

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
CHARLOTTESVILLE DIVISION**

ROGER D. WALKER,

*Plaintiff,*

v.

JOHN E. POTTER, *United States Postmaster  
General*

*Defendant*

CIVIL No. 3:06CV00069

ORDER

JUDGE NORMAN K. MOON

This matter is before the Court on the Defendant's March 12, 2007 Motion to Dismiss. Defendant asserts that the action is time barred because the EEOC "Right to Sue" letter issued on May 17, 2005, giving until no later than August 18, 2005 to file the action. Plaintiff concedes these points but argues that because an earlier action was filed on time, the statute of limitations was tolled. Two earlier actions have actually been filed, but both were dismissed because Plaintiff failed to serve Defendant within the 120-day period mandated by Fed. R. Civ. Proc. 4(m).<sup>1</sup> These were 3:05CV00040 and 3:06CV00031. No motion for an extension of time was filed in the former, although such a motion was filed and denied after the expiration of the service period in the latter.

Under federal law, the statute of limitations is not tolled by the filing of a complaint; a subsequent dismissal without prejudice is treated for limitations purposes as though no complaint

---

<sup>1</sup>No reason for this failure was given. Because service may be accomplished by certified mail, there is no question of evasion or misconduct on the part of defendants or private process servers.

was ever filed. Although the Court is unable to locate a published case from the Fourth Circuit on point,<sup>2</sup> several unpublished cases endorse this rule. *Quinn v. Watson*, 119 Fed. Appx. 517, 2005 U.S. App. LEXIS 839 (4th Cir. N.C. 2005); *Aziz v. Orbital Sciences Corp.*, 1998 U.S. App. LEXIS 26736 (4th Cir. 1998). Additionally, cases from other circuits show a unanimous trend. *See Brennan v. Kulick*, 407 F.3d 603, 606 (3d Cir. 2005); *Chico-Velez v. Roche Prods.*, 139 F.3d 56, 58-59 (1st Cir. 1998) (dismissal used as sanction); *Justice v. United States*, 6 F.3d 1474, 1478-79 (11th Cir.1993); *Minnette v. Time Warner*, 997 F.2d 1023, 1026-27 (2d Cir. 1993) (citing *Berry v. CIGNA/RSI-CIGNA*, 975 F.2d 1188, 1191 (5th Cir. 1992)); *Kington v. United States*, 396 F.2d 9 (6th Cir. 1968) (voluntary dismissal); *Johnson v. Railway Express Agency, Inc.*, 489 F.2d 525 (6th Cir. 1973) (involuntary dismissal); *Haislip v. Riggs*, 534 F. Supp. 95, 98 (W.D.N.C. 1981). In EEOC cases, filing a single day late will result in dismissal. *Harvey v. New Bern City Police Dept.*, 813 F. 2d 652 (4th Cir. 1987). This case was filed on December 29, 2006, more than 16 months after the time limit expired.

Even supposing that the limitations period were tolled, Plaintiff had at most a few days of limitations period left after the dismissal of the first case; he waited months before refile. This action is therefore time barred.

The Motion to Dismiss is GRANTED. The case is DISMISSED in its entirety and STRICKEN from the docket of this Court.

The Clerk of the Court is directed to send a certified copy of this Order to all counsel of record.

---

<sup>2</sup>Defendant cites *Mendez v. Elliot*, 45 F.3d 75 (4th Cir. 1995) for the proposition that dismissal without prejudice does not eliminate the statute of limitations defense. This case does not address tolling, however.

ENTERED:

\_\_\_\_\_  
U.S. District Judge

\_\_\_\_\_  
Date