

On November 30, 2001, Plaintiff Willa Burke filed her Motion to Intervene. On January 24, 2002, this Court granted Burke's Motion to Intervene. Thereafter, on March 6, 2002, Plaintiff Burke filed a motion for extension of time to serve Defendant Samuel Turner ("Turner"). The Court granted Plaintiff Burke's motion on March 19, 2002, allowing Plaintiff to effect service upon Turner no later than May 9, 2002. Between January and June, Plaintiff Burke attempted to serve Turner. Plaintiff Burke unsuccessfully sent a waiver of service via certified and third class mail to Turner's last known address in Texas. Plaintiff Burke also attempted to have Turner formally served

in Texas by the United American Reporting Service. Additionally, the Equal Employment Opportunity Commission sent an inquiry to the United States Post Office regarding a possible address for Turner in Concord, California. The Post Office reported that the address was vacant. Next, Plaintiff Burke sent a summons and fee for service to the Dunklin County Sheriff's Department for service of Samuel Turner. Plaintiff Burke received return of service indicating that Turner was served in the Dunklin County jail. However, Plaintiff Burke later discovered that the wrong Samuel Turner had been served. Plaintiff Burke contacted the Sheriff and instructed him to send a new summons. The wrong Samuel Turner was served again. Finally, the correct Samuel Turner was served on June 12, 2002. On July 1, 2002, Defendant Turner filed this Motion to Dismiss.

II. DISCUSSION

According to Rule 4(m) of the Federal Rules of Civil Procedure, “[i]f service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court . . . shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified period of time. . . .” Fed. R. Civ. P. 4(m). The Rule also states “provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate time.” Id. In this case, Plaintiff Burke has attempted to serve Defendant on several occasions, thereby, exercising due diligence by her continual attempts to serve Turner. Plaintiff Burke has shown good cause for her failure to serve Turner in the specified time. Additionally, if this motion to dismiss is granted, the statute of limitations bars Plaintiff Burke from her day in court. Therefore, in accordance with Rule 4(m) and in the interest of justice, this

Court retroactively extends the time for Plaintiff Burke to serve Turner and deems the service upon Samuel Turner on June 12, 2002, as timely.

III. CONCLUSION

For the foregoing reasons, Defendant Samuel Turner's motion to dismiss is hereby DENIED.

IT IS SO ORDERED.

Date: August 30, 2002

/s/ Ortrie D. Smith
ORTRIE D. SMITH, JUDGE
UNITED STATES DISTRICT COURT