisp retained counsel for the purpose of filing her Fourth Amended Complaint (Doc. 15), filed August 9, 2019, but says she is otherwise proceeding pro se (Docs. 32, 33). On December 26, 2019, UNC-Chapel Hill filed the present motion to dismiss (Doc. 23), which Chrisp opposes (Doc. 27).

II. ANALYSIS

Chrisp alleges that this court has personal jurisdiction over the parties, as well as subject matter jurisdiction pursuant to 42 U.S.C. § 2000e-2, et seq. and 29 U.S.C. § 621, et seq. (Doc. 15 ¶ 6.) Challenging this court's jurisdiction over it, UNC-Chapel Hill argues that Chrisp "fail[ed] to effect timely service of process," thus depriving this court of personal jurisdiction. (Doc. 25 at 14.) This challenge is made pursuant to Federal Rules of Civil Procedure 12(b)(2), 12(b)(4), and 12(b)(5). (Id. at 14-15.)

In addressing Defendant's motions, the court will treat Chrisp as a pro se litigant⁵ and is mindful that it must construe

⁵ Chrisp had retained counsel who filed a purported limited notice of appearance and two motions to extend time to file a Fourth Amended Complaint. (Docs. 10, 11, and 13.) Counsel then filed and signed a Fourth Amended Complaint on Chrisp's behalf. (Doc. 15.) For reasons not relevant here, Chrisp's counsel was unable to proceed as his practice was taken over by the North Carolina State Bar, and the Magistrate Judge granted Chrisp additional time to either retain new counsel or file a notice of intent to proceed pro se. (Doc. 32.) Chrisp then filed a

her complaint liberally, thus permitting a potentially meritorious case to develop if one is present. Erickson v. Pardus, 551 U.S. 89, 94 (2007). However, the liberal construction of a pro se plaintiff's pleading does not require the court to ignore clear defects in pleading, Bustos v. Chamberlain, No. 3:09-1760-HMH-JRM, 2009 WL 2782238, at *2 (D.S.C. Aug. 27, 2009), or to become an advocate for the pro se party, Weller v. Dep't of Soc. Servs., 901 F.2d 387, 391 (4th Cir. 1990). A pro se litigant is subject to the service requirements of the Federal Rules of Civil Procedure. See Carawan v. Mitchell, 400 F. Supp. 3d 371, 393 n.6 (W.D.N.C. 2019) (dismissing a pro se plaintiff's claims against parties who were not timely served in accordance with Rule 4(m)); Pitts v. O'Geary, 914 F. Supp. 2d 729, 734 (E.D.N.C. 2012) (dismissing pro se plaintiffs' claims against each defendant they failed to serve in accordance with Rule 4(m)); Stafford v. Discover Bank, 350 F. Supp. 2d 695, 698-99 (M.D.N.C. 2004) (granting the defendant's motion to dismiss where the pro se plaintiff failed to comply with Rule 4(m)); Lostutter v. Olsen, No. 1:16-CV-1098, 2017 WL 3669557 (M.D.N.C. Aug. 24, 2017) (requiring pro se plaintiff to comply with service rules). While mere technicalities ordinarily should not stand in the way of finding proper service and courts will liberally construe the rules when actual notice occurs, "the rules

notice informing the court that she was unable to retain new counsel and intended to proceed pro se. (Doc. 33.)

are there to be followed, and plain requirements for the means of effecting service of process may not be ignored.” Armco, Inc. v Penrod-Staufffer Bldg. Sys., Inc., 733 F.2d 1087, 1089 (4th Cir. 1984).

“Absent waiver or consent, a failure to obtain proper service on the defendant deprives the court of personal jurisdiction over the defendant.” Ulhorn v. Fletcher, No. 1:18cv137, 2018 WL 4055267, at *2 (M.D.N.C. Aug. 24, 2018) (citing Koehler v. Dodwell, 152 F.3d 304, 306 (4th Cir. 1998)). Federal Rule of Civil Procedure 4(m) provides that if a defendant is not served within 90 days of the filing of the complaint, the court on motion or on its own after providing notice to the plaintiff “must dismiss the action without prejudice against the defendant or order that service be made within a specified time.” Fed. R. Civ. P. 4(m). However, if the plaintiff can show good cause for the failure, “the court must extend the time for service for an appropriate period.” Id. “Generally, for purposes of Rule 4(m), ‘good cause’ requires some showing of diligence on the part of the plaintiffs. Put conversely, good cause generally exists when the failure of service is due to external factors, such as the defendant’s intentional evasion of service.” Attkisson v. Holder, 925 F.3d 606, 627 (4th Cir. 2019), as amended (June 10, 2019). “The plaintiff bears the burden of establishing that service of process has been accomplished in a manner that complies with Rule 4.”

Plant Genetic Sys., N.V. v. Ciba Seeds, 933 F. Supp. 519, 526 (M.D.N.C. 1996).

Chrisp's initial complaint was filed on June 22, 2018. (Doc. 2.) Following Rule 4(m), Chrisp was required to serve UNC-Chapel Hill within 90 days, or by September 20, 2018. However, Chrisp filed a series of amended complaints, the present one having been filed on August 9, 2019. (Doc. 15.) Assuming that the date of the Fourth Amended Complaint is operative, Chrisp was nevertheless required under Rule 4(m) to serve UNC-Chapel Hill by November 7, 2019. UNC-Chapel Hill did not obtain a summons until December 2, 2019 (Doc. 17) and was finally served on December 5, 2019 (Doc. 19). UNC-Chapel Hill was not timely served, and Chrisp has failed to provide any reason, much less good cause, for her failure to comply with Rule 4(m). Rather, her response to UNC-Chapel Hill's motion to dismiss demonstrates a misunderstanding of the Federal Rules and a conflation of the 90-day time period discussed in her EEOC right to sue letters and the 90-day period in which to effect service under Federal Rule 4(m).⁶

⁶ Chrisp dedicates one paragraph to opposing UNC-Chapel Hill's motion to dismiss pursuant to Rules 12(b)(2), 12(b)(4), and 12(b)(5), stating:

Defendant UNC Chapel was served in a timely matter, they were served within the 90 days of the motion being allowed. Motion was filed in a timely matter with the court. There is no time frame that state[s] that a motion should be served 90 days after filed in court. After motion had been granted you have 90 days to serve the defendant. I received my right to sue May 2018, I filed my motion on June 2018 which was within the 90-day time frame. A motion for extension was granted by

Because there is no waiver or consent, Chrisp's failure to obtain proper service on UNC-Chapel Hill "deprives the court of personal jurisdiction over the defendant." Ulhorn, 2018 WL 4055267, at *2 (citing Koehler, 152 F.3d at 306). "Personal jurisdiction . . . is an essential element of the jurisdiction of a district . . . court, without which the court is powerless to proceed to an adjudication." Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 584 (1999). Because the court finds in the present case that it lacks personal jurisdiction over UNC-Chapel Hill, it need not address subject matter jurisdiction or the merits of Chrisp's claims and UNC-Chapel Hill's motion to dismiss will be granted without prejudice. See Ruhrgas AG, 526 U.S. at 584-85.

III. CONCLUSION

For the reasons stated, the court finds that Chrisp has failed to comply with the mandates of Federal Rule of Civil Procedure 4(m) and has not shown good cause for her failure. As such, the court lacks personal jurisdiction over UNC-Chapel Hill.

IT IS THEREFORE ORDERED that Defendant's motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(2), 12(b)(4), and 12(b)(5) (Doc. 23) is GRANTED and Plaintiff's Fourth Amended

the judge. Courts cases can be in court for years. My complaint was within the 90-day window. I was within my time frame when motion was allowed to be severed [sic]. Motion should be allowed and they **SHOULD** be held accountable for all their action at hand and other damage at trial.

(Doc. 27 at 12.)

Complaint (Doc. 15) is DISMISSED WITHOUT PREJUDICE. Any remaining ground for dismissal argued is DENIED WITHOUT PREJUDICE as MOOT.

/s/ Thomas D. Schroeder
United States District Judge

July 10, 2020