

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

ROBERT HARRY KUNFERMAN,
Plaintiff,

OPINION and ORDER

09-cv-662-bbc

v.

JOANNE E. BERG, KARLA A. WEBER,
ERNESTO R. MONGE, DEBRA LAUDER,
CYNTHIA B. HASZ and SUSAN FISCHER,

Defendants.

In this civil action for monetary and injunctive relief, pro se plaintiff Robert Harry Kunferman is proceeding on claims that defendant Ernesto Monge retaliated against him in violation of his right to free speech under the First Amendment and defendants Monge, Susan Fischer, Debra Lauder, Cynthia Hasz, Joanne Berg and Karla Weber defamed him by stating that he is disruptive and racist. Now before the court is defendants' motion for judgment on the pleadings concerning plaintiff's state law defamation claim. Defendants contend that plaintiff's defamation claim should be dismissed because he failed to comply with Wisconsin's notice of claim requirements.

I conclude that plaintiff's notice of claim was untimely and thus, he failed to comply

with Wisconsin's notice of claim statute, Wis. Stat. § 893.82(3). Because the statute is jurisdictional, this court does not have the authority to decide plaintiff's defamation claim. Therefore, I will grant defendants' motion for judgment on the pleadings and dismiss plaintiff's defamation claim.

OPINION

Wisconsin's notice of claim statute requires a plaintiff to file a notice with the attorney general's office before commencing a civil action "against any state officer, employee or agent for or on account of any act growing out of or committed in the course of the discharge of the officer's, employee's or agent's duties." Wis. Stat. § 893.82(3). The notice must be filed within 120 days of the event causing the alleged injury and must state "the time, date, location and the circumstances of the event giving rise to the claim for the injury" as well as "the names of persons involved, including the name of the state officer, employee or agent involved." Id. Strict compliance with the notice of claim statute is a condition precedent to bringing a civil action against a state officer or employee. Kellner v. Christian, 197 Wis. 2d 183, 195-96, 539 N.W.2d 685, 690 (1995); see also Wis. Stat. § 893.82(2m) ("No claimant may bring an action against a state officer, employee or agent unless the claimant complies strictly with the requirements of this section."); Newkirk v. Wisconsin Dept. of Transportation, 228 Wis. 2d 830, 837, 598 N.W.2d 610, 613 (Ct. App. 1999

(“strict compliance with § 893.82(5), stats., is required in all cases”); Ibrahim v. Samore, 118 Wis. 2d 720, 726, 348 N.W.2d 554, 558 (1984). If a plaintiff fails to comply strictly with the notice of claim requirements, the court must dismiss his or her claims, regardless whether the state employee had actual notice or was prejudiced by the lack of notice. J.F. Ahern Co. v. Wisconsin State Bldg. Commission, 114 Wis. 2d 69, 81, 336 N.W.2d 679, 685 (1983); Carlson v. Pepin County, 167 Wis. 2d 345, 357, 481 N.W.2d 498, 503 (Ct. App. 1992).

Defendants have moved for judgment on the pleadings under Fed. R. Civ. P. 12(c), contending that plaintiff’s defamation claim should be dismissed because he failed to comply with Wisconsin’s notice of claim requirements in three respects. First, plaintiff’s notice of claim was untimely; second, the notice of claim does not state specifically the time, date, location and the circumstances of defendants’ alleged defamatory statements; and third, plaintiff failed to identify defendant Hasz by name in the notice of claim.

A court may enter judgment on the pleadings “only if it appears beyond doubt that the plaintiff cannot prove any facts that would support his claim for relief.” Buchanan-Moore v. County of Milwaukee, 570 F.3d 824, 827 (7th Cir. 2009) (citation and quotation marks omitted). Because plaintiff alleges in his second amended complaint that he filed the notice of claim on February 28, 2009, it is possible to determine from the pleadings whether plaintiff’s notice is timely. However, to determine whether the contents of plaintiff’s notice satisfy the specificity requirements of § 893.82(3), I would need to

consider the notice itself, which was not attached to plaintiff's complaint. When a court considers materials outside the pleadings that are not central to the plaintiff's claims, it must convert the motion for judgment on the pleadings to a motion for summary judgment under Fed. R. Civ. P. 56 and allow the plaintiff an opportunity to submit materials in response to the defendants' motion. R.J. Corman Derailment Services, LLC v. International Union of Operating Engineers, Local Union 150, 335 F.3d 643, 647 (7th Cir. 2003) ("[I]f, on a motion under [12(c)], matters outside the pleadings are presented to and not excluded by the court, then the motion must be converted to one for summary judgment under Fed. R. Civ. P. 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."); Tierney v. Vahle, 304 F.3d 734, 738 (7th Cir. 2002). Thus, I will consider first whether I can resolve defendants' motion on the timeliness issue alone without converting the motion to one for summary judgment.

The acts giving rise to plaintiff's defamation claim occurred in June 2008. Plaintiff alleges that in 2008, he published certain political writings on the internet that were disapproved of by defendant Monge, an employee in the University of Wisconsin financial aid office. On June 11, 2008, Monge allegedly refused to assist plaintiff with his application for financial aid because he disapproved of these writings and plaintiff sought to file a complaint against Monge. Sometime in June or July 2008, after plaintiff complained about Monge, defendants Monge, Lauder, Berg, Fischer, Hasz and Weber, also employees of the

university, filed statements with the university alleging that plaintiff was disruptive and racist. On the basis of defendants' statements, plaintiff was charged with disorderly conduct in July 2008. According to plaintiff's complaint, he filed a notice of claim with the attorney general's office on February 28, 2009.

Because defendants are state employees and their alleged defamatory acts occurred during the course of their employment, the notice of claim statute applies to plaintiff's state law defamation claim. Defendants contend that because plaintiff's notice of claim was filed after the expiration of the 120-day deadline set in the statute, plaintiff's notice was untimely. Plaintiff concedes that the notice of claim statute applies in this case and concedes that he did not file his notice of claim within 120 days of defendants' alleged defamation in June 2008. However, plaintiff contends that the 120-day deadline was tolled until either the date on which the court denied defendants' motion to dismiss his state law defamation claim under Fed. R. Civ. P. 8, or the date he was able to discover information required to comply with the notice of claim statute. Plaintiff's first argument does not make sense and he has cited no legal basis to support it. The notice of claim is a condition precedent to filing a lawsuit, so it would make no sense to toll the deadline for filing a notice of claim until after the lawsuit has been commenced in court and survives a motion to dismiss.

Plaintiff's second argument is that he could not file a notice of claim within 120 days of defendants' alleged defamatory acts because although he knew that the university filed a

disorderly conduct report against him, he did not know that defendants Monge, Fischer, Lauder, Hasz, Berg and Weber had filed defamatory statements supporting the charge. Although plaintiff's brief is difficult to follow and contains irrelevant and distracting information and arguments, I understand that plaintiff is alleging that the University of Wisconsin and the police department refused to provide him with information about the statements supporting the disorderly conduct charge until March and November 2009, even though he asked for the information repeatedly. Thus, plaintiff did not know that he had a potential defamation claim against defendants. Plaintiff contends that under these circumstances, the discovery rule or principles of estoppel should apply to toll the 120-day deadline.

The discovery rule provides that "tort claims shall accrue on the date the injury is discovered or with reasonable diligence should be discovered, whichever occurs first." Hansen v. A.H. Robins, Inc., 113 Wis. 2d 550, 560, 335 N.W.2d 578, 583 (1983). In addition, "under Wisconsin law, a cause of action will not accrue until the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, not only the fact of injury but also that the injury was probably caused by the defendant's conduct or product." Borello v. United States Oil Co., 130 Wis. 2d 397, 411, 388 N.W.2d 140, 146 (1986). The doctrine of equitable estoppel may be applied to prohibit a party from asserting an argument contrary to a position adopted previously by the party, on which the party asserting estoppel

relied to its detriment. Nugent v. Slaght, 2001 WI App 282, ¶ 29, 249 Wis. 2d 220, 638 N.W.2d 594.

Unfortunately for plaintiff, Wisconsin courts have held repeatedly that § 893.82 is jurisdictional and cannot be tolled or waived by the discovery rule or principles of estoppel. Weinberger v. State of Wisconsin, 105 F.3d 1182, 1188 (7th Cir. 1997) (“Section 893.82 is jurisdictional and *strict* compliance is required. There is no equitable basis for partial or ‘substantial’ compliance, as [plaintiff] would wish. Whatever reason [plaintiff] may offer for his inability to comply, the fact is that noncompliance is fatal to the claim.”) (emphasis in original); Riccitelli v. Broekhuizen, 227 Wis. 2d 100, 116, 595 N.W.2d 392, 399 (1999) (“No time exception [to the notice of claim requirement] is permitted. As a jurisdictional statute, § 893.82(3) requires strict compliance.”) (internal citations and quotations omitted); J.F. Ahern, 114 Wis. 2d at 83 (“No basis exists for the equitable doctrine of estoppel. The [notice of claim] statute must be enforced even though it produces harsh consequences.”) (citation and quotation marks omitted); Ibrahim, 118 Wis. 2d at 726 (“Failure to give the notice is fatal to the action. No action may be brought unless the notice is given.”) (internal citation and quotations omitted); Oney v. Schrauth, 197 Wis. 2d 891, 901-04, 541 N.W.2d 229, 232-33 (Ct. App. 1995) (holding that neither discovery rule nor equitable estoppel may toll deadline for filing notice of claim under § 893.82(3) because it “is a jurisdictional statute and must be strictly complied with before a trial court obtains jurisdiction”); see also Renner

by Brennan v. Madison General Hospital, 151 Wis. 2d 885, 889-91, 447 N.W.2d 97, 99-100 (Ct. App. 1989); Munroe v. Dykstra, 1997 WL 268855, *3 (Ct. App. 1997) (unpublished).

Because plaintiff did not comply with § 893.82(3) by filing a notice of claim within 120 days of defendants' alleged defamatory statements, and this deadline cannot be tolled, this court lacks jurisdiction over plaintiff's defamation claim. Therefore I will grant defendants' motion for judgment on the pleadings and dismiss plaintiff's defamation claim.

ORDER

IT IS ORDERED that the motion for judgment on the pleadings filed by defendants Ernesto Monge, Susan Fischer, Debra Lauder, Cynthia Hasz, Joanne Berg and Karla Weber, dkt. #56, is GRANTED. Plaintiff Robert Harry Kunferman's defamation claim is DISMISSED for failure to comply with Wis. Stat. § 893.82(3). Defendants Fischer, Lauder, Hasz, Berg and Weber are DISMISSED from this case.

Entered this 8th day of December, 2010.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge