[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-12364
Non-Argument Calendar

D.C. Docket No. 4:19-cv-00004-CDL

JIMMY SCOTT,

Plaintiff-Appellant,

versus

PIEDMONT COLUMBUS REGIONAL HOSPITAL,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Georgia

(May 11, 2020)

Before WILLIAM PRYOR, ROSENBAUM, and JILL PRYOR, Circuit Judges.

PER CURIAM:

Jimmy Scott, an African American man proceeding *pro se*, filed a lawsuit alleging that his former employer Piedmont Columbus Regional Hospital ("Piedmont") violated Title VII of the Civil Rights Act of 1964 ("Title VII") and the Age Discrimination in Employment Act ("ADEA") by terminating him, subjecting him to a hostile work environment, and retaliating against him for complaining to human resources. Piedmont moved to dismiss the complaint as untimely, arguing that Scott failed to file his complaint within 90 days of receiving a right-to-sue letter from the Equal Employment Opportunity Commission ("EEOC"). The district court granted that motion and dismissed Scott's complaint, and Scott appealed. After careful review, we affirm the dismissal of Scott's complaint.

We review *de novo* the grant of a motion to dismiss for failure to state a viable claim, accepting the complaint's allegations as true and construing them in the light most favorable to the plaintiff. *Am. Dental Ass'n v. Cigna Corp.*, 605 F.3d 1283, 1288 (11th Cir. 2010). We liberally construe the filings of *pro se* parties. *Campbell v. Air Jam. Ltd.*, 760 F.3d 1165, 1168–69 (11th Cir. 2014).

Before an employee may sue in federal court under Title VII or the ADEA, he must first file a charge of discrimination with the EEOC. 42 U.S.C. § 2000e-5(b) & (f)(1); 29 U.S.C. § 626(d)(1). If the EEOC decides not to litigate on the employee's behalf, the EEOC must send the employee notice, often called a right-to-sue letter. *See* 42 U.S.C. § 2000e-5(f)(1); 29 U.S.C. § 626(e).

If the EEOC issues a right-to-sue letter, the employee must bring suit in federal court within 90 days of the receipt of that letter. *Id.* The 90-day time limit, though mandatory, is not jurisdictional. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393, 398 (1982). Because it's non-jurisdictional, the time limit is subject to equitable tolling, meaning that a court may excuse the failure to file on time under certain circumstances. *Id.*

The plaintiff bears the burden of establishing that equitable tolling is warranted. *Bost v. Fed. Express Corp.*, 372 F.3d 1233, 1242 (11th Cir. 2004). "Equitable tolling is an extraordinary remedy which should be extended only sparingly." *Id.* (quotation marks omitted). It's generally warranted where the plaintiff fails to file on time because of extraordinary circumstances that are both beyond his control and unavoidable even with diligence. *Arce v. Garcia*, 434 F.3d 1254, 1261 (11th Cir. 2006).

Equitable tolling is not appropriate, however, "where the plaintiff's failure to file was caused by plaintiff's own negligence." *Bryant v. U.S. Dep't of Agric.*, 967 F.2d 501, 504 (11th Cir. 1992). In other words, "the principle of equitable tolling does not extend to what is at best a garden variety claim of excusable neglect." *Id.* (quotation marks omitted).

In *Baldwin County Welcome Center v. Brown*, 466 U.S. 147 (1984), for example, the Supreme Court held that equitable tolling did not apply in a Title VII

case where the plaintiff failed to file on time despite having notice of the 90-day filing deadline. *Id.* at 151–52. The Court stated that no circumstance prevented her from filing on time and that "[o]ne who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence." *Id.* at 151. Further, the Court rejected the plaintiff's argument that equitable tolling should apply because the defendant was not prejudiced, explaining that while the lack of prejudice is relevant to equitable tolling "it is not an independent basis for invoking the doctrine." *Id.* at 151–52. The Court emphasized that "[p]rocedural 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." *Id.* at 152.

Here, the district court properly dismissed Scott's complaint. Scott filed his complaint on December 6, 2018. That was 101 days from the date the right-to-sue letter was mailed, according to the right-to-sue letter attached to Scott's complaint. Although we do not know the precise date Scott received the right-to-sue letter from the EEOC, he does not dispute that he failed to file his complaint within 90 days of his receipt of that letter.

Instead, Scott maintains that we should allow his late-filed complaint to move forward based on his "excusable neglect" and the lack of prejudice to Piedmont. However, as we have noted, we have held that equitable tolling "does not extend to what is at best a garden variety claim of excusable neglect," and Scott does not

identify any circumstances for his late filing beyond his own negligence. *See Bryant*, 967 F.2d at 504; *Brown*, 466 U.S. at 151. Moreover, the lack of prejudice to Piedmont "is not an independent basis for invoking the doctrine." *Brown*, 466 U.S. at 151–52. Accordingly, Scott has not met his burden of showing that equitable tolling of the 90-day deadline is warranted.[1] *See Bost*, 372 F.3d at 1242.

We acknowledge Scott's frustration that the courts will not reach the merits of his claims, but we cannot disregard the "[p]rocedural requirements established by Congress for gaining access to the federal courts." *Brown*, 466 U.S. at 152. We therefore affirm the dismissal of Scott's complaint as untimely.

AFFIRMED.

[1] The district court did not err by failing to hold an evidentiary hearing. Scott offers no reason to believe that, with further factual development, he could establish an entitlement to equitable tolling of the 90-day period.