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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 MARCUS COLLINS,

11 Plaintiff,

12 v.

13 SWEDISH MEDICAL CENTER, et
14 al.,

15 Defendants.

CASE NO. C15-0948JLR

ORDER

16 **I. INTRODUCTION**

17 This matter comes before the court on Defendants Adam Messer, Steve Marshall,
18 Donna Moberly, Trish Gallagher, and Rian Brown (collectively, “Individual
19 Defendants”); Swedish Medical Center (“Swedish”); and Providence Health & Services’
20 (“Providence”) motion to dismiss for insufficient service of process. (Mot. (Dkt. # 14).)
21 The court has reviewed the motion, all submissions filed in support thereof and
22 opposition thereto, the relevant portions of the record, and the applicable law. Being

1 fully advised,¹ the court GRANTS Individual Defendants, Swedish, and Providence’s
2 (collectively, “Moving Defendants”) motion and DISMISSES Plaintiff Marcus Collins’s
3 claims against them WITHOUT PREJUDICE. Additionally, the court DISMISSES *sua*
4 *sponte* Mr. Collins’s claims against SIEU 1199NW and Margaret Cary WITHOUT
5 PREJUDICE and with leave to amend.

6 II. BACKGROUND

7 Mr. Collins initiated this litigation by filing a motion for leave to proceed *in forma*
8 *pauperis* on June 15, 2015 (IFP Mot. (Dkt. # 1)), after receiving a right-to-sue letter from
9 the Equal Employment Opportunity Commission (“EEOC”) on March 20, 2015 (Compl.
10 (Dkt. # 4) ¶ 4.1). The court granted Mr. Collins’s motion on June 16, 2015 (IFP Order
11 (Dkt. # 3)), and he filed his *pro se* complaint that same day (*see* Compl.).

12 In his complaint, Mr. Collins alleges Moving Defendants violated Title VII of the
13 Civil Rights Act of 1964 (“Title VII”), 42 U.S.C. § 2000e. (Compl. ¶¶ 5.1-5.9.) The
14 alleged violations stem from a “restructure” of the surgical department at Swedish that
15 began in June 2011. (*Id.* ¶¶ 3.3-3.4.) Part of the restructure agreement provided that Mr.
16 Collins would be reassigned if he obtained additional certification offered by Swedish.
17 (*Id.*) Alternatively, if he declined to obtain the additional certification, the agreement
18 provided that Mr. Collins would be “laid off with severance benefits or given preference
19 for another open position in the medical center for which he . . . was qualified.” (*Id.*
20 ¶ 3.5.) Mr. Collins did not pursue the opportunity for additional certification (*see id.*

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22 ¹ No party has asked for oral argument concerning this motion, and the court deems it to
be unnecessary. *See* Local Rules W.D. Wash. LCR 7(b)(4).

1 ¶ 3.9) and declined Swedish’s offers of employment in other positions because, in his
2 opinion, they “fell short of contractual obligations” (*id.* ¶¶ 3.13, 3.16). On July 25, 2015,
3 Swedish offered Mr. Collins a position that Mr. Collins felt “satisfied the contractual
4 obligation,” but Swedish later terminated Mr. Collins from the position because he
5 refused to accept a rotating weekend shift. (*Id.* ¶¶ 3.17, 3.21; *see also id.* ¶¶ 3.24, 3.29,
6 3.32.) This lawsuit followed. (Compl.)

7 On July 21, 2015, the Clerk issued a summons for each defendant named in the
8 complaint. (Summons (Dkt. # 5).) On August 3, 2015, counsel for Providence and
9 Swedish filed a notice of appearance. (Providence Not. (Dkt. # 6).) On November 2,
10 2015, the same counsel filed a notice of appearance on behalf of Individual Defendants.
11 (Indiv. Not. (Dkt. # 13).) That same day, Moving Defendants subsequently filed the
12 instant motion to dismiss Mr. Collins’s claims for insufficient service of process pursuant
13 to Federal Rule of Civil Procedure 12(b)(5).² (Mot. at 1.) Providence and Individual
14 Defendants alternatively move to dismiss Mr. Collins’s claims against them for failure to
15 state a claim. (*Id.*) Although Mr. Collins filed proof of service of summons on
16 Providence and Swedish on November 12, 2015, Mr. Collins has not provided the court
17 with proof of service of the complaint on any Moving Defendants. (*Compare* Aff. for
18 Providence (Dkt. # 18) *and* Aff. for Swedish (Dkt. # 19) *with* Raymond Decl. (Dkt.
19 # 21).)

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21 ² Although Defendants do not expressly characterize their motion as such, their motion to
22 dismiss “because [Mr. Collins] failed to serve them within 120 days after filing [his complaint]”
is effectively a Rule 12(b)(5) motion to dismiss for insufficient service of process. (Mot. at 1);
Fed. R. Civ. P. 12(b)(5).

1 **III. ANALYSIS**

2 **A. Moving Defendants’ Motion**

3 Moving Defendants argue that the court should dismiss Mr. Collins’s claims
4 against them because he failed to timely and properly serve them. (See Mot. at 1.)
5 Federal Rule of Civil Procedure 4 articulates the requirements for timely and proper
6 service. See Fed. R. Civ. P. 4(c). Pursuant to Rule 4, the plaintiff is responsible for
7 ensuring that both the summons and complaint are served upon each defendant within the
8 timeframe provided by Rule 4(m). See Fed. R. Civ. P. 4(b), (c)(1). At the time Mr.
9 Collins filed his complaint, Rule 4(m) required him to serve each defendant within 120
10 days³ after filing his complaint. Fed. R. Civ. P. 4(m) advisory committee’s note to 2015
11 amendment. “[I]n the absence of proper service of process, the district court has no
12 power to render any judgment against the defendant’s person or property unless the
13 defendant has consented to jurisdiction or waived lack of process.” *SEC v. Ross*, 504
14 F.3d 1130, 1138-39 (9th Cir. 2007); see also *Omni Capital Int’l, Ltd. v. Rudolf Wolff &*
15 *Co.*, 484 U.S. 97, 104 (1987). Rule 12(b)(5) allows a defendant to move to dismiss an
16 action for insufficient service of process. Fed. R. Civ. P. 12(b)(5).

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19 ³ Effective December 1, 2015, the time period for proper service decreased from 120 days
20 to 90 days. Fed. R. Civ. P. 4(m); Fed. R. Civ. P. 4(m) advisory committee’s note to 2015
21 amendment. Because Mr. Collins filed his complaint in June 2015 (see Compl.), the court
22 considers Mr. Collins’s deadline for timely service under Rule 4(m) to be 120 days from the date
he filed his complaint. See *Dao v. Liberty Life Assurance Co. of Boston*, No. 14-CV-04749-SI
(EDL), 2016 WL 796095, at *2 (N.D. Cal. Feb. 23, 2016) (quoting 2015 U.S. Order 0017)
(explaining that the 2015 amendments to the Federal Rules of Civil Procedure apply to pending
cases “insofar as just and practicable”).

1 If the plaintiff does not timely serve a defendant, Rule 4(m) requires the court to
2 grant an extension of time for service if the plaintiff shows good cause. Fed. R. Civ. P.
3 4(m); *see also Efaw v. Williams*, 473 F.3d 1038, 1040 (9th Cir. 2007). A plaintiff’s
4 “tardy efforts to accomplish service” are not sufficient to show good cause. *McClain III*
5 *v. 1st Sec. Bank of Wash.*, No. C13-2277RSM, 2014 WL 7043474, at *2 (W.D. Wash.
6 Dec. 11, 2014). If the plaintiff does not show good cause for failing to comply with Rule
7 4, the court must either dismiss the complaint without prejudice or grant a specific
8 extension of time for service. Fed. R. Civ. P. 4(m); *see also Efaw*, 473 F.3d at 1040-41.
9 The court’s discretion under Rule 4(m) is broad. *See Efaw*, 473 F.3d at 1041 (citing
10 *Henderson v. United States*, 517 U.S. 654, 661 (1996)). In exercising its discretion, the
11 court may consider factors including the length of delay in proper service, prejudice to a
12 defendant, statute of limitations, actual notice of the lawsuit, and eventual service. *Id.*

13 Mr. Collins has shown neither timely and proper service nor good cause for failing
14 to effect such service.⁴ (*See generally* Dkt.) Thus, the court has discretion to dismiss Mr.
15 Collins’s claims without prejudice or grant Mr. Collins an extension of time for service.
16 *See* Fed. R. Civ. P. 4(m); *Efaw*, 473 F.3d at 1041. The court considers the *Efaw* factors
17 in exercising this discretion. *Efaw*, 473 F.3d at 1041.

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20 ⁴ The court is mindful of Mr. Collins’s *pro se* status, but that status does not excuse his
21 failure to respond to Defendants’ motion. Although the court views a *pro se* litigant’s filings
22 liberally, *see Erickson v. Pardus*, 551 U.S. 89, 94 (2007), *pro se* litigants “must still follow the
same rules of procedure that govern other litigants.” *In re Harris*, 596 F. App’x 581, 583 (9th
Cir. 2015) (quoting *Briones v. Riviera Hotel & Casino*, 116 F.3d 379, 381 (9th Cir. 1997))
(internal quotations omitted).

1 Although several of the *Efaw* factors weigh against dismissal, the court finds that
2 dismissal is appropriate in light of the delay, the lack of eventual service, and Mr.
3 Collins's failure to take any action to pursue his claims or explain his conduct to the
4 court. Mr. Collins filed his complaint more than 280 days ago and has not accomplished
5 proper service on any Moving Defendants.⁵ (*See generally* Dkt.); *see also Troxell v.*
6 *Fedders of N. Am., Inc.*, 160 F.3d 381, 382 (7th Cir. 1998) (affirming the district court's
7 dismissal under Rule 12(b)(5) when the plaintiff effected proper service more than 240
8 days after filing the complaint). Moreover, although Mr. Collins's Title VII claim is now
9 likely time-barred, he has made no effort to communicate to the court a desire to preserve
10 his claims. *See Payan v. Aramark Mgmt. Servs. Ltd. P'ship*, 495 F.3d 1119, 1121 (9th
11 Cir. 2007) (noting that a Title VII claim is statutorily barred after 90 days from the
12 claimant's receipt of an EEOC right-to-sue letter); (Compl. ¶ 4.1 (alleging that Mr.
13 Collins received the EEOC's right-to-sue letter on March 20, 2015)); *see also Troxell*,
14 160 F.3d at 382-83 (affirming a district court's dismissal for failure to satisfy Rule 4(m)
15 even though the plaintiff was statutorily barred from refileing the claim). Accordingly, the
16 court exercises its discretion under Rule 4(m) to dismiss Mr. Collins's claims against
17 Moving Defendants for failure to timely serve them.

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20 ⁵ As noted above, in response to Defendants' Rule 12(b)(5) motion Mr. Collins filed two
21 affidavits attesting that on November 10, 2015, a process server served a summons on both
22 Providence and Swedish. (Aff. for Providence; Aff. for Swedish.) However, this summons-only
service was insufficient because (1) it did not include the complaint (*compare* Aff. for
Providence *and* Aff. for Swedish *with* Compl.); and (2) the service occurred outside the period
required by Rule 4(m).

1 **B. Additional Defendants Who Have Not Yet Appeared**

2 As noted above, Mr. Collins is proceeding *pro se* and *in forma pauperis*. (IFP
3 Order.) A complaint filed by any person proceeding *in forma pauperis* is subject to a
4 mandatory *sua sponte* review and dismissal if it (1) “is frivolous or malicious,” (2) “fails
5 to state a claim on which relief may be granted,” or (3) “seeks monetary relief against a
6 defendant who is immune from such relief.” 28 U.S.C. § 1915(e)(2)(B)(i)-(iii); *Calhoun*
7 *v. Stahl*, 254 F.3d 845, 845 (9th Cir. 2001) (clarifying that although much of 28 U.S.C.
8 § 1915 references prisoners, § 1915(e)(2)(B) applies to both prisoners and non-prisoners
9 proceeding *in forma pauperis*); *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000)
10 (“[S]ection 1915(e) not only permits but requires a district court to dismiss an *in forma*
11 *pauperis* complaint that fails to state a claim.”). Unless amendment would be futile, the
12 court should grant leave to amend when dismissing a complaint under Section 1915(e).
13 *See Lopez*, 203 F.3d at 1128-29.

14 Because Mr. Collins is proceeding *pro se*, the court construes his pleadings
15 liberally. *See Bernhardt v. L.A. Cty.*, 339 F.3d 920, 925 (9th Cir. 2003). Nonetheless, a
16 complaint must “give the defendant fair notice of what the . . . claim is and the grounds
17 upon which it rests” and must include sufficient facts to “state a claim for relief that is
18 plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007)
19 (alteration in original) (citations omitted). Dismissal for failure to state a claim for relief
20 “can be based on the lack of a cognizable legal theory or the absence of sufficient facts
21 alleged under a cognizable legal theory.” *Balistreri v. Pacifica Police Dep’t*, 901 F.2d
22 696, 699 (9th Cir. 1990); *see also* Fed. R. Civ. P. 8(a)(2).

1 In addition to Moving Defendants, Mr. Collins included two other defendants in
2 his complaint: “SIEU 1199NW” and “Margaret Cary, C/O SIEU 1199NW.” (Compl.
3 ¶¶ 1.4, 1.10.) Mr. Collins alleges “negligent misrepresentation” against SIEU 1199NW
4 (*id.* ¶ 5.2) and a violation of Title VII against Ms. Cary (*id.* ¶ 5.8). Mr. Collins fails to
5 assert any facts supporting his claim that SIEU 1199NW “negligently misrepresented”
6 the terms of the bargaining agreement between SIEU 1199NW and Swedish. (*See id.*
7 ¶¶ 3.1-3.35); *see generally Manning v. Swedish Med. Ctr.*, No. C15-949RSL, 2015 WL
8 4231584, at *2 (W.D. Wash. July 9, 2015) (reaching the same conclusion regarding a
9 nearly identical complaint). Accordingly, Mr. Collins fails to state a claim on which
10 relief may be granted, and the court dismisses his claim against SIEU 1199NW. *See* 28
11 U.S.C. § 1915(e)(2)(B)(ii).

12 Additionally, Mr. Collins’s claim against Ms. Cary lacks a cognizable legal
13 theory. (*See* Compl. ¶¶ 5.8-5.9.) Mr. Collins cannot sue individual defendants under
14 Title VII. *See Craig v. M & O Agencies, Inc.*, 496 F.3d 1047, 1058 (9th Cir. 2007) (“We
15 have long held that Title VII does not provide a separate cause of action against
16 supervisors or co-workers.”); *Pink v. Modoc Indian Health Project, Inc.*, 157 F.3d 1185,
17 1189 (9th Cir. 1998) (“[C]ivil liability for employment discrimination does not extend to
18 individual agents of the employer who committed violations, even if that agent is a
19 supervisory employee.”). Accordingly, Mr. Collins’s allegations against Ms. Cary fail to
20 state a claim on which relief may be granted. *See Balistreri*, 901 F.2d at 699; *see also* 28
21 U.S.C. § 1915(e)(2)(B)(ii).

1 In sum, the court dismisses *sua sponte* Mr. Collins's claims against SIEU
2 1199NW and Ms. Cary because Mr. Collins's *in forma pauperis* complaint fails to state a
3 claim against either defendant. Pursuant to Section 1915(e), the court grants Mr. Collins
4 leave to amend the claims against SIEU 1199NW and Ms. Cary, but he must do so within
5 20 days of the date of this order. If Mr. Collins does not file an amended complaint with
6 respect to those claims within 20 days of the date of this order, the court will dismiss his
7 claims against SIEU 1199NW and Ms. Cary without prejudice and without leave to
8 amend.

9 IV. CONCLUSION

10 For the foregoing reasons, the court GRANTS Moving Defendants' motion to
11 dismiss for insufficient service of process (Dkt. # 14) and DISMISSES Mr. Collins's
12 claims against Adam Messer, Steve Marshall, Donna Moberly, Trish Gallagher, Rian
13 Brown, Swedish, and Providence (Dkt. # 4) WITHOUT PREJUDICE.⁶ Additionally, the

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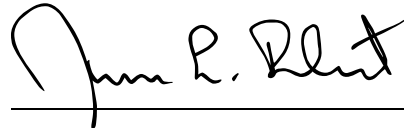
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21 ⁶ Because no changes to Mr. Collins's complaint can overcome the dismissal resulting
22 from his failure to serve Moving Defendants, granting Mr. Collins leave to amend those claims
would be futile.

1 court DISMISSES *sua sponte* Mr. Collins's claims against SIEU 1199NW and Ms. Cary
2 WITHOUT PREJUDICE. The court GRANTS Mr. Collins 20 days to amend his
3 complaint with respect to the claims against SIEU 1199NW and Ms. Cary.

4 Dated this 28th day of March, 2016.

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8 JAMES L. ROBART
United States District Judge