IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

CODY MICHAEL DEGRAVE,

Plaintiff,

v.

STATE OF WI D.O.C.,
LINCOLN HILLS SCHOOL FOR BOYS,
and MS. SOMMERS,

Defendants.

OPINION AND ORDER

21-cv-256-wmc

Pro se plaintiff Cody Michael DeGrave alleges that a Lincoln Hills School staff member sexually assaulted him several times after he was sent there in 1999.[1] DeGrave is proceeding *in forma pauperis*, and the court screened his complaint as required under 28 U.S.C. § 1915 subject to DeGrave showing cause why his case should not be dismissed as time barred. (Dkt. #7.) In response, DeGrave argues that he is entitled to equitable tolling. (Dkt. #8.) Unfortunately for plaintiff, the court disagrees and must dismiss this case for the following reasons.

OPINION

In the summer of 1999, DeGrave was convicted of a felony at the age of 17and sent to the notorious Lincoln Hills School for Boys in Irma, Wisconsin. He was incarcerated there until May 2000 but released while still 17. During his time at the facility, a staff member named Ms. Sommers would allegedly make sexual comments to DeGrave and watch him shower. (Dkt. #8 at 1.) She would also allegedly "pull [him] out of his cell

[1] When DeGrave filed this lawsuit, he was incarcerated at the Brown County Jail. (Dkt. #1 at 1.)

after lockdown to talk to her in the office." (Dkt. #1 at 3.) There, the sexual abuse allegedly went as far as Ms. Sommer "giving [him] oral sex on multiple occasions." (Dkt. #8 at 1.) DeGrave says that he came to fear "the sound of my door popping unlocked" on nights Ms. Sommer was on duty. (*Id.* at 2.) And explains how this experience left him "emotionally and mentally traumatized," which has "negatively affected [his] entire life." (Dkt. #1 at 3.)[2]

While plaintiff's allegations of sexual abuse are very serious, he has a timing problem: the alleged abuse occurred over 20 years ago. Because § 1983 does not have a limitations period, federal courts borrow the forum state's applicable statute of limitations for personal injury claims. *Johnson v Rivera*, 272 F.3d 519, 521 (7th Cir. 2001). In its show cause order, the court specifically noted that plaintiff's sexual abuse claims appear to have accrued immediately after the assaults occurred in 1999, and discussing several possible Wisconsin statutes of limitations, explained how none of them appeared to allow plaintiff to bring this civil lawsuit over two decades later. (Dkt. #7 at 4-5.) Because plaintiff has now clarified that the alleged abuse occurred when he was still a minor, the court adds Wis. Stat. § 893.587 to that discussion, which, as amended in 2003, now tolls the limitations period for claims of sexual assault involving a child until the plaintiff reaches the age of 35. Even if that statue applies here, however, plaintiff was born in 1982, which would make

[2] The court takes these facts from plaintiff's complaint and his response to the show cause order. (Dkt. ##1, 8.) In addressing any *pro se* litigant's complaint, the court must read the allegations of the complaint generously, resolving ambiguities and making reasonable inferences in plaintiff's favor. *Haines v. Kerner*, 404 U.S. 519, 521 (1972).

him at least 39 years old when he finally filed this lawsuit in 2021. (Dkt. #7 at 5). Therefore, his claims appear time barred.

In response, plaintiff argues that the doctrine of equitable tolling also applies. "Equitable tolling permits a plaintiff to avoid the bar of the statute of limitations if, despite the exercise of all due diligence, he is unable to obtain vital information bearing on the existence of his claim." *Shropshear v. Corp of City of Chi.*, 275 F.3d 593, 593 (7th Cir. 2001). In the context of § 1983 claims, "the state, rather than the federal, doctrine of equitable tolling governs." *Id.* at 596. "Although Wisconsin case law on equitable tolling is sparse, it is clear that, as in *Shropshear*, tolling is available only when the plaintiff's failure to meet a filing deadline is out of the plaintiff's control or occurred despite the plaintiff's due diligence." *Henderson v. Jess*, No. 18-cv-680-jdp, 2021 WL 1080269, at *9 (W.D. Wis. Mar. 19, 2021) (collecting cases)

Plaintiff has not and cannot meet his burden. Indeed, plaintiff's response only speaks generally about the current psychological evidence surrounding a link between mental illness, trauma, and sexually abused juveniles. (Dkt. #8 at 1). Certainly, mental illness can warrant equitable tolling, but "only if the illness in fact prevents the sufferer from managing his affairs and thus from understanding his legal rights and acting upon them." *Obriecht v. Foster*, 727 F.3d 744, 750-51 (7th Cir. 2013) (quoting *Miller v. Runyon*, 77 F.3d 189, 191 (7th Cir. 1996)). Here, plaintiff does not claim that he recently recovered repressed memories of the abuse; he recalls what happened and fearing his interactions with Ms. Sommer at the time. Rather, he generally alleges that he lacked the knowledge to recognize that he had been abused, did not have any opportunity to disclose

the information, and was unsure if anyone would have taken him seriously. However, plaintiff does not explain *when* he first recognized his past abuse, nor allege that he has any mental illness himself, nor explain how mental illness or trauma affected him to the point that could not make any effort to pursue his claims in court until recently.

Plaintiff also asserts that he generally feared retaliation from the DOC, but bases his assertion on his having spent "20 out of 22 years since [his] release from Lincoln Hills Correctional Facility" under DOC supervision. (Dkt. #8 at 1.) Although plaintiff further alleges that he lived in "legitimate fear" of unspecified retaliation, he does not allege specific facts giving rise to this ongoing, long-term fear. (*Id*.) Moreover, courts have expressed skepticism about using such a generalized fear as the basis for equitable tolling in various contexts. *E.g.*, *Rosenblum v. Yates*, No. 09-cv-3302, 2011 WL 590750, at *3 (E.D. Cal. Feb. 10, 2011) (plaintiff's "generalized allegation [of] fear of retaliation" was "insufficient to meet his high burden"); *Davis v. Jackson*, No. 15-cv-5359 (KMK), 2016 WL 5720811, at *8-12 (S.D.N.Y. Sept. 30, 2016) (although the specific facts alleged amounted to extraordinary circumstances meriting equitable tolling, "[g]eneralized allegations of fear of retaliation" would be insufficient); *Fox v. Lackawanna Cnty*., No. 3:16-cv-1511, 2017 WL 5007905, at *9 (M.D. Pa. Nov. 2, 2017) (even if a reasonable fear of retaliation in the prison context may, on occasion, justify equitable tolling, this principle would not be applicable where a plaintiff had been released from prison years before his claims were filed).

Finally, this court is not aware of any Wisconsin court that has applied equitable tolling based on a generalized fear of retaliation. To the contrary, the law provides a

separate remedy for retaliation by prison officials based on an inmate submitting complaints. *See Bridges v. Gilbert*, 557 F.3d 541, 546 (7th Cir. 2009) (discussing what a plaintiff must show to prevail on a First Amendment retaliation claim against prison officials); *cf. Perkins for Est. of Perkins v. Brennan*, 821 F. App'x 630, 632 (7th Cir. 2020) (fear of retaliation did not excuse a failure to exhaust administrative remedies and provide a basis for equitable tolling because the law provided a remedy for retaliation). While this alternative remedy does not necessarily preclude tolling based on well-founded fear, because plaintiff alleges only a generalized fear of retaliation in the years after he left Lincoln Hills, the court cannot conclude that he is entitled to equitable tolling on that basis. Thus, although the court sympathizes with plaintiff, it must dismiss his lawsuit.

ORDER

IT IS ORDERED that plaintiff Cody Michael DeGrave's motion for leave to proceed (dkt. #2) is DENIED, and this case is DISMISSED as time barred.

Entered this 21st day of September, 2023.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge