

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

FRANK MALAVE,

Plaintiff,

v.

JAMES REED, M.D., GINGER JONES,
and MICHAEL MOOREHEAD,

Defendants.

ORDER

04-C-824-C

This civil action was removed to federal court from the Circuit Court for Adams County, Wisconsin, because plaintiff is suing health care personnel employed by the Bureau of Prisons for medical negligence. This means that the case must be brought in federal court under the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680.

Although the appropriate forum for a tort claims act case is a federal district court, the court must dismiss the suit immediately if it appears that the plaintiff has not met the jurisdictional prerequisites for filing such a suit. Fed. R. Civ. P. 12(h)(3). In addition, where, as here, plaintiff is a prisoner, a district court must screen the complaint and dismiss the case if the plaintiff's claim is frivolous or malicious, fails to state a claim upon which

relief may be granted or has been brought against a defendant who is immune from suit. 28 U.S.C. § 1915A. From my review of plaintiff's complaint, I conclude that the case must be dismissed for lack of jurisdiction.

First, claimants seeking damages under the Federal Torts Claims Act are required to exhaust administrative remedies prior to bringing suit in federal court. 28 U.S.C. § 2675(a); Sullivan v. United States, 21 F.3d 198, 206 (7th Cir. 1994) (satisfaction of section 2675(a)'s exhaustion requirement is a jurisdictional prerequisite to a suit in federal court (citing Deloria v. Veterans Admin., 927 F.2d 1009, 1011 (7th Cir.1991))). Those remedies are exhausted by filing a claim for damages with the relevant federal agency within two years after the claim accrues. 28 U.S.C. § 2401(b). If the relevant federal agency does not "make final disposition of a claim within six months after it is filed" the claimant may deem such failure to act a "final disposition" for purposes of the Act, at which point suit may be brought in federal court. Id. Nothing in the record transferred from the Adams County Circuit Court shows that plaintiff has exhausted his administrative remedies.

Even if plaintiff were able to supply proof of exhaustion of his administrative remedies with respect to his claim of negligence, this court would lack jurisdiction to hear plaintiff's claim.

Statutes of limitations in suits under the Federal Tort Claims Act are jurisdictional and cannot be waived. Crawford v. United States, 796 F.2d 924, 927-28 (7th Cir. 1986). Tort claims against the United States must be "filed within six years after the right of action

first accrues." 28 U.S.C. § 2401(a). A cause of action for medical malpractice accrues "when the plaintiff discovered he had a medical problem that required attention." Heard v. Sheahan, 253 F. 3d 316 (7th Cir. 2001). (Contrasting accrual of medical malpractice claim with accrual of Eight Amendment claim which runs from the last day on which the defendants refused to treat the plaintiff's serious medical condition.) Plaintiff's cause of action accrued sometime in 1993, when he alleges that "Dr. Reed, working with Ginger Jones," became specifically aware that a private neurosurgeon had recommended lumbar laminectomy surgery" for plaintiff. According to plaintiff, Reed, in concert with Jones, delayed providing the surgery until 1999, causing plaintiff to suffer exacerbated and prolonged pain and suffering. Plaintiff alleges that during the time he was awaiting surgery, he was "unable to stand erect, suffered intermittent pain and then numbness in the right leg, and arm misalignment." Although plaintiff must have been aware in 1993 that he was not getting the treatment a neurosurgeon had recommended, he did not file his complaint in this case until September 23, 2004, more than six years after his medical problem was apparent. Therefore, the statute of limitations bars his tort claim arising out of defendant Reed's and Jones's failure to schedule him for prompt surgery.

Plaintiff's only allegation against defendant Michael Moorehead is that following plaintiff's surgery, Moorehead "placed plaintiff in solitary confinement because he did not want to see any wheelchairs." This allegation does not make out a claim of legal negligence against Moorehead, nor does it state any other kind of claim of a violation of federal or

constitutional law over which this court might have jurisdiction.

ORDER

IT IS ORDERED that this case is DISMISSED for lack of jurisdiction.

Entered this 24th day of November, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge