

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

ROBERT HARRY KUNFERMAN,
Plaintiff,

OPINION and ORDER

10-cv-574-bbc

v.

ROBERT SHAW,
Defendant.

ROBERT HARRY KUNFERMAN,
Plaintiff,

OPINION and ORDER

10-cv-575-bbc

v.

DAVID A. BACKSTROM,
Defendant.

Plaintiff Robert Harry Kunferman is proceeding pro se on claims that defendant Robert Shaw (case number 10-cv-574-bbc) and defendant David Backstrom (case number 10-cv-575-bbc) retaliated against him in violation of the First Amendment. Now before the court are defendants' motions to dismiss the complaints in both cases for failure to comply with Wisconsin's statute of limitations. Because the allegations in plaintiff's second amended

complaints establish that his claims against defendants are untimely, the motions to dismiss will be granted.

In plaintiff's second amended complaint, he alleges the following facts.

ALLEGATIONS OF FACT

A. Case Number 10-cv-574-bbc

Plaintiff Robert Kunferman attended the University of Wisconsin Eau Claire from 1997 to 2001. Defendant Robert Shaw is the former dean of the university. While plaintiff was a student there, he engaged in political speech and attempted to file an age discrimination complaint with defendant Shaw. On or about December 17, 2000, in response to plaintiff's complaint that older students were being treated unfairly by the university, defendant Shaw and a police officer entered one of plaintiff's classes and began to question him. That same month, Shaw told plaintiff he disapproved of his speech and filed a disorderly conduct charge against plaintiff that was based on false accusations. In late 2000 and 2001, plaintiff requested information from the university regarding witnesses and evidence that allegedly supported the charge.

B. Case Number 10-cv-575-bbc

Defendant David Backstrom is the former police chief of the University of Wisconsin Eau Claire, and was involved in filing the December 2000 disorderly conduct charge against plaintiff.

On more than thirty occasions, plaintiff requested records from Backstrom that substantiated the charge. In May 2001, Backstrom entered plaintiff's home uninvited, obtained a milk jug from the refrigerator and intimidated and threatened plaintiff.

PROCEDURAL HISTORY

Plaintiff filed a complaint containing a § 1983 claim against defendants Shaw and Backstrom on October 30, 2009, Kunferman v. Board of Regents, 09-cv-662-bbc. That complaint was dismissed for failure to satisfy Fed. R. Civ. P. 8 and 20, and plaintiff filed an amended complaint on April 22, 2010. That complaint was also dismissed and plaintiff filed a second amended complaint on July 16, 2010. On October 5, 2010, the second amended complaint was severed into three separate lawsuits, including case numbers 09-cv-662-bbc, 10-cv-574-bbc and 10-cv-575-bbc.

OPINION

Although motions to dismiss under Fed. R. Civ. P. 12(b)(6) do not generally address affirmative defenses, “the statute of limitations may be raised in a motion to dismiss if the allegations of the complaint itself set forth everything necessary to satisfy the affirmative defense.” Brooks v. Ross, 578 F.3d 574, 579 (7th Cir. 2009) (citation omitted); Cancer Foundation, Inc. v. Cerberus Capital Management, 559 F.3d 671, 674-75 (7th Cir. 2009) (“Dismissing a complaint as untimely at the pleading stage is an unusual step But dismissal

is appropriate when the plaintiff pleads himself out of court by alleging facts sufficient to establish the complaint's tardiness."). In considering a motion to dismiss, the court must accept as true all well-pleaded factual allegations in the complaint, drawing all reasonable inferences in favor of the plaintiff. Reger Development, LLC v. National City Bank, 592 F.3d 759, 763 (7th Cir. 2010).

In Wisconsin, claims brought under 42 U.S.C. § 1983 have a six-year statute of limitations. Reget v. City of La Crosse, 595 F.3d 691, 694 (7th Cir. 2010); Wudtke v. Davel, 128 F.3d 1057, 1061 (7th Cir. 1997); see also Wis. Stat. § 893.53 (governing actions to recover for violations of injuries to noncontractual rights). The clock starts running "when the prospective plaintiff discovers (or should if diligent have discovered) both the injury that gives rise to his claim and the injurer." Jay E. Hayden Foundation v. First Neighbor Bank, N.A., 610 F.3d 382, 386 (7th Cir. 2010).

Plaintiff was granted leave to proceed on his retaliation claims on the basis of his allegations that defendant Shaw filed a baseless disorderly conduct charge against him in December 2000 and defendant Backstrom visited his home uninvited and intimidated and threatened him in May 2001. Applying the Wisconsin six-year statute of limitations to the date of the incidents, December 2006 was the latest date on which plaintiff could have filed a timely § 1983 claim against defendant Shaw, and May 2007 was the latest date on which plaintiff could have filed a timely § 1983 claim against defendant Backstrom. However, plaintiff did not raise a § 1983 claim for retaliation against Shaw or Backstrom until October 30, 2009, and the

operative complaints in case numbers 10-cv-574-bbc and 10-cv-575-bbc were not filed until October 6, 2010.

Plaintiff contends that the statute of limitations should be tolled because he did not discover the injuries caused by defendants Shaw and Backstrom until sometime later and could not have discovered the injuries with reasonable diligence because defendants and others concealed them. He raises three defenses to the statute of limitations in support of his argument: (1) the continuing violation doctrine; (2) equitable estoppel or equitable tolling; and (3) the fraudulent concealment doctrine. However, plaintiff fails to develop any of these defenses and fails to point to specific facts and reasons why these defenses should apply in his cases.

With respect to his argument based on the continuing violation doctrine, plaintiff contends that the doctrine should toll the statute of limitations because Shaw's and Backstrom's acts of retaliation continued to harm him after he left Eau Claire and became a student at the University of Wisconsin in Madison. However, even if plaintiff could point to specific injuries he suffered after 2000 and 2001 as a result of Shaw's and Backstrom's retaliatory acts, such subsequent injuries would not toll the statute of limitations. The continuing violation doctrine allows a "suit to be delayed until a series of wrongful acts blossoms into an injury on which suit can be brought." Limestone Development Corp. v. Village of Lemont, Illinois, 520 F.3d 797, 801 (7th Cir. 2008). The doctrine is "not about a continuing, but about a cumulative, violation." Id. In other words, the doctrine applies in situations in which several acts contribute to one injury, but does not apply where the plaintiff alleges several discrete acts and injuries.

Hildebrandt v. Illinois Department of Natural Resources, 347 F.3d 1014, 1028 (7th Cir. 2003).

Plaintiff is proceeding on claims that defendants committed discrete retaliatory acts that harmed him in specific ways in 2000 and 2001. Thus, the statute of limitations began to run when those injuries occurred and the continuing violation doctrine does not apply.

To satisfy the elements of equitable estoppel, plaintiff would have to show that defendants took active steps to prevent him from filing a claim against them. Smith v. Potter, 445 F.3d 1000, 1010 (7th Cir. 2006) (Equitable estoppel “only comes into play if the defendant takes active steps to prevent the plaintiff from suing in time.”) (citations omitted); Mull v. ARCO Durethene Plastics, Inc., 784 F.2d 284, 292 (7th Cir. 1986) (“Equitable estoppel is available only if [plaintiff’s] otherwise untimely filing was the result either of a deliberate design by [defendant] or of actions that [defendant] should unmistakably have understood would cause [plaintiff] to delay filing his charge.”) (citation and quotation omitted). Equitable tolling would apply if “despite all due diligence, [plaintiff could not] obtain the information necessary to realize that he may possibly have a claim.” Jones v. Res-Care, Inc., 613 F.3d 665, 670 (7th Cir. 2010) (quoting Beamon v. Marshall & Ilsley Trust Co., 411 F.3d 854, 860 (7th Cir. 2005)); see also Soignier v. American Bd. of Plastic Surgery, 92 F.3d 547, 553-54 (7th Cir. 1996).

It is difficult to distinguish between plaintiff’s equitable tolling, equitable estoppel and his fraudulent inducement arguments, but the thrust of his arguments seem to be that defendants

and others concealed documents relevant to plaintiff's retaliation claims against defendants until long after the statute of limitations had expired. Plaintiff attaches several exhibits to his brief, contending that they prove that defendants concealed documents revealing their motives for retaliating against plaintiff, that several people were involved in concealing documents from plaintiff and that he acted diligently in seeking records related to his claims. Aside from the problem that plaintiff failed to authenticate any of the exhibits and several of the exhibits appear to be irrelevant to the claims he is pursuing in this case, the exhibits cannot save plaintiff's claims. Neither the exhibits nor plaintiff's arguments suggest that plaintiff did not have the information necessary to file his claim until after the statute of limitations had expired or that defendants somehow discouraged or prevented plaintiff from filing suit within the statute of limitations. Instead, it is clear from plaintiff's own allegations that he knew about the injury caused by Shaw in December 2000 and the injury caused by Backstrom in May 2001.

With respect to plaintiff's claim against defendant Shaw, the "injury" element of plaintiff's retaliation claim is the allegedly baseless disorderly conduct charge filed by Shaw in December 2000. Op. & Order, Sept. 9, 2010, dkt. #48, at 8-9, case number 09-cv-662-bbc ("[Plaintiff] alleges that the above-named defendants filed a baseless charge for disorderly conduct against him. This allegation, which must be accepted as true, would likely deter a person of ordinary firmness from engaging in future First Amendment activity.") Plaintiff's allegations reveal that in December 2000 he knew that defendant Shaw filed the charge. Plf.'s Sec. Am. Cpt., dkt. #2, at 10, 12-13. Although plaintiff may not have known the identity of particular

students or university staff that allegedly complained about him in support of the charge, his second amended complaint alleges that he knew the charge was baseless and that Shaw disapproved of plaintiff's political speech and complaints about age discrimination. Thus, he had sufficient information to pursue a claim against defendant Shaw before the statute of limitations had run.

The injury aspect of plaintiff's retaliation claim against defendant Backstrom is Backstrom's visit to plaintiff's home in May 2001. Id. at 10 ("Having the chief of police making an unannounced visit to one's home and going through a refrigerator would likely cause a person of ordinary firmness to think twice before exercising his First Amendment rights in the future.") Plaintiff knew about the injury in May 2001 because he was present when Backstrom entered the house. Plf.'s Sec. Am. Cpt., dkt. #2, at 12-13.

In sum, plaintiff has not established that the doctrine of continuing violation, equitable estoppel, equitable tolling or fraudulent concealment should apply to toll the statute of limitations under the circumstances of this case. Accordingly, defendants' motions to dismiss plaintiff's claims for failure to comply with the statute of limitations will be granted.

ORDER

IT IS ORDERED that

1. Defendant Robert Shaw's motion to dismiss plaintiff Robert Harry Kunferman's complaint, dkt. #9, in case number 10-cv-574-bbc, for failure to comply with the statute of

limitations is GRANTED.

2. Defendant David Backstrom's motion to dismiss plaintiff's complaint, dkt. #8, in case number 10-cv-575-bbc, for failure to comply with the statute of limitations is GRANTED.

3. The clerk of court is directed to entered judgment for defendants and close these cases.

Entered this 6th day of January, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge