No. 16-

IN THE

Supreme Court of the United States

ADRIAN R. SCOTT,

Petitioner,

v.

MARYLAND STATE DEPARTMENT OF LABOR, LICENSING & REGULATION *et al.,*

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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June 23, 2017

QUESTION PRESENTED

This case presents the question on which the Court granted certiorari, but was unable to resolve, in *Chen* v. *Mayor & City Council of Baltimore, Md.*, 135 S. Ct. 939 (2015) (mem.):

Whether, under Federal Rule of Civil Procedure 4(m), a district court has discretion to extend the time for service of process even without a showing of good cause, as the Second, Third, Fifth, Seventh, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits have held, and as this Court has interpreted, or whether the district court lacks such discretion, as the Fourth Circuit has squarely held and as the Sixth Circuit has repeatedly suggested.

PARTIES TO THE PETITION

Petitioner in this Court, plaintiff-appellant below, is Adrian R. Scott.

Respondents, defendants-appellees below, are the Maryland State Department of Labor, Licensing & Regulation; Jennifer Dashell Reed; Alice L. Wirth; James Younger III; Edward W. Schwabeland; Randolph J. Shipe; and LeAnn Lorenz.

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PETITION FOR A WRIT OF CERTIORARI

Adrian R. Scott respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The Fourth Circuit's opinion (Pet. App. 1a-14a) is reported at 673 F. App'x 299 (4th Cir. 2016). The court's order denying rehearing en banc (Pet. App. 25a) is unreported. The district court's order (Pet. App. 15a-16a) is unreported. The decision of the U.S. Equal Employment Opportunity Commission (Pet. App. 17a-24a) is unreported.

JURISDICTION

The order denying a timely petition for rehearing en banc was entered on March 30, 2017. Pet. App. 25a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

RULE OF CIVIL PROCEDURE INVOLVED

At all relevant times, Federal Rule of Civil Procedure 4(m) provided:

> If a defendant is not served within 120 days after the complaint is filed, the court—on motion or on its own after notice to the plaintiff—must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for

> the failure, the court must extend the time for service for an appropriate period.

Fed. R. Civ. P. 4(m) (2014).[1]

STATEMENT OF THE CASE

This case implicates the same circuit split—a 9-1 or 9-2 conflict—on which this Court granted certiorari in *Chen* v. *Mayor & City Council of Baltimore, Maryland*, 135 S. Ct. 475 (2014). As in *Chen*, the question presented is whether, under Federal Rule of Civil Procedure 4(m), a district court has discretion to extend the time for service of process even without a showing of good cause, as the Second, Third, Fifth, Seventh, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits have held, which is also consistent with this Court's interpretation of the same provision, or whether the district court lacks such discretion, as the Fourth Circuit has held and the Sixth Circuit appears to endorse. See *id.* (describing the conflict as 7-1 based on the *pro se* petitioner's count). This Court was unable to resolve the conflict in *Chen* due to the *pro se* petitioner's failure to file a merits brief. *Chen* v. *Mayor & City Council of Balt., Md.*, 135 S. Ct. 939 (2015) (mem.); see also *Chen*, 135 S. Ct. 1485 (2015) (mem.) (denying rehearing).

In the decision below, the Fourth Circuit affirmed the dismissal of petitioner's civil rights claims against the Maryland State Department of Labor, Licensing & Regulation ("DLLR") pursuant to Fed. R. Civ. P. 12(b)(5) and 4(m) on the sole basis that he had not shown good cause for extending the time in which to properly serve DLLR. Pet. App. 11a-13a. Consistent

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[1] The 120-day service period was amended to 90 days, effective December 1, 2015, subsequent to this suit. Fed. R. Civ. P. 4(m) (2015).

with Circuit precedent, the court affirmed dismissal without analyzing whether, even if good cause were lacking, the equities supported the exercise of discretion to extend the service period. See *id.* Specifically, the Fourth Circuit has long held "Rule 4(m) requires that if the complaint is not served within 120 days after it is filed, the complaint *must be dismissed absent a showing of good cause*." *Mendez* v. *Elliot*, 45 F.3d 75, 78 (4th Cir. 1995) (emphasis added); see Pet. App. 11a-12a (applying *Mendez* in dismissing for lack of good cause); see also *Chen* v. *Mayor of City of Balt.*, 292 F.R.D. 288 (D. Md.) (applying *Mendez*), *aff'd* 546 F. App'x 187 (4th Cir. 2013) (mem.), *cert. granted*, 135 S. Ct. 475 (2014) (mem.), *cert dismissed*, 135 S. Ct. 939 (2015) (mem.).

As the grant of *certiorari* in *Chen* illustrates (and as other courts of appeals have recognized), the Fourth Circuit's interpretation of Rule 4(m) is irreconcilable with the holdings of every other court of appeals to have addressed the issue, except the Sixth Circuit upon which the court below relied. The conflict continues to cause disparate results in like cases solely because of geography, and the Fourth Circuit's idiosyncratic *Mendez* rule continues to inflict significant harm on *pro se* plaintiffs (as Mr. Scott was at the times when he attempted to serve defendants) within the Fourth Circuit. Mr. Scott, for instance, presented the very equitable circumstances that the advisory committee comments to Rule 4(m) and multiple courts of appeals have held justify discretionary extensions as a matter of equity under Rule 4(m) even if good cause for extending the period to properly effectuate service does not exist. Because of the *Mendez* rule, neither the Fourth Circuit nor the district court considered whether equity favored an extension of the service period.

The need for this Court's review remains at least as imperative as it was in *Chen*. Moreover, Mr. Scott's petition for rehearing en banc presented the Fourth Circuit with a clear opportunity, after *Chen*, to self-correct, and the court of appeals refused to do so. This Court's intervention is needed.

I. BACKGROUND REGARDING FEDERAL RULE OF CIVIL PROCEDURE RULE 4(m) (FORMERLY RULE 4(j)).

At all relevant times, Federal Rule of Civil Procedure 4(m) read:

> If a defendant is not served within 120 days after the complaint is filed, the court—on motion or on its own after notice to the plaintiff—must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period.[2]

In sum, Rule 4(m) mandates that a court extend time for service when good cause is shown. When no good cause exists, the rule otherwise grants the court discretion between dismissing the action and ordering that service be made within some specified time.

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[2] This version of the rule was effective from 2007 to 2015. From 1993 to 2007, Rule 4(m) was substantively identical to the post-2007 version, reading:

> If 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 on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; 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) (2007).

That stands in stark contrast to the rule prior to the 1993 Amendments (to what was then Rule 4(j)), which read:

> If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required *cannot show good cause* why such service was not made within that period, the action *shall be dismissed* as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion.

Fed. R. Civ. P. 4(j) (1992) (emphases added); see, *e.g.*, *Frasca* v. *United States*, 921 F.2d 450, 453 (2d Cir. 1990) ("Rule 4(j) establishes a 120-day period in which service must be made, and expressly provides an exception only on plaintiff's showing of good cause.").

In other words, prior to its amendment in 1993, the rule was almost the opposite. If good cause were shown, the court had discretion to extend time for service, but if not, it had no choice but to dismiss the action.

II. FACTUAL AND PROCEDURAL BACKGROUND.

A. Mr. Scott's *Pro Se* Suit And Attempts At Service.

This suit stems from Mr. Scott's mistreatment during his employment by the Maryland Department of Labor, Licensing & Regulation ("DLLR"). Actions against Mr. Scott, who is black, included assault, physical threats endorsed by his supervisors, the imposition of arbitrary and demeaning rules on him alone (despite no deficiencies in his performance), baseless cancellations of classes, exclusion from work premises

based on fabricated threats on Mr. Scott's life, frivolous complaints, threats relating to his continued employment, concealment of a job opportunity that should have been publicly posted (as required by policy), and wrongful termination. See Br. of Adrian Scott at 4–11, No. 15-1617 (4th Cir. Sept. 23, 2015) (hereafter "Scott Br."); Joint Appendix at App.11–21, No. 15-1617 (4th Cir. Sept. 11, 2015) (hereafter "CA4-App.").

After exhausting his remedies before the U.S. Equal Employment Opportunity Commission, see Pet. App. 17a–24a, on July 30, 2014, Mr. Scott filed a *pro se* civil rights complaint in the District of Maryland regarding his treatment at DLLR. He alleged that respondents (DLLR and individual employees) wrongfully failed to hire him, wrongfully terminated his employment, and failed to promote him on the basis of his race, color, sex, and age. CA4-App.1–5.

After filing suit, Mr. Scott made three prompt, good-faith attempts to serve respondents properly. DLLR received actual and timely notice of suit, timely appeared, and timely moved to dismiss. The sole flaw in Mr. Scott's service was that he directed DLLR's summons and complaint to a "satellite office" rather than the address for DLLR's registered agent. Pet. App. 4a–5a, 8a–11a.

First Attempt. On August 1, 2014, the day after filing suit, Mr. Scott sent the complaint to each respondent by certified mail.[3] CA4-App.189. Unknown to Mr. Scott, although he did address one complaint to "Office Principal Counsel MD DLLR" at a proper DLLR address (CA4-App.00199), it was not the correct service address, as the agency's secretary is located elsewhere.

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[3] Mr. Scott sent these without summonses, as he was unaware summonses would be issued by the U.S. Marshal Service or needed to be served.

CA4-App.40; CA4-App.81. Nonetheless, a DLLR employee signed for all respondents' complaints on August 4, 2014. CA4-App.192–95; CA4-App.198–200.

After his first service attempt, Mr. Scott's service period was tolled until February 27, 2015, by virtue of the grant of his petition to proceed *in forma pauperis ("IFP")* on October 30, 2014. Pet. App. 8a. Although the *IFP* Order directed the Clerk of Court to mail Mr. Scott "a copy of the Marshal form for each Defendant," CA4-App.27, and Mr. Scott had named multiple defendants, the Clerk provided just one Marshal Form. CA4-App.189.

Second Attempt. Mr. Scott timely returned the only Marshal Form he had received to the Clerk, using the same DLLR mailing address. CA4-App.31; CA4-App.189–90.[4] Because Mr. Scott received only one Marshal Form, Mr. Scott asked the Clerk how to serve the other defendants. CA4-App.190. The Clerk advised that it "missed" the others and would mail additional forms to Mr. Scott. *Id*.

On November 21, 2014, the Clerk issued the summons to DLLR at the same satellite office address provided by Mr. Scott. CA4-App.29. Again, a DLLR employee accepted service. CA4-App.32–34. On December 11, 2014, counsel appeared for all respondents in federal district court. CA4-App.I-003.

In mid-December 2014, having received no additional Marshal Forms from the Clerk, Mr. Scott went to the Clerk's office in person and obtained additional forms. CA4-App.190. On January 16, 2015, Mr. Scott

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[4] The *IFP* Order had a footnote stating that Mr. Scott "may" contact the office of the State Department of Assessments and Taxation to obtain the name and "service address" for the "resident agent," but it did not explain those terms or their significance. CA4-App.27 n.1.

returned Marshal Forms for the individual defendants. CA4-App.114–19; CA4-App.190. Those summonses were issued on February 26, 2015, and served March 9–10, 2015. CA4-App.122–33; CA4-App.141–58.

Third Attempt. After receiving respondents' timely motion to dismiss, filed on January 22, 2015, and realizing he should serve DLLR's Secretary, Mr. Scott—still proceeding *pro se*—obtained an additional Marshal Form from the Clerk, addressed it to "Secretary Kelly M. Schulz" using the same satellite office address as before, and filed it for service on February 2, 2015, still well before the February 27 deadline for *IFP* service. CA4-App.113; CA4-App.190.

B. Mr. Scott's Newly Obtained Counsel Requested An Extension Of Time To Perfect Service.

Respondents' motion to dismiss was the first time that Mr. Scott learned that service was improper. After Mr. Scott filed a *pro se* extension of time to respond to the motion on February 6, 2015, he obtained counsel (now former counsel) who appeared on March 10, 2015. CA4-App.I-004. In timely opposing the motion to dismiss, Mr. Scott requested "additional time for his newly-engaged counsel to comply with the Court's directions for correction of any errors rather than consider dismissal." CA4-App.164. Mr. Scott specifically "request[ed] in the event that the Court deems service inadequate, that the Court extend the time for service" "to permit Plaintiff's counsel a reasonable amount of time to correct the errors in process." CA4-App.176–77. Counsel invoked Rule 4(m) of the Federal Rules of Civil procedure, recognizing that the rule requires that a court extend the time to perfect service upon a showing of good cause. CA4-App.169–70.

After arguing for good cause,[5] Mr. Scott's former counsel separately submitted that dismissal "would be manifestly unjust to the Plaintiff, who has tried mightily to follow both the letter and spirit of the Court's Order." CA4-App.175. Counsel identified multiple equitable considerations that supported extending the time for service if Mr. Scott's *pro se* service attempts were deemed improper. Among other things, counsel argued that the court should grant an extension based on Scot's *pro se* status, his repeated good faith attempts to perfect service, and, as a result of those efforts, respondents "all had actual notice, and have suffered no prejudice." CA4-App.172–77.

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[5] Within the Fourth Circuit, good cause under Rule 4(m) is interpreted extremely narrowly. As in some other circuits, good cause exists if service is not perfected for reasons entirely outside of the party's control (*e.g.*, where a defendant deliberately and fraudulently avoids service, or failure to serve is attributable to the court). Pet. App. 9a–10a (finding good cause for partially extending time to serve defendants because "that delay was outside of Scott's control, and *solely attributable* to the Clerk and the [United States Marshals Service]") (emphasis added); *id.* (plaintiffs "should not be penalized for delay in service beyond their control") (collecting cases); *see*, *e.g.*, *Burns & Russell Co. of Balt.* v. *Oldcastle, Inc.*, 166 F. Supp. 2d 432, 439 n.9 (D. Md. 2001) ("In general, an attorney's 'inadvertence or heedless[ness]' or 'misplaced reliance, will not serve to excuse a failure to timely serve.' Instead, courts will consider 'factors outside of a party's control' that prevent timely service, such as 'evasive or misleading conduct on behalf of defendant or illness on behalf of plaintiff.'") (alteration in original) (citations omitted); *Magraff* v. *Lowes HIW, Inc.*, 217 F. App'x 759, 761 (10th Cir. 2007) (similar).

C. Bound By Fourth Circuit Precedent, The Courts Below Did Not Consider Mr. Scott's Equitable Arguments For Extending The Time For Service.

Upon respondents' motion, see CA4-App.39–43, the district court dismissed the action against all defendants pursuant to Rules 12(b)(5) and 4(m). Its one-paragraph order concluded that service was not effected within 120 days, and that good cause for an extension was lacking. Pet. App. 15a–16a.

Not surprisingly, given the Fourth Circuit's *Mendez* rule and the district judge's prior interpretation of *Mendez*,[6] the district court did not address Mr. Scott's arguments for an equitable extension. *Id.* That is, the court did not proceed to consider—as a district court in nine other circuits in the country would have in these circumstances—whether reasons not amounting to good cause justified extending the service period. *Id.*[7]

Mr. Scott timely appealed, again arguing—separate from his showing of good cause—that dismissal "is manifestly unjust." Scott Br. 13, 18–19. Mr. Scott reiterated his good faith attempts to serve while *pro se*

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[6] Years earlier, District Judge Motz, who dismissed Mr. Scott's action, recognized that "Fourth Circuit precedent requires a showing of good cause before a court can grant an extension of time." *Knott* v. *Atl. Bingo Supply, Inc.*, No. Civ. JFM-05-1747, 2005 WL 3593743, at *1 & n.1 (D. Md. Dec. 22, 2005) (dismissing under Rule 4(m) and citing *Mendez*, 45 F.3d at 79). He noted that although other judges in the District had questioned *Mendez*'s "continuing validity" in light of the circuit split presented here and this Court's post-*Mendez* interpretation of Rule 4(m), he recognized that the District of Maryland "continued to require a showing of good cause, explaining that the district court is not free to disregard Fourth Circuit Precedent." *Id.* at *1 n.1.

[7] The same one-paragraph order also dismissed pursuant to Rule 12(b)(6). Pet. App. 15a–16a.

and respondents' acceptance of service, Reply Br. of Adrian Scott at 4, No. 15-1617 (4th Cir. Dec. 15, 2015) (hereafter "Scott Reply Br."), emphasizing that the purpose of service (actual notice) had been effectuated, and that dismissal would be inequitable because the statute of limitations had run, *id.* at 5–6.

The Fourth Circuit affirmed the dismissal as to DLLR for improper service pursuant to Rules 12(b)(5) and 4(m), because "we agree with the district court that Scott did not demonstrate good cause for his repeated failure to effect proper service." Pet. App. 12a.[8] Relying on *Mendez*, 45 F.3d at 78, and the similarly outlying precedent of the Sixth Circuit, see Pet. App. 11a, the appeals court did not address Mr. Scott's equitable arguments for a discretionary extension after finding good cause lacking, see *id.* at 11a–13a.

Mr. Scott timely sought *en banc* review, which was denied. Pet. App. 25a. Mr. Scott now timely seeks a writ of certiorari.

REASONS FOR GRANTING THE PETITION

In *Chen*, this Court granted certiorari on, but was unable to resolve the question whether, under Federal Rule of Civil Procedure 4(m), a district court has discretion to extend the time for service of process absent a showing of good cause. This Court acknowledged, based on the showings of the *pro se* petitioner in *Chen*, that a 7-1 circuit split existed, with only the Fourth

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[8] The Fourth Circuit did not reach DLLR's arguments that its dismissal could be affirmed on Rule 12(b)(6) grounds. Unlike the district court, the Fourth Circuit held the individual defendants were timely served, but affirmed their dismissal for failure to state a claim. Pet. App. 14a. This petition does not seek review of that holding.

Circuit holding that a district court has no such discretion. *Chen*, 135 S. Ct. 475. In fact, an even deeper split exists; the Second, Third, Fifth, Seventh, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits all permit discretionary extensions under Rule 4(m). The Fourth Circuit expressly holds that extensions are *only* available upon a showing of good cause, and the Sixth Circuit has repeatedly articulated a similar rule while not speaking as directly to the issue. And, as Mr. Scott's case shows, the Fourth Circuit's entrenched rule refusing to entertain requests for discretionary extensions has significant repercussions, especially for *pro se* parties. Faced with the very circumstances Mr. Scott argued supported an equitable extension, other circuits repeatedly have held that discretionary extensions are appropriate. This case presents an ideal vehicle to answer the question that this Court was unable to resolve in *Chen*.

I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CIRCUIT SPLIT IT RECOGNIZED IN *CHEN*.

This is a straightforward case in which to grant *certiorari*. The Fourth Circuit again applied the *Mendez* rule that led this Court to grant certiorari in *Chen* on the same question here. The Fourth Circuit remains on the wrong end of a severely lopsided circuit split in the interpretation of Rule 4(m). The Fourth Circuit's rule is in irreconcilable conflict with *nine* other courts of appeals, in conflict with this Court's interpretation of the provisions at issue, is echoed only by the Sixth Circuit, and makes no sense under the plain language of Rule 4(m) and the interpretation of that language by the advisory committee.

1. At least nine circuits hold that Rule 4(m) makes an extension of time *mandatory* if a showing of good cause is made, and *discretionary* based on the equities

if good cause is not shown. That is true in the seven circuits that this Court recognized in *Chen*, 135 S. Ct. 475, as well as the Eighth and D.C. Circuits. See, *e.g.*, *Mann* v. *Castiel*, 681 F.3d 368, 375 (D.C. Cir. 2012) ("Other circuits to consider the issue have held, with one exception [citing *Mendez*], that Rule 4(m) allows the district court to grant discretionary extensions."); *id.* at 376; *Zapata* v. *City of N.Y.*, 502 F.3d 192, 195–96 (2d Cir. 2007) ("We hold that district courts have discretion to grant extensions [under Rule 4(m)] even in the absence of good cause."); *Horenkamp* v. *Van Winkle & Co.*, 402 F.3d 1129, 1131–33 (11th Cir. 2005); *In re Sheehan*, 253 F.3d 507, 513 (9th Cir. 2001); *Panaras* v. *Liquid Carbonic Indus. Corp.*, 94 F.3d 338, 340 (7th Cir. 1996); *Thompson* v. *Brown*, 91 F.3d 20, 21 n.1 (5th Cir. 1996) ("We necessarily reject the Fourth Circuit's approach, which treats rule 4(m) as identical to the former rule 4(j)."); *Adams* v. *AlliedSignal Gen. Aviation Avionics*, 74 F.3d 882, 887 (8th Cir. 1996); *Espinoza* v. *United States*, 52 F.3d 838, 840–41 (10th Cir. 1995); *Petrucelli* v. *Bohringer & Ratzinger, GMBH*, 46 F.3d 1298, 1305 (3d Cir. 1995) (even if a district court finds that "good cause does not exist, [it] may in its discretion decide whether to dismiss the case without prejudice or extend time for service").

Indeed, at least three of those courts hold that a district court abuses its discretion *ab initio* by failing to consider whether to extend service absent good cause. *Corbett* v. *ManorCare, Inc.*, 224 F. App'x 572, 574 (9th Cir. 2007); *Okla. ex rel. Bd. of Regents* v. *Fellman*, 153 F. App'x 505, 507 (10th Cir. 2005); *Veal* v. *United States*, 84 F. App'x 253, 256 (3d Cir. 2004).

The Fourth Circuit, by contrast, stands in clear conflict with all of these circuits. *Mendez* squarely held

that a showing of good cause is the *only* way to extend the service period under Rule 4(m):

> Rule 4(m) requires that if the complaint is not served within 120 days after it is filed, the complaint must be dismissed absent a showing of good cause.... A district court has *no* discretion to salvage an action once the court has found a violation of Rule 4(m) and a lack of good cause.

Mendez, 45 F.3d at 78–79 (alterations omitted) (emphasis added); see also *Chen*, 292 F.R.D. at 293; Pet. App. 11a. And that rule has stuck for more than 20 years.[9]

This case is emblematic. Here, the Fourth Circuit, expressly relying on *Mendez*, 45 F.3d 75, dismissed Mr. Scott's claims against DLLR because he purportedly failed to show good cause justifying an extension of the service period under Rule 4(m). Pet. App. 11a–12a. The court did so without addressing Mr. Scott's showings that many factors supported an equitable extension of the service period, even if an extension were not mandated. Mr. Scott petitioned for rehearing en banc, and the Fourth Circuit refused to reconsider *Mendez*. The court of appeals' good cause-only interpretation of extensions under Rule 4(m) thus remains in place and is, as this Court recognized in *Chen*, overwhelmingly rejected by its sister circuits.

Indeed, the only circuit arguably in the Fourth Circuit's company is the Sixth Circuit, as the court below tacitly acknowledged. See Pet. App. 11a (citing and

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[9] Indicative of the Fourth Circuit's outlier status, *Mendez* relied on and quoted from an Eleventh Circuit decision, *In re Cooper*, 971 F.2d 640, 641 (11th Cir. 1992) (per curiam), for the "no discretion" rule. *See Mendez*, 45 F.3d at 78–79. *Cooper* has since been expressly overruled as outdated, *Horenkamp*, 402 F.3d at 1131–32 & n.2, but *Mendez* persists.

quoting *Nafzinger* v. *McDermott Int'l, Inc.*, 467 F.3d 514 (6th Cir. 2006), in tandem with *Mendez*). In *Nafzinger* and many other cases, the Sixth Circuit continues to treat Rule 4(m) as if it were the former Rule 4(j). *Nafzinger*, 467 F.3d at 521 ("Dismissal of the action 'shall' follow unless the 'plaintiff shows good cause' for failure to meet the 120–day deadline."); *id.* at 521–22 (dismissing action upon finding that plaintiff did not establish good cause without proceeding to consider discretionary extension); *accord Garner* v. *City of Memphis*, 576 F. App'x 460, 463 (6th Cir. 2014) (same); *Hill* v. *Rhodes Inc.*, 39 F. App'x 246, 247 (6th Cir. 2002) ("Absent a showing of good cause to justify a failure to effect timely service, the Federal Rules of Civil Procedure compel dismissal."); *Harris* v. *City of Cleveland*, 7 F. App'x 452, 456 (6th Cir. 2001) (per curiam) ("In the absence of a showing of good cause, failure to timely serve a defendant mandates dismissal."); *Byrd* v. *Stone*, 94 F.3d 217, 219 (6th Cir. 1996). The Sixth Circuit repeatedly terminates its analysis immediately after finding no good cause without proceeding to consider a discretionary extension, *e.g.*, *Nafzinger*, 467 F.3d at 520–22; *Garner*, 576 F. App'x at 463; and we have found no case in which the Sixth Circuit has considered whether to grant a discretionary extension consistent with those available in the nine other circuits noted above.[10]

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[10] To be sure, several Sixth Circuit cases have suggested—opaquely—that discretion exists beyond the good cause inquiry. *See O'Kroley* v. *Fastcase, Inc.*, 831 F.3d 352, 355–56 (6th Cir. 2016) ("Because O'Kroley offered no 'good cause' for his failure to comply with this rule, the district court *permissibly dismissed* Fastcase from the case.") (emphasis added), *cert. denied*, 137 S. Ct. 639 (2017); *Donaldson* v. *United States*, 35 F. App'x 184, 185 (6th Cir. 2002) ("[A]bsent a showing of good cause by the plaintiff, the district court *may* dismiss the case for failure to effect timely service.") (emphasis added); *Catz* v. *Chalker*, 142 F.3d 279, 289

Whether the question presented here is considered subject to a 9-1 or 9-2 circuit split, the conflict warrants this Court's review just as it did in *Chen*.

2. In addition to implicating a deep circuit split, the Fourth Circuit's holdings and the rule repeatedly stated by the Sixth Circuit collide with this Court's post-*Mendez* interpretation of Rule 4(m). In *Henderson* v. *United States*, this Court recognized (in dicta) that, even without good cause, Rule 4(m) provides discretion to extend time for service: "Most recently, in 1993 amendments to the Rules, *courts have been accorded discretion to enlarge the 120–day period 'even if there is no good cause shown.*'" 517 U.S. 654, 662 (1996) (emphasis added) (quoting Fed. R. Civ. P. 4 Advisory Committee's Notes—1993 amendment, *subdivision (m)*). Moreover, the *Henderson* court recognized that the plain language of Rule 4(m) permits discretionary extensions. It explained that whereas prior to amendment, the Rule (then 4(j)) required that, if the party serving "'cannot show good cause why such service was not made within that [120–day] period, *the action shall be dismissed as to that defendant*,'" *id.* at

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n.10 (6th Cir. 1998) ("In Catz's view, Rule 4(m) not only compels dismissal without prejudice if 120 days elapse without service, but also preempts any other action by the district court grounded on independent bases. We disagree with that reading. The language of the rule implies that the district court has enough flexibility to make some other disposition of the case ...."). The district courts within the Sixth Circuit are in disarray as a result. *Compare*, *e.g.*, *Nicholson* v. *N-Viro Int'l Corp.*, No. 3:06CV01669, 2007 WL 2994452, at *4 (N.D. Ohio Oct. 12, 2007) ("In the Sixth Circuit, absent good cause, dismissal due to lack of service is '"mandatory rather than discretionary."'), *with*, *e.g., Beyoglides* v. *Montgomery Cty. Sheriff*, 166 F. Supp. 3d 915, 917 (S.D. Ohio 2016) ("Even in the absence of good cause, the Court maintains discretion to grant an extension of time to effectuate service of process.").

661 (quoting Fed. R. Civ. P. 4(j) (1988)), post-amendment Rule 4(m) is markedly different because it (i) requires mandatory extensions for good cause, and (ii) accords discretion to extend the period absent good cause, *id.* at 662–63 & n.10.[11]

Mendez, however, inexplicably ignored the significant textual difference between former Rule 4(j) and Rule 4(m) (as well as the Advisory Committee's notes discussing that change). The Fourth Circuit claimed, *contra Henderson*, that "Rule 4(j) was edited without a change in substance and renumbered as Rule 4(m)." *Mendez*, 45 F.3d at 78; see also *Nafzinger*, 467 F.3d at 521 (construing the term "shall" in Rule 4 as if Rule 4(j) were still in effect). Thus, as other courts of appeals have recognized, the Fourth Circuit's rule is indefensible because *Mendez* "provides no insight as to why the court disregarded the plain language of rule 4(m) and instead treats the rule as the mirror image of rule 4(j)." *Thompson*, 91 F.3d at 21 n.1; see, *e.g.*, *Panaras*, 94 F.3d at 340 (*Mendez* "relied on precedent interpreting Rule 4(j) to require good cause for an extension of time limit for service and erroneously concluded that Rule 4(j) was amended and renumbered as 4(m) without substantive change").

3. Because of this Court's inability to resolve this conflict in *Chen*, the *Mendez* rule continues to harm plaintiffs, particularly *pro se* plaintiffs like Mr. Scott,

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[11] The corresponding language of Rule 4(m) in effect at the time relevant here is substantively the same, "If a defendant is not served within 120 days after the complaint is filed, the court ... must dismiss the action ... *or order that service be made within a specified time*." Fed. R. Civ. P. 4(m) (2014) (emphasis added).

based solely on the fact that their claims arise in the Fourth Circuit.[12]

Such arbitrary treatment on a threshold issue of access to the courts undermines respect for the law and the courts. The Fourth Circuit *in this case* declined the chance to revisit its rule en banc, even after this Court recognized in *Chen* that review of that rule is necessary. This Court's review remains as vital as it was in *Chen*.

II. THIS IS AN EXCELLENT VEHICLE TO RESOLVE THE QUESTION PRESENTED.

This case provides an ideal vehicle in which to resolve the circuit split upon which this Court granted review in *Chen*.

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[12] *See*, *e.g.*, *Cobb* v. *GC Servs., LP,* No. 3:16-3764, 2017 WL 1856176, at *3 (S.D.W. Va. May 8, 2017) (issuing order to show good cause why case should not be dismissed under Rule 4(m), and stating "Cobb may *only* secure leave of the Court by making a showing of good cause why she was unable to properly serve DoE in 90 days.") (emphasis added); *Chien* v. *Grogan*, No. 1:16CV1470(JCC/MSN), 2017 WL 1091504, at *2 (E.D. Va. Mar. 23, 2017) (dismissing pursuant to Rule 4(m) because plaintiff "d[id] not include any information that would allow the Court to conclude that good cause exists for the failure to execute proper service of process prior to the deadline"); *Kyser* v. *Edwards*, No. 2:16-CV-05006, 2017 WL 924249, at *3 (S.D.W. Va. Feb. 9, 2017) ("The United States Court of Appeals for the Fourth Circuit has interpreted Rule 4(m) to require dismissal of a complaint that has not been served upon a defendant within the Rule 4(m) period, absent a showing of good cause."), *report and recommendation adopted*, No. 2:16-CV-05006, 2017 WL 891293 (S.D.W. Va. Mar. 6, 2017); *see also United States ex rel. Moore* v. *Cardinal Fin. Co.*, Civ. No. CCB-12-1824, 2017 WL 1165952, at *6 (D. Md. Mar. 28, 2017) (stating "[e]specially since *Chen*, members of this bench have concluded *Mendez* is good law," and that the Fourth Circuit's decisions in *Chen* and in this case reaffirmed the *Mendez* rule).

To begin, the Fourth Circuit applied the *Mendez* rule and held that Mr. Scott was not entitled to an extension simply because he failed to establish good cause. As shown above, despite the *Mendez* rule, Mr. Scott presented equitable considerations in his briefing to the district court and to the court of appeals, asking those courts to grant the requested extension to perfect service because fairness required it. Nonetheless, those courts, bound by *Mendez*, never moved past the good cause analysis to consider whether a discretionary, equitable extension was appropriate.

The issue is thus cleanly and squarely presented, and there is no way to read the court of appeals decision to turn on anything but the Fourth Circuit's backwards view of Rule 4(m). See, *e.g.*, Pet. App. 11a ("Scott argues that he has shown good cause for his failure to properly serve DLLR, *and the district court should have granted his request to extend the time to effect proper service. We disagree*.") (emphasis added). This entire dispute has been about timeliness, just as it was in *Chen*—that is, whether a district court has the discretion to grant an extension absent good cause. Nowhere was the Fourth Circuit presented with the issue of whether the service itself was sufficient (*e.g.*, whether the erroneous satellite address Scott used nonetheless constituted correct service of DLLR), as DLLR suggested below in opposing en banc review. *En banc* Opp. at 2–8, No. 15-1617 (4th Cir. Mar. 10, 2017). Rather, both the district court and the Fourth Circuit contemplated and rejected an extension based on good cause alone, but each ended its Rule 4(m) inquiry there, without consideration of a discretionary extension absent good cause. Pet. App. 11a–13a; *id.* at 15a–16a .

Moreover, the equitable considerations Mr. Scott presented here—even if not sufficient to establish

"good cause" for a mandatory extension—are precisely the sort of considerations that the advisory committee comments and multiple appellate courts have recognized are a sound basis for a discretionary, equitable extension. As discussed, Mr. Scott advocated for an extension based on:

(i) Mr. Scott's suit would be barred by the statute of limitations if dismissed.

(ii) his repeated good faith attempts to properly serve,

(iii) his *pro se* status,

(iv) that service was incomplete only because he did not understand the "registered agent" requirement,

(v) that because Defendants accepted the restricted certified mail they received, he had no notice of purported improper service,

(vi) that Defendants had actual notice of service, and

(vii) that Defendants sustained no prejudice but instead timely appeared and moved to dismiss.

See Scott Br. 13–20; Scott Reply Br. 4–6; CA4-App.172–77.

Put simply, had this case arisen anywhere else, perhaps save the Sixth Circuit, not only would the district court have had discretion to grant an extension of the time for service, in all likelihood the extension would have been granted. For example, the advisory committee's notes to Rule 4(m) explain that, "Relief may be justified, for example, if the applicable statute of limitations would bar the refiled action ...." Fed. R. Civ. P. 4 Advisory Committee's Notes—1993 amendment, *subdivision (m).* And the Seventh Circuit has recog-

nized that "most district judges probably would exercise lenity and allow a late service" where, as here, "defendant does not show any actual harm to its ability to defend the suit," "the defendant received actual notice of the suit within a short time after the attempted service," and "dismissal without prejudice has the effect of dismissal with prejudice because the statute of limitations has run." *Coleman* v. *Milwaukee Bd. of Sch. Dirs.*, 290 F.3d 932, 934 (7th Cir. 2002); see also, *e.g.*, *Wright* v. *Potter*, 350 F. App'x 898, 899 (5th Cir. 2009) (per curiam) ("Even without a showing of good cause, we have held that a plaintiff should be allowed additional time to perfect service under Rule 4(m) where the claims would be otherwise time-barred and there is no clear record of delay or evidence of contumacious conduct."); *Veal*, 84 F. App'x at 256 (listing among factors that "frequently weigh in favor of [discretionary] extension" plaintiff was *pro se*, statute of limitations had run, and "the service required was of a kind often found to be confusing").

Finally, unlike *Chen* and many other cases in which these Rule 4(m) issues typically arise, Mr. Scott is no longer proceeding *pro se* but has the benefit of experienced appellate counsel. Now is the time to resolve a circuit split that has existed for two decades and has persisted in the years since *Chen* was dismissed.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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June 23, 2017

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 15-1617

MR. ADRIAN R. SCOTT,

Plaintiff-Appellant,

v.

MARYLAND STATE DEPARTMENT OF LABOR, LICENSING & REGULATION; JENNIFER DASHIELL REED, Director of the Office of Fair Practices; ALICE L. WIRTH, Deputy Assistant Secretary Office of Educational & Workforce Skills Training for Correctional Institutions; JAMES YOUNGER, III, Principal Maryland Correctional Institute; EDWARD W. SCHWABELAND, Principal Maryland Correctional Institute; RANDOLPH J. SHIPE, Principal Maryland Correctional Institute; LEANN LORENZ,

Defendants-Appellees.

Appeal from the United States District Court for the District of Maryland, at Baltimore. J. Frederick Motz, Senior District Judge. (1:14-cv-02432-JFM)

Argued: September 20, 2016
Decided: December 20, 2016

Before NIEMEYER and DIAZ, Circuit Judges, and Irene M. KEELEY, United States District Judge for

the Northern District of West Virginia, sitting by designation.

Affirmed by unpublished per curiam opinion.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Adrian R. Scott appeals the district court's dismissal of his employment discrimination suit against the Maryland State Department of Labor, Licensing & Regulation ("DLLR") and six DLLR employees for violations of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e *et seq*., and the Age Discrimination in Employment Act of 1967 (the "ADEA"), 29 U.S.C. § 621 *et seq*. Finding that the district court did not abuse its discretion by dismissing the claims against DLLR under Fed. R. Civ. P. 12(b)(5), and that the six DLLR employees are not subject to suit in their individual capacities, we affirm the judgment.

I.

This case is before us on a motion to dismiss, so we accept the factual allegations of Scott's complaint as true. *See De'Lonta v. Johnson*, 708 F.3d 520, 524 (4th Cir. 2013). Anne Arundel Community College ("AACC") contracted with DLLR on a yearly basis to provide academic, occupational, and library instruction at various Maryland correctional institutions. AACC bore the primary responsibility for recruiting and hiring instructors, but DLLR also interviewed and approved candidates. Beginning in March 2009, AACC employed Scott as an instructor for the Employment

Readiness Workshop at Maryland Correctional Institution – Jessup ("MCI-J"). His contract was renewed every year until 2012.

Although Scott's experience as a contract employee was initially satisfactory, it took a decidedly unpleasant turn in the spring of 2012. During that time, Scott allegedly suffered sexual and workplace harassment, as a consequence of which he filed at least three administrative complaints with DLLR. This action resulted in further harassment and retaliatory behavior from his immediate supervisor, the MCI-J school principal, and eventually the replacement principal. Finally, in July 2012, at DLLR's direction, AACC refused to renew Scott's contract. After that, DLLR advised Scott that, in order to return to work, he would be required to drop all his complaints and agree not to file any others. On October 12, 2012, Scott signed an agreement that allowed him to return to work at a different DLLR facility, Metropolitan Training Center ("MTC"), located in Baltimore. The harassment and retaliation resumed while Scott was at MTC, however, and, on October 22, 2012, DLLR again terminated his employment.

In September 2012, while between jobs at MCI-J and MTC, Scott filed a charge with the Equal Opportunity Employment Commission ("EEOC") alleging that DLLR and its agents had subjected him to discrimination, harassment, and retaliation in violation of Title VII and the ADEA. The EEOC dismissed the matter because it was "unable to conclude that the information obtained establishe[d] violations of the statutes." J.A. 54. It then issued a Notice of Suit Rights on April 30, 2014, informing Scott that his EEOC charge had been dismissed and that he had a right to file suit within 90 days of receiving the notice.

On July 30, 2014, Scott filed a *pro se* complaint charging employment discrimination and naming as defendants DLLR and six DLLR employees.

In his complaint, Scott alleged violations of Title VII and the ADEA. More particularly, he alleged that the defendants wrongfully failed to hire him, terminated his employment, and failed to promote him, all on the basis of his race, color, sex, and age. At the time he filed his complaint, Scott chose not to have any summonses issued. Instead, he sent a copy of the complaint to each defendant by certified mail to a satellite DLLR office located in Baltimore. The administrative office of DLLR is located elsewhere, however; neither the DLLR secretary nor any registered agent is located at the address used by Scott. Apparently, a mail room employee at the DLLR satellite office signed for the complaints on August 4, 2014, while at the Post Office picking up the building's mail.

On October 30, 2014, the district court granted Scott's request for leave to proceed *in forma pauperis* and provided him with specific instructions about how to properly effect service on the defendants through the United States Marshals Service ("USMS"). In its Order, the district court directed the Clerk to mail Scott a USMS service form for each defendant, and also directed Scott to complete the form and return it, together with a copy of the complaint for each named defendant, within 21 days.

At the end of its Order, the district court directed the Clerk to deliver only one copy of the USMS form. According to Scott, the Clerk only sent him one form, which he addressed to DLLR and returned to the Clerk's office on November 20, 2014, the last day to do so. Scott asked the Clerk's office what he should do in order to serve the other defendants, and was advised

that the Clerk would mail the appropriate forms to him. The Clerk then issued the summons to DLLR on November 21, 2014.

The USMS mailed the summons and complaint for DLLR to the address provided by Scott, by certified mail, return receipt, and restricted delivery. Despite the district court's careful instructions to him about how to obtain an address sufficient for serving DLLR's resident agent, Scott directed service to "Maryland State Department of Labor Licensing Regulation" and listed the same DLLR satellite office address to which he had initially mailed the complaints.

On December 1, 2014, a mail room employee at the satellite office accepted service of the summons directed to DLLR. According to this employee's affidavit, he later gave the envelope to the Unemployment Insurance Board of Appeals, from where it eventually wound its way to the Office of Fair Practices on or about December 3, 2014. Counsel then noted an appearance on behalf of all the defendants on December 11, 2014. In mid-December, Scott again went in person to the Clerk's office to pick up the additional USMS forms he had not received by mail.

On January 22, 2015, the defendants moved to dismiss the complaint. On February 2, 2015, the Clerk received additional USMS forms and service copies of the complaint from Scott. Although the USMS form for DLLR listed its secretary, Scott inexplicably directed that service be made at the Baltimore satellite office. The individual defendants' forms directed that service be made at various addresses, including several correctional facilities, and also at the Baltimore DLLR satellite office. Ultimately, the summonses were sent by certified mail, return receipt and restricted delivery, and were executed either on March 9 or 10, 2015.

On March 10, 2015, Scott's attorney noted her appearance, and, on March 12, 2015, the parties consented to a second 30-day extension of time for Scott to respond to the motion to dismiss, which he finally did on April 10, 2015. That response addressed the substantive issues raised in the motion to dismiss, and also included brief requests for an extension of time in which to cure service, if necessary, and also for leave to file an amended complaint should the Court find the first complaint defective. Aside from those embedded requests, Scott never moved for an extension of the time in which to serve the defendants, *see* Fed. R. Civ. P. 6(b), nor did he separately move for leave to file an amended complaint pursuant to Rule 15(a)(2) and the Local Rules of the District of Maryland.

The district court dismissed the complaint on May 7, 2015,[1] finding that Scott had not properly effected service on DLLR, had not served the individual defendants within the 120-day service period, and had failed to show good cause to extend the service period. It also determined as a matter of law that the defendants were immune from suit in federal court. It concluded that the six individual DLLR employees are not proper defendants under Title VII or the ADEA, that DLLR was not Scott's employer under Title VII, and that DLLR was not subject to suit under the ADEA.

II.

We review a district court's decision for abuse of discretion where, as here, it dismisses a claim for improper service of process under Rule 12(b)(5).

[1] Because the district court did not state whether the dismissal was with prejudice, pursuant to Fed. R. Civ. P. 41(b), "a[n] [involuntary] dismissal . . . operates as an adjudication on the merits."

Shao v. Link Cargo (Taiwan) Ltd., 986 F.2d 700, 708 (4th Cir. 1993). A district court abuses its discretion by failing to exercise any discretion, failing to apply the proper standard, or by using "erroneous factual or legal premises." *James v. Jacobson*, 6 F.3d 233, 239 (4th Cir. 1993). We review *de novo* a dismissal under Rule 12(b)(6). *Wag More Dogs, Ltd. Liab. Corp. v. Cozart*, 680 F.3d 359, 364 (4th Cir. 2012). The plaintiff bears the burden of proving adequate service once a motion to dismiss for insufficient service of process has been filed pursuant to Fed. R. Civ. P. 12(b)(5). *See Dickerson v. Napolitano*, 604 F.3d 732, 752 (2d Cir. 2010).

III.

At the time of the events in this case, a plaintiff was required to serve a summons and complaint on each defendant within 120 days of filing suit. Fed. R. Civ. P. 4(c), (m) (2014) (amended 2015). However, as we held in *Robinson v. Clipse*, the service period of Fed. R. Civ. P. 4(m) is tolled while the district court considers an *in forma pauperis* complaint. 602 F.3d 605, 608 (4th Cir. 2010) ("[A]n *in forma pauperis* plaintiff should not be penalized for a delay caused by the court's consideration of his complaint."). If a plaintiff fails to effect service within the time required, the district court must dismiss the action "*or* order that service be made within a specified time." Fed. R. Civ. P. 4(m) (emphasis added).

When a plaintiff is proceeding *in forma pauperis*, the district court must order the USMS to effect service. Fed. R. Civ. P. 4(c)(3). In the District of Maryland, service upon a state-created governmental organization may be effected by serving its chief executive officer, its designated resident agent, or the Maryland Attorney General. Fed. R. Civ. P. 4(j); Md. Rule 2-

124(k). "[T]he real purpose of service of process is to give notice to the defendant," *Karlsson v. Rabinowitz*, 318 F.2d 666, 669 (4th Cir. 1963), and "'mere technicalities' should not stand in the way of consideration of a case on its merits." *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 316-17 (1988).

"[A]ctual notice," however, is not the controlling standard. *See Mining Energy*, *Inc. v. Dir.*, *Office of Workers' Comp. Programs*, 391 F.3d 571, 576 (4th Cir. 2004). Although actual notice typically warrants liberal construction of the rules, they "are there to be followed, and plain requirements . . . may not be ignored." *Armco*, *Inc. v. Penrod-Stauffer Bldg. Sys.*, *Inc.*, 733 F.2d 1087, 1089 (4th Cir. 1984).

A.

We first address the timeliness and sufficiency of service on DLLR. Although Scott filed his complaint and motion to proceed *in forma pauperis* on July 30, 2014, the district court did not rule on his motion until October 30, 2014. Therefore, the 120-day period within which Scott was required to serve the defendants did not run until February 27, 2015. *See Robinson*, 602 F.3d at 608.

When the district court granted Scott's motion to proceed *in forma pauperis*, it ordered him to return the proper forms and service copies of the complaint so that the USMS could effect service on his behalf. Unfortunately, despite the need to serve seven defendants, Scott returned only one USMS form to the Clerk by November 20, 2014. That form directed service on "Maryland State Department of Labor Licensing Regulation," rather than its secretary or resident agent as required by the rules. Fed. R. Civ. P. 4(j); Md. Rule 2-124(k). Scott also failed to follow the district

court's instruction to identify the proper address for service. Once again, he listed the same Baltimore satellite office to which he had sent copies of the complaint three months before. Nevertheless, service of this complaint and summons to DLLR was accepted at the address Scott provided on December 1, 2014.

After the defendants moved to dismiss his complaint on January 22, 2015, Scott returned additional copies of the complaint and USMS forms to the Clerk on February 2, 2015. Although he listed the secretary of DLLR on the USMS forms, Scott again directed service on DLLR at the Baltimore satellite office. This second attempt at service was delayed, through no fault of Scott, until after the expiration of the 120-day period. The Clerk inexplicably delayed issuing the summonses until February 26, 2015, and, as a consequence, the second summons to DLLR was not executed until March 9, 2015.[2]

We have previously recognized that *in forma pauperis* plaintiffs "must rely on the district court and the [USMS] to effect service," and should not be penalized for delay in service beyond their control. *See Robinson*, 602 F.3d at 608-09 (citing *Graham v. Satkoski*, 51 F.3d 710, 713 (7th Cir. 1995) ("The prisoner may rely on the Marshals Service to serve process, and the Marshals Service's failure to complete service is automatically 'good cause' to extend time for service under Rule 4(m).")); *see also Wright v. First Student*, *Inc.*, 710 F.3d 782, 783-84 (8th Cir. 2013) ("[I]f the delay in service was the result of a delay by

[2] Although the district court's docket reflects that a summons was returned as having been executed on DLLR, the returned executed summons itself is absent from the record. For the purpose of this analysis, we assume that the summons was, in fact, served at the address Scott provided on the USMS form.

court staff or the USMS in fulfilling their obligations, [the plaintiff's] complaint should not have been dismissed under Rule 4(m)."). Here, the March 9, 2015, service of process occurred after the 120-day period expired on February 27, 2015. Because that delay was outside of Scott's control, and solely attributable to the Clerk and the USMS, pursuant to *Robinson* we find good cause for the delay and conclude that Scott's attempt at service was timely.

Nevertheless, both of Scott's timely attempts to serve DLLR were insufficient despite the fact that DLLR received actual notice of the suit. Actual notice does not equate to sufficient service of process, even under the liberal construction of the rules applicable to a *pro se* plaintiff. *See*, *e.g.*, *Crowley v. Bannister*, 734 F.3d 967, 975 (9th Cir. 2013) ("Neither actual notice, nor simply naming the person in the caption of the complaint, will subject defendants to personal jurisdiction if service was not made in substantial compliance with Rule 4."); *Precision Etchings & Findings*, *Inc. v. LGP Gem*, *Ltd.*, 953 F.2d 21, 24 (1st Cir. 1992) ("Although 'minor' *formal* defects are excusable provided actual notice has been accomplished, . . . the rule nevertheless must be accorded at least substantial compliance.").

The requirements for serving a state-created government agency are clear, and we note that the district court rendered Scott additional assistance by providing a website and a telephone number where he could obtain the proper name and address for serving DLLR's resident agent. Despite his obligation to do so, Scott failed to direct service to the proper address both in November 2014 and also in February 2015; instead, he directed that service be made at a satellite DLLR office. *See Lee v. Armontrout*, 991 F.2d 487 (8th Cir.

1993) ("[I]t [is the plaintiff's] responsibility to provide proper addresses for service . . . ."). We find this error to be more than a "mere technicalit[y]," and that actual notice is incapable of curing such a substantial defect in service. *See Torres*, 487 U.S. at 316-17. To hold otherwise would eviscerate the clear requirements of Rule 4. *See Armco*, *Inc*., 733 F.2d at 1089.

B.

Scott argues that he has shown good cause for his failure to properly serve DLLR, and the district court should have granted his request to extend the time to effect proper service. We disagree.

Rule 4(m) requires extension of the 120-day service period only when the plaintiff can show good cause for his failure to serve. Fed. R. Civ. P. 4(m); *Mendez v. Elliot*, 45 F.3d 75, 78 (4th Cir. 1995); *see also Nafziger v. McDermott Intern*., *Inc*., 467 F.3d 514 (6th Cir. 2006) ("Establishing good cause is the responsibility of the party opposing the motion to dismiss . . . and 'necessitates a demonstration of why service was not made within the time constraints.'"). Because the question of what constitutes "good cause" necessarily is determined on a case-by-case basis within the discretion of the district court, courts have declined to give it a concrete definition, preferring to analyze a number of factors. These include whether: 1) the delay in service was outside the plaintiff's control, 2) the defendant was evasive, 3) the plaintiff acted diligently or made reasonable efforts, 4) the plaintiff is *pro se* or *in forma pauperis*, 5) the defendant will be prejudiced, or 6) the plaintiff asked for an extension of time under Rule 6(b)(1)(A). *See Kurka v. Iowa Cty*., *Iowa*, 628 F.3d 953, 957 (8th Cir. 2010); *Dickerson*, 604 F.3d at 752. In addition, the Supreme Court has "never suggested that procedural rules in ordinary civil litigation should

be interpreted so as to excuse mistakes by those who proceed without counsel." *McNeil v. United States*, 508 U.S. 106, 113 (1993).

Under the facts in this case, we agree with the district court that Scott did not demonstrate good cause for his repeated failure to effect proper service. Even acknowledging that Scott's *pro se* status may have contributed to the shortcomings in service of process, his status is not the only relevant factor a district court should consider. Although Scott admittedly made multiple attempts at service, those efforts lacked diligence and reasonableness.

Scott relies heavily on the fact that the Clerk sent him only one copy of the USMS form. However, he has never explained why he failed to inquire about additional forms at the Clerk's office and waited to return the one form for DLLR until the final day on which he had been directed to do so. Moreover, the Clerk's error was not so onerous as to prevent him from taking simple steps, such as making copies of the USMS form, to cure the problem. We find it even more confounding that the forms he claims he retrieved in person in mid-December 2014 were not submitted to the Clerk for nearly two months.

Setting aside issues of timeliness, service of process on DLLR was insufficient on both occasions for the sole reason that Scott refused to follow the district court's specific instructions about how to find the proper service address for DLLR. In the second instance, he could simply have copied it directly from the defendants' motion to dismiss into the "Serve At" line of the USMS form. The only justification Scott has provided for his repeated failure is that he "is not a savvy internet user and did not understand the relevance of the reference to the resident agent." Such a subjective

misunderstanding of procedural requirements cannot excuse Scott's noncompliance. *See McNeil*, 508 U.S. at 113 ("[R]ules of procedure are based on the assumption that litigation is normally conducted by lawyers.").

Even Scott's attorney, after noting her appearance, did not file a motion pursuant to Fed. R. Civ. P. 6(b) seeking to extend the time in which to serve. Instead, she added a brief, one-sentence request for an extension in her response to the defendants' motion to dismiss, which was not filed until nearly one month after she noted her appearance. We note that she also included a one-paragraph request for leave to amend the complaint if the complaint was found "deficient and subject to dismissal." J.A. 186. Despite the elapse of one month between her appearance and the filing of any response, Scott's attorney failed to comply with the District of Maryland's local rule requiring that she both attempt to obtain consent of opposing counsel and attach the proposed amended complaint.[3] In consideration of all these facts, we conclude that the district court did not abuse its discretion by dismissing the complaint for insufficient service of process.[4]

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[3] District of Maryland Local Rule 103.6(a).

[4] Scott's attorney urges us to view the defendants' motion to dismiss as a motion to quash. *See Vorhees v. Fischer & Krecke*, 697 F.2d 574, 576 (4th Cir. 1983) ("[T]he statute of limitations had run on the plaintiffs' various causes of action . . . the action should not have been dismissed until the plaintiffs were given a reasonable opportunity to attempt to effect valid service of process on the defendant."). We are under no obligation to do so. Scott had a reasonable opportunity to effect valid service, and he failed to do so on multiple occasions. Moreover, the district court dismissed the case more than two months after the service period had expired; at no time did it cut short Scott's chance at proper service.

C.

We turn next to the question of whether the district court properly dismissed the claims against the individual defendants. As discussed earlier, based on Scott's *in forma pauperis* status, his March 2015 attempts to serve the individual defendants were timely. Nevertheless, regardless of whether the individual defendants were properly served, the district court correctly concluded that the violations of Title VII and the ADEA alleged in the complaint failed to state a claim for relief against them.

In *Birkbeck v. Marvel Lighting Corp.*, we held that "the ADEA limits civil liability to the employer," and that Congress did not intend to impose personal liability on an employer's agents. 30 F.3d 507, 510-11 (4th Cir. 1994). Likewise, in *Lissau v. Southern Food Services, Inc.*, interpreting similar language in Title VII, we held that individuals are not subject to liability under that statute. 159 F.3d 177, 180-81 (4th Cir. 1998). Therefore, we agree with the district court that, whether they were properly served or not, the individual defendants are not appropriate parties to this lawsuit.

IV.

For the reasons discussed, the judgment of the district court is

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. – JFM-14-2432

ADRIAN R. SCOTT

v.

MARYLAND DEPARTMENT OF LABOR,
LICENSING AND REGULATION, ET AL.

ORDER

Upon consideration of the memoranda submitted in connection with defendant's motion to dismiss, and it appearing that (1) service has not been properly effected upon the Maryland Department of Labor, Licensing and Regulation, (2) the individual defendants were not served within 120 days of the filing of this suit and plaintiff did [sic] has not shown good cause for extending that period; (3) defendants are immune from suit in federal court; (4) the Maryland Department of Labor, Licensing and Regulation was not the employer of plaintiff and therefore is not subject to suit under Title VII; (5) the individual defendants are [sic][1] proper defendants in an action under Title VII; (6) the Maryland Department of Labor, Licensing and Regulation is not subject to suit under the Age discrimination in Employment Act; (7) the

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[1] ["Paragraph 5 of the order entered herein on May 7, 2015 is hereby amended to read 'the individual defendants are not proper defendants in an action under Title VII.'" July 16, 2015 Order.]

individual defendants are not subject to suit under the AREA; and (8) the complaint does not otherwise state a claim against defendants upon which relief can be granted, it is, this 7th day of May 2015

ORDERED

1. Defendant's motion to dismiss (document 11) is granted; and

2. This action is dismissed.

/s/
J. Frederick Motz
United States District Judge

APPENDIX C

EEOC Form 161 (11/09)

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

DISMISSAL AND NOTICE OF RIGHTS

To: Adrian R. Scott
3927 Belle Avenue
Baltimore, MD 21215

From: Baltimore Field Office
10 South Howard St
3rd Floor
Baltimore, MD 21201

☐ *On behalf of person(s) aggrieved whose identity is CONFIDENTIAL (29 CFR §1601.7(a))*

EEOC Charge No.	531-2012-02173
EEOC Representative	Regina Davis, Investigator
Telephone No.	(410) 209-2241

THE EEOC IS CLOSING ITS FILE ON THIS CHARGE FOR THE FOLLOWING REASON:

☐ The facts alleged in the charge fail to state a claim under any of the statutes enforced by the EEOC.

☐ Your allegations did not involve a disability as defined by the Americans With Disabilities Act.

☐ The Respondent employs less than the required number of employees or is not otherwise covered by the statutes.

☐ Your charge was not timely filed with EEOC; in other words, you waited too long after the date(s) of the alleged discrimination to file your charge

☒ The EEOC issues the following determination: Based upon its investigation, the EEOC is unable to conclude that the information obtained establishes violations of the statutes. This does not certify that the respondent is in compliance with the statutes. No finding is made as to any other issues that might be construed as having been raised by this charge.

☐ The EEOC has adopted the findings of the state or local fair employment practices agency that investigated this charge.

☐ Other *(briefly state)*

- NOTICE OF SUIT RIGHTS -

(See the additional information attached to this form.)

Title VII, the Americans with Disabilities Act, the Genetic Information Nondiscrimination Act, or the Age Discrimination in Employment Act: This will be the only notice of dismissal and of your right to sue that we will send you. You may file a lawsuit against the respondent(s) under federal law based on this charge in federal or state court. Your lawsuit *must be filed WITHIN 90 DAYS of your receipt of this notice*; or your right to sue based on this charge will be lost. (The time limit for filing suit based on a claim under state law may be different.)

Equal Pay Act (EPA): EPA suits must be filed in federal or state court within 2 years (3 years for willful violations) of the alleged EPA underpayment. This means that *backpay due for any violations that occurred more than 2 years (3 years) before you file suit may not be collectible.*

On behalf of the Commission

/s/ Rosemarie Rhodes — 4/30/2014

Enclosures(s) Rosemarie Rhodes, Director — *(Date Mailed)*

cc: Jennifer Dashiell Reed
Director of the Office of Fair Practices
State of Maryland DLLR
1100 N. Eutaw Street, Room 613
Baltimore, MD 21201

INFORMATION RELATED TO FILING SUIT
UNDER THE LAWS ENFORCED BY THE EEOC

(This information relates to filing suit in Federal or State *court under Federal law. If you also plan to sue claiming violations of State law, please be aware that time limits and other provisions of State law may be shorter or more limited than those described below.)*

PRIVATE SUIT RIGHTS – Title VII of the Civil Rights Act, the Americans with Disabilities Act (ADA), the Genetic Information Nondiscrimination Act (GINA), or the Age Discrimination in Employment Act (ADEA):

In order to pursue this matter further, you must file a lawsuit against the respondent(s) named in the charge *within 90 days of the date you receive this Notice*. Therefore, you should *keep a record of this date*. Once this 90-day period is over, your right to sue based on the charge referred to in this Notice will be lost. If you intend to consult an attorney, you should do so promptly. Give your attorney a copy of this Notice, and its envelope, and tell him or her the date you received it. Furthermore, in order to avoid any question that you did not act in a timely manner, it is prudent that your suit be filed *within 90 days of the date this Notice was mailed to you* (as indicated where the Notice is signed) or the date of the postmark, if later.

Your lawsuit may be filed in U.S. District Court or a State court of competent jurisdiction. (Usually, the appropriate State court is the general civil trial court.) Whether you file in Federal or State court is a matter for you to decide after talking to your attorney. Filing this Notice is not enough. You must file a "complaint" that contains a short statement of the facts of your case which shows that you are entitled to relief. Your

suit may include any matter alleged in the charge or, to the extent permitted by court decisions, matters like or related to the matters alleged in the charge. Generally, suits are brought in the State where the alleged unlawful practice occurred, but in some cases can be brought where relevant employment records are kept, where the employment would have been, or where the respondent has its main office. If you have simple questions, you usually can get answers from the office of the clerk of the court where you are bringing suit, but do not expect that office to write your complaint or make legal strategy decisions for you.

PRIVATE SUIT RIGHTS – Equal Pay Act (EPA):

EPA suits must be filed in court within 2 years (3 years for willful violations) of the alleged EPA underpayment: back pay due for violations that occurred *more than 2 years (3 years) before you file suit* may not be collectible. For example, if you were underpaid under the EPA for work performed from 7/1/08 to 12/1/08, you should file suit before 7/1/10 – *not* 12/1/10 – in order to recover unpaid wages due for July 2008. This time limit for filing an EPA suit is separate from the 90-day filing period under Title VII, the ADA, GINA or the ADEA referred to above. Therefore, if you also plan to sue under Title VII, the ADA, GINA or the ADEA, in addition to suing on the EPA claim, suit must be filed within 90 days of this Notice and within the 2- or 3-year EPA back pay recovery period.

ATTORNEY REPRESENTATION – Title VII, the ADA or GINA:

If you cannot afford or have been unable to obtain a lawyer to represent you, the U.S. District Court having jurisdiction in your case may, in limited circumstances, assist you in obtaining a lawyer. Requests for

such assistance must be made to the U.S. District Court in the form and manner it requires (you should be prepared to explain in detail your efforts to retain an attorney). Requests should be made well before the end of the 90-day period mentioned above, because such requests do not relieve you of the requirement to bring suit within 90 days.

ATTORNEY REFERRAL AND EEOC ASSISTANCE – All Statutes:

You may contact the EEOC representative shown on your Notice if you need help in finding a lawyer or if you have any questions about your legal rights, including advice on which U.S. District Court can hear your case. If you need to inspect or obtain a copy of information in EEOC's file on the charge, please request it promptly in writing and provide your charge number (as shown on your Notice). While EEOC destroys charge files after a certain time, all charge files are kept for at least 6 months after our last action on the case. Therefore, if you file suit and want to review the charge file, *please make your review request within 6 months of this Notice*. (Before filing suit, any request should be made within the next 90 days.)

If you file suit, please send a copy of your court complaint to this office.

[SEAL] U.S. EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
Baltimore Field Office

City Crescent Building
10 South Howard St., 3rd Floor
Baltimore, MD 21201
(Charge Status/Pending Business) 1-866-408-8075
(General Info/New Charge Filing) 1-800-669-4000
TTY (410) 962-6065
FAX (410) 962-2817/4270

[APR 30 2014]

Adrian R. Scott
3927 Belle Avenue
Baltimore, MD 21215

Re: EEOC Charge No.: 531-2012-01273
Scott vss. State of Maryland DLLR

Dear Mr. Scott:

Having considered all the information provided by both you and Respondent on the above cited charge of discrimination, we are unable to conclude that the information obtained establishes a violation of the statute(s) as you have alleged.

Therefore, you are being issued a Dismissal and Notice of Rights which affords you the opportunity to take this matter into Federal Court. You have the right to file a lawsuit against the employer within 90 days from the date you receive the Dismissal and Notice of Rights. If you fail to file a lawsuit within the appropriate time frame, you will lose the right to pursue this matter in court.

Should you wish to obtain a copy of the administrative file for this charge, please write to the following address to make such a request. You must do so within

the above referenced 90 day period, which can be extended if you do file a lawsuit in court concerning this matter. Please be advised that there may be a fee if you make such a request for file disclosure. Furthermore, please note that failure to receive requested documents in a timely manner does not extend the time period for filing a lawsuit. This process can take up to thirty (30) days to complete. Please consider this timeframe when submitting your request.

File Disclosure Unit
EEOC – Philadelphia District Office
801 Market Street, Suite 1300
Philadelphia, PA 19107

Should you have any questions, please contact me at (410) 209-2241 or via email at regina.davis@eeoc.gov.

We regret that we could not be of further service to you in this matter.

Sincerely

/s/ Regina M. Davis
Regina M. Davis
Investigator

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED: March 30, 2017

No. 15-1617
(1:14-cv-02432-JFM)

MR. ADRIAN R. SCOTT

Plaintiff-Appellant

v.

MARYLAND STATE DEPARTMENT OF LABOR, LICENSING & REGULATION; JENNIFER DASHIELL REED, Director of the Office of Fair Practices; ALICE L. WIRTH, Deputy Assistant Secretary Office of Educational & Workforce Skills Training for Correctional Institutions; JAMES YOUNGER, III, Principal Maryland Correctional Institute; EDWARD W. SCHWABELAND, Principal Maryland Correctional Institute; RANDOLPH J. SHIPE, Principal Maryland Correctional Institute; LEANN LORENZ

Defendants-Appellees

ORDER

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc.

For the Court

/s/ Patricia S. Connor, Clerk