

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

NORMAN MALONE,

Petitioner,

v.

CORRECTIONS CORPORATION OF AMERICA,

Respondents.

ORDER

07-C-377-C

In 2003, petitioner Norman Malone was a Wisconsin prisoner being held in an Oklahoma facility run by respondent Corrections Corporation of America. In his proposed complaint, petitioner asserts several claims for alleged violations of his constitutional rights arising out of a disturbance at the facility in April 2003.

In an order dated August 14, 2007, I stayed a decision whether to allow petitioner to proceed on his claims because it appeared from the body of his complaint that petitioner intended to sue a number of individuals he did not name in the complaint's caption. I gave petitioner until August 31, 2007 in which to either amend his complaint to clearly identify the other parties he wished to sue or to inform the court that he wished to sue respondent Corrections Corporation only.

Petitioner has filed a response to the August 14 order in which he states that he wishes to sue former Wisconsin Department of Corrections Secretary Jon Litscher, former warden Jody Bradley and former correctional officer Chad Gamble as well as “John/Jane Doe employees.” In addition, petitioner asks for a 45-day extension to file an amended complaint that incorporates these changes. Petitioner’s motion will be denied as moot. I must dismiss this case because it is clear from his complaint that he cannot prevail on his claims.

In the August 14 order, I overlooked the legal effect of the time and place of the events giving rise to petitioner’s claims: each of them took place in Oklahoma in April and May of 2003. In cases like petitioner’s brought under 42 U.S.C. § 1983, the statute of limitations is controlled by *state* law, in particular by a state’s personal injury statute of limitations. Wilson v. Garcia, 471 U.S. 261 (1985). (The statute of limitations is the amount of time a party has to file a lawsuit after he was injured.) Although petitioner brought this case in Wisconsin (which has a personal injury statute of limitations of six years, Wudtke v. Davel, 128 F.3d 1057, 1061 (7th Cir. 1997)), Wisconsin law does not provide the limitations period in this case. Because all of the actions giving rise to this lawsuit occurred in Oklahoma, it is that state’s personal injury statute of limitations that controls this case. Brademas v. Indiana Housing Finance Authority, 354 F.3d 681, 685 (7th Cir. 2004); Hunt v. Bennett, 17 F.3d 1263, 1265 (10th Cir. 1994). Unfortunately for

petitioner, Oklahoma's limitations period is only two years from the time petitioner became aware of his injury, Kripp v. Luton, 466 F.3d 1171, 1174 (10th Cir. 2006), which means that he was required to bring this action in 2005 or earlier. Because petitioner did not file this action until July 2007, it must be dismissed as barred by the statute of limitations.

Although the basic rule is that a statute of limitations defense is an affirmative defense, a district court may dismiss a complaint on its own motion if a party pleads enough information showing the complaint is untimely. Kauthar v. SDN BHD v. Sternberg, 149 F.3d 659, 670 n.14 (7th Cir 1998). See also United States v. Lewis, 411 F.3d 838 (7th Cir.2005); Gleash v. Yuswak, 308 F.3d 758, 760-61 (7th Cir.2002). That situation is present here, because petitioner's complaint plainly reveals that he was aware of all of his injuries in 2003 and he failed to file a lawsuit within two years.

Because I am dismissing the complaint on the basis of petitioner's own allegations, this is a dismissal for failure to state a claim upon which relief may be granted. Jones v. Bock, 127 S. Ct. 910, 920-21 (2007) ("A complaint is subject to dismissal for failure to state a claim if the allegations, taken as true, show the plaintiff is not entitled to relief. If the allegations, for example, show that relief is barred by the applicable statute of limitations, the complaint is subject to dismissal for failure to state a claim."). Therefore, I must assess a strike against petitioner under 28 U.S.C. § 1915(g), which requires courts to record a strike against a prisoner for each case he files that is dismissed "on the grounds that it is frivolous,

malicious, or fails to state a claim upon which relief may be granted.” If a prisoner files three such actions or appeals, he may not proceed in forma pauperis unless he “is under imminent danger of serious physical injury.” 28 U.S.C. § 1915(g).

ORDER

IT IS ORDERED that

1. On the court’s own motion, this case is DISMISSED for failure to state a claim upon which relief may be granted because each of petitioner Norman Malone’s claims are barred by the statute of limitations.

2. Petitioner’s motion for an extension of time is DENIED as moot.

3. A strike is recorded against petitioner in accordance with 28 U.S.C. § 1915(g).

Entered this 11th day of September, 2007.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge