

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON**

DALE BORING,

Plaintiff,

v.

**MARTIN O'MALLEY, Commissioner of
Social Security, UNITED STATES SOCIAL
SECURITY ADMINISTRATION, GAIL
ENNIS, DONALD JEFFERSON,
MICHELLE MURRAY, AURELIA
MOORE**

Defendants.

Case No. 3:23-cv-1611-YY

ORDER

Michael H. Simon, District Judge.

Plaintiff, representing himself, has sued the Commissioner of the Social Security Administration in his official capacity,¹ the U.S. Social Security Administration, and four employees of the Social Security Administration in their official and personal capacities. After issuing an Order to Show Cause why the case should not be dismissed for lack of proper service, U.S. Magistrate Judge Youlee Yim You issued a Findings and Recommendation recommending that this Court dismiss the case for failure to comply with Rule 4(m) of the Federal Rules of Civil

¹ The Court substitutes the current Commissioner, Martin O'Malley, for the Acting Commissioner, Kilolo Kijakazi, originally named by Plaintiff. *See* Fed. R. Civ. P. 25(d).

Procedure. Plaintiff objects, arguing that he has attempted to cure the deficiencies in service and requesting that he be given the opportunity to do so if his service attempts continue to be lacking.

As Judge You explained in her Findings and Recommendation, Plaintiff's service was insufficient because to serve the United States, which is required to sue a federal agency or its employees in their official or personal capacities, Plaintiff must have an independent person serve a copy of the summons and complaint by registered or certified mail on the United States Attorney General. *See Fed. R. Civ. P. 4(i)(1)(B), (i)(2), (i)(3)*. As Judge You further explained, Plaintiff's service also was lacking because he purports to sue the four employees in their *personal* capacity but has not had an independent person other than Plaintiff himself attempt to serve those four employees as individuals. Thus, service is insufficient to pursue claims against them in their personal capacity. *See Fed. R. Civ. P. 4(i)(3)*.²

Because Plaintiff is proceeding *pro se* and appears to have attempted in good faith to cure the service deficiencies, the Court extends the time for service under Rule 4(m) until June 1, 2024, and defers considering the Findings and Recommendation, ECF 16. If Plaintiff fails to cure the deficiencies in service identified by Judge You and in this Order and to properly serve

² Even if Plaintiff decides to forego his claims against these Defendants in their personal capacity, he technically would not have properly served them individually in their official capacity. Plaintiff himself sent them a copy of the summons and complaint through certified mail, instead of having a nonparty send the documents. However, “a pro se plaintiff’s failure to comply with service requirements under Rule 4(i) does not require dismissal of the complaint if (a) the party to be personally served had actual notice, (b) the defendant would suffer no prejudice from the defect in service, (c) there is justifiable excuse for the failure to serve properly, and (d) the plaintiff would be severely prejudiced if the complaint were dismissed.” *Humphrey v. Decker*, 173 F.R.D. 529, 531 (E.D. Wash. 1997) (citing *Borzeka v. Heckler*, 739 F.2d 444, 447 (9th Cir. 1984), *Clark v. Inspector Gen. of the U.S. Dep’t of Agric.*, 944 F. Supp. 818, 820 (D. Or. 1996)). Plaintiff filed this lawsuit on the last day expressly allowed by the agency and thus may suffer significant prejudice from its dismissal. The Court would therefore decline to dismiss the official capacity claims on the grounds that Plaintiff and not another person sent the documents.

Defendants as required under the Federal Rules of Civil Procedure by June 1, 2024, the Court will adopt the Findings and Recommendation and dismiss this case without prejudice.

IT IS SO ORDERED.

DATED this 29th day of April, 2024.

/s/ Michael H. Simon
Michael H. Simon
United States District Judge