No. 21-5941

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GLENDRICK GARDNER,

Plaintiff-Appellant,

v.

LEXINGTON FAYETTE URBAN COUNTY GOVERNMENT, et al.

Defendants-Appellees.

ORDER

Before: SILER, CLAY, and DONALD, Circuit Judges.

Glendrick Gardner, a pro se Kentucky resident, filed a petition for rehearing of the panel's March 9, 2022, order that affirmed the district court's judgment dismissing his 42 U.S.C. § 1983 complaint against his former employer, the Lexington-Fayette Urban County Government, as well as several of its employees.

Upon careful consideration, this panel concludes that it did not misapprehend or overlook any point of law or fact when it issued its order. Fed. R. App. P. 40(a).

We therefore **DENY** the petition for rehearing.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

NOT RECOMMENDED FOR PUBLICATION

No. 21-5941

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Mar 09, 2022
DEBORAH S. HUNT, Clerk

GLENDRICK GARDNER, Plaintiff-Appellant, v. LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT, et al., Defendants-Appellees.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

ORDER

Before: SILER, CLAY, and DONALD, Circuit Judges.

Ex #1 Glendrick Gardner, a pro se Kentucky resident, appeals the judgment of the district court dismissing his 42 U.S.C. § 1983 action against his former employer, the Lexington-Fayette Urban County Government ("LFUCG"), as well as several of its employees. Before the court is also Gardner's motion to "grant immunities." This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a). Ex #2

Gardner filed his action in June 2021 against LFUCG and four of its employees in their official capacities: Waste Management Program Managers Russell Scott and Willie Kay Lewis; Yard Waste Supervisor William Jones; and Jeremy Hobbs, who worked in human resources. Ex #3 Documents attached to Gardner's complaint indicated that he began working for LFUCG in July 2015 as a sanitation worker and sustained an injury while working in December 2015. Gardner was taken to the hospital and released with restrictions of "no riding on the back of a truck and no operating of heavy equipment," but LFUCG returned Gardner to regular duty. Gardner worked without incident until May 2016, when he was placed on new medication that made him

dizzy. Gardner's his dizziness caused another accident at work. Gardner saw a neurologist, who recommended the restrictions that were previously imposed, but LFUCG again returned him to regular work. Gardner requested worker's compensation benefits at some point but was denied. In October 2016, when Gardner alerted Scott and Lewis about his restrictions, Gardner was immediately removed from work and advised to complete forms for leave under the Family and Medical Leave Act ("FMLA"), which he never completed. Gardner was discharged effective December 1, 2016, when all his regular medical leave expired. He had not applied for FMLA leave, and he could not return to work without restrictions.

Gardner claimed that the defendants violated his Fourth Amendment right to be "secure in hands of employer," his Fifth and Fourteenth Amendment right to due process, his Sixth Amendment right to a jury trial, and his Eighth Amendment right to be free from cruel and unusual punishment. In addition to his complaint, Gardner filed a motion to proceed in forma pauperis, which the district court granted.

Screening Gardner's complaint pursuant to 28 U.S.C. § 1915(e)(2)(B), the district court determined that the action was barred by res judicata because Gardner had filed a federal suit in November 2020 raising the same claims, and the court had dismissed that action; that the complaint failed to state a claim for relief under any of the constitutional provisions that Gardner cited; that the defendants—sued in their official capacities—were immune from suit; and that Gardner's claims were barred by the applicable statute of limitations. The district court therefore dismissed the action with prejudice.

We review the dismissal of claims at screening under § 1915(e)(2)(B) using the standard set out in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). *Hayward v. Cleveland Clinic Found.*, 759 F.3d 601, 608 (6th Cir. 2014); *Hill v. Lappin*, 630 F.3d 468, 470-71 (6th Cir. 2010). To avoid dismissal, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). We construe a pro se litigant's pleadings liberally. *See Williams v. Curtin*, 631 F.3d 380, 383 (6th Cir. 2011).

We review de novo a district court's application of the doctrine of res judicata. *Black v. Ryder/P.I.E. Nationwide, Inc.*, 15 F.3d 573, 582 (6th Cir. 1994). Under that doctrine, a final

judgment on the merits is an absolute bar to a subsequent action between the same parties or their privies based upon the same claims. *See Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981); *Bittinger v. Tecumseh Prods. Co.*, 123 F.3d 877, 880 (6th Cir. 1997); *Kane v. Magna Mixer Co.*, 71 F.3d 555, 560 (6th Cir. 1995).

As the district court explained, Gardner brought a prior case that named Scott, Hobbs, Jones, and Lewis as defendants. *See Gardner v. Scott, et al.*, No. 5:20-cv-00456 (E.D. Ky. Jan. 4, 2021). In that suit, Gardner claimed that the defendants violated his constitutional rights in connection with the injury he suffered on the job. The district court dismissed the action without prejudice. We dismissed his appeal as untimely. *Gardner v. Scott, et al.*, No. 21-5360 (6th Cir. June 16, 2021). Gardner's current suit involves the same parties and is based on the same claims as his prior action. But a dismissal without prejudice is generally not a judgment on the merits for res judicata purposes. *Wheeler v. Dayton Police Dep't*, 807 F.3d 764, 767 (6th Cir. 2015) (citing *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 396 (1990)). Accordingly, Gardner's current action is not barred by res judicata.

Nevertheless, the district court did not err by dismissing Gardner's action. First, Gardner failed to state a claim for relief under the Fourth, Sixth, Eighth, and Fifth and Fourteenth Amendments. To state a claim under 42 U.S.C. § 1983, a plaintiff must allege that (1) a right secured by the Constitution or a federal statute has been violated, and (2) the violation was committed by a person acting under color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988); *Flanory v. Bonn*, 604 F.3d 249, 253 (6th Cir. 2010). Although local governments may be considered "persons" for the purposes of such a claim, a local government violates § 1983 only when an official policy or custom deprives an individual of her constitutional rights. *Monell v. Dep't of Soc. Servs. of N.Y.*, 436 U.S. 658, 690-91 (1978). And we treat a suit against individual defendants in their official capacities as "analogous to a suit against the local entity." *Pineda v. Hamilton County*, 977 F.3d 483, 494 (6th Cir. 2020).

A plaintiff can establish local-government liability by demonstrating: (1) the existence of an illegal official policy or legislative enactment; (2) that an official with final decision-making authority ratified illegal actions; (3) the existence of a policy of inadequate training or supervision; or (4) the existence of a custom of tolerance or acquiescence of federal rights violations. *See*

Thomas v. City of Chattanooga, 398 F.3d 426, 429 (6th Cir. 2005). Gardner's complaint did not allege facts showing that a policy or custom of LFUCG violated any of his constitutional rights. Nor did Gardner allege facts showing that the LFUCG employees violated his constitutional rights, and his "'legal conclusions couched as factual allegations' . . . need not be accepted as true." *Rondigo, L.L.C. v. Township of Richmond*, 641 F.3d 673, 684 (6th Cir. 2011) (quoting *Twombly*, 550 U.S. at 555). In any event, employment in Kentucky is "at-will"; as a result, Gardner had no constitutionally protected property interest in his employment. *Bailey v. Floyd Cnty. Bd. of Educ. ex rel. Towler*, 106 F.3d 135, 141-42 (6th Cir. 1997). Thus, the district court properly dismissed the complaint on this basis.

Finally, even if Gardner had stated a claim, his § 1983 action would have been barred by the applicable statute of limitations. A district court may sua sponte raise the statute of limitations when that defense is apparent from the face of the complaint. *Alston v. Tenn. Dep't of Corr.*, 28 F. App'x 475, 476 (6th Cir. 2002). Kentucky's statute of limitations for § 1983 actions is one year. *See Bonner v. Perry*, 564 F.3d 424, 430-31 (6th Cir. 2009). "[T]he statute of limitations begins to run when the plaintiff knows or has reason to know of the injury which is the basis of his action." *McCune v. City of Grand Rapids*, 842 F.2d 903, 905 (6th Cir. 1988). Here, the statute of limitations began to run, at the very latest, in 2016 when Gardner was terminated from his employment with LFUCG. His complaint, filed in 2021, was therefore time-barred.

For the foregoing reasons, we **AFFIRM** the judgment of the district court. We **DENY** Gardner's motion to "grant immunities."

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION
(at Lexington)

GLENDRICK GARDNER, Plaintiff, V. LEXINGTON FAYETTE URBAN CO. GOVERNMENT, et al., Defendants.	)	Civil Action No. 5: 21-175-DCR **JUDGMENT**

*** *** *** ***

Pursuant to the Memorandum Opinion and Order entered this date, and in accordance with Rule 58 of the Federal Rules of Civil Procedure, it is hereby

ORDERED and **ADJUDGED** as follows:

1. The claims asserted by Plaintiff Glendrick Gardner against all defendants named in this civil action are **DISMISSED** with prejudice and this matter is **DISMISSED** and **STRICKEN** from the docket.

2. Judgment is **ENTERED** in favor of the defendants with respect to all claims asserted in this proceeding.

3. This is a **FINAL** and **APPEALABLE** Judgment and there is no just cause for delay.

Dated: October 4, 2021.

Danny C. Reeves, Chief Judge
United States District Court
Eastern District of Kentucky

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION
(at Lexington)

GLENDRICK GARDNER, Plaintiff, V. LEXINGTON FAYETTE URBAN CO. GOVERNMENT, et al., Defendants.	)	Civil Action No. 5: 21-175-DCR **MEMORANDUM OPINION AND ORDER**

*** *** *** ***

Plaintiff Glendrick Gardner is a resident of Lexington, Kentucky. Proceeding without counsel, Gardner has filed a Complaint pursuant to 42 U.S.C. § 1983 asserting claims against his former employer, the Lexington-Fayette Urban County Government ("LFUCG"), as well as several employees of LFUCG in their official capacities. [Record No. 1] The Court has granted Gardner's motion for leave to proceed in forma pauperis by prior Order. [Record No. 3]

The Court conducts an initial review of the Complaint pursuant to 28 U.S.C. § 1915(e)(2). The statute requires the Court to dismiss any claim that is frivolous, malicious, fails to state a claim upon which relief may be granted, or seeks monetary relief from a defendant who is immune from such relief. McGore v. Wrigglesworth, 114 F.3d 601, 607-08 (6th Cir. 1997), abrogated on other grounds, Jones v. Bock, 549 U.S. 199 (2007). At this stage of the case, the Court accepts the plaintiff's factual allegations as true. Further, the legal claims are liberally construed in his favor. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555-56

(2007). The Court also evaluates the Complaint under a more lenient standard because Gardner is not represented by an attorney. Erickson v. Pardus, 551 U.S. 89, 94 (2007).

The allegations in Gardner's Complaint are unclear and hard to follow. However, they become a little clearer when reviewed in conjunction with a copy of an attached unemployment compensation decision. See [Record No. 1 at 2-4; Record No. 1-3 at 2-4] On December 21, 2015, Gardner was working as a sanitation worker on a garbage truck for LFUCG when he suffered a work-related injury. He was taken to a local hospital for medical treatment. Gardner was released with a doctor's directive that he not operate heavy equipment or ride on the back of a truck. The doctor's order was placed in Gardner's personnel file at LFUCG. Notwithstanding the order, Gardner's supervisors returned him to his regular job duties.

On May 6, 2016, Gardner suffered an incident while at work due to medication that made him dizzy. He was evaluated by a neurologist, who again directed that Gardner not operate heavy equipment or ride on the back of a truck. But again, his supervisors returned Gardner to regular work activities.

Gardner's supervisors requested that he complete workers compensation forms in October 2016. Gardner did not comply, apparently because he did not understand the forms and the doctor to whom he had been referred refused to complete them for him. In December 2016, Gardner was terminated for not reporting to work after he had exhausted all of his leave time and had not completed the required forms. [Record No. 1-3 at 3-4]

Gardner asserts in his Complaint that the defendants "filed two work-related injuries in the name of another government agency." He does not clearly explain the import of this assertion, and none of the documents attached to the Complaint provide clarification. Gardner

further states that he was "written up" by his supervisors, notwithstanding the fact that the defendants were aware that he was subject to work restrictions. Gardner includes a letter dated October 31, 2016 from a law firm declining to represent him regarding his claims. [Record No. 1-1 at 1] He contends that the defendants violated his rights under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. [Record No. 1 at 4]

The Court has thoroughly reviewed the Complaint, but concludes that it must be dismissed for several reasons. First, this action is barred by res judicata. Gardner acknowledges that he filed suit regarding the same claims on a prior occasion. [Record No. 1 at 7] In November 2020, Gardner filed a Complaint in this Court arising out of the same facts, asseting the same claims, and naming the same defendants. Gardner v. Scott, No. 5: 20-CV-456-JMH (E.D. Ky. 2020). The Court concluded that it lacked subject matter jurisdiction over Gardner's claims because a Kentucky statute (KRS § 342.690(1)) establishes that the Kentucky's workers' compensation statute provides the exclusive remedy for any and all claims falling within its scope. [Record Nos. 5, 7 therein] Gardner filed a notice of appeal following this determination. However, on June 16, 2021, the United States Court of Appeals for the Sixth Circuit dismissed the appeal as untimely. [Record No. 15 therein] Gardner filed the current Complaint two weeks later.

Res judicata encompasses issue preclusion which prohibits a party from relitigating an issue that has already been decided. Migra v. Warren City School Dist. Bd. of Educ., 465 U.S. 75, 77 n.1 (1984). This Court previously concluded that it lacks subject matter jurisdiction to entertain Gardner's claims, and he may not seek a different result by simply filing suit a second

suit. This is true even if the prior determination was incorrect,[1] as the proper avenue to challenge that determination was through appeal. Gardner's appeal was dismissed as untimely and, therefore, the matter is conclusively decided against him.

Second, Gardner's allegations fail to state a claim under any of the constitutional amendments he cites, including the Fourth (which prohibits unreasonable searches and seizures), the Sixth (which provides certain rights in criminal trials), the Eighth (which prohibits excessive fines or punishments for civil or criminal offenses), or the Fifth and Fourteenth (which require due process of law before property is taken).

In addition, Gardner sues the defendants only in their official capacities. A claim asserted against a government employee in his or her "official capacity" is, in fact, one directed solely against the government agency that employs the individual. Lambert v. Hartman, 517 F.3d 433, 439-40 (6th Cir. 2008). But a county government (here, LFUCG) is only liable under Section 1983 when its employees cause injury by carrying out the county's formal policies or practices. Monell v. Dept. of Social Services, 436 U.S. 658, 694 (1978). As a result, a plaintiff must specify in his Complaint the county policy or custom which he alleges caused

[1] It may have been so, as the decision did not address the application of the Supremacy Clause. Cf. Jackson v. Sedgwick Claims Mgmt. Servs., Inc., 731 F.3d 556, 568 (6th Cir. 2013) ("Although Michigan has the right to declare that its workers' compensation system is the exclusive remedy under state law for workplace injuries, see Mich. Comp. Laws § 418.131, it cannot exclude the federal government from providing its own remedies so long as it acts within the scope of its enumerated powers."). See also Roberts v. Roadway Exp., Inc., 149 F. 3d 1098, 1105 (10th Cir. 1998) ("If Roadway means to argue that Colorado's Workers' Compensation Act provides the exclusive remedy for all work-related injuries including emotional distress caused by violations of the civil rights laws, that argument is readily disposed of by the Supremacy Clause."); Rosa v. Cantrell, 705 F. 2d 1208, 1221 (10th Cir. 1982) (collecting cases); Lopez v. S.B. Thomas, Inc., 831 F.2d 1184, 1190 (2d Cir. 1987) (same).

his injury. Paige v. Coyner, 614 F.3d 273, 284 (6th Cir. 2010). Gardner does not allege that his supervisors acted pursuant to any such policy. His allegations therefore fail to state a claim under Section 1983. Bright v. Gallia County, Ohio, 753 F. 3d 639, 660 (6th Cir. 2014); Brown v. Cuyahoga County, Ohio, 517 F. App'x 431, 436 (6th Cir. 2013).

And even if Gardner's allegations were sufficient, his claims under Section 1983 are barred by the applicable statute of limitations. The Court may dismiss a claim plainly barred by the applicable limitations period upon initial screening. Jones v. Bock, 549 U.S. 199, 215 (2007) ("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."); Norman v. Granson, No. 18-4232, 2020 WL 3240900, at *2 (6th Cir. Mar. 25, 2020) ("Where a statute of limitations defect is obvious from the face of the complaint, sua sponte dismissal is appropriate."). In Kentucky, civil rights claims asserted under 42 U.S.C. § 1983 are governed by a one-year statute of limitations. KRS § 413.140(1)(a); Hornback v. Lexington-Fayette Urban Co. Gov't., 543 F. App'x 499, 501 (6th Cir. 2013). The events giving rise to Gardner's claim occurred from May through December 2016. The running of the limitations period had plainly commenced when Gardner sought out an attorney to represent him regarding his claims, and certainly no later than when he was terminated in December 2016. Johnson v. Memphis Light Gas & Water Div., 777 F. 3d 838, 843 (6th Cir. 2015) (noting that to determine when a claim accrues courts look "to what event should have alerted the typical lay person to protect his or her rights.") (cleaned up). Gardner was required to file suit by December 2017, but did not do so here until June 2021. Therefore, his claims are time-barred.

Accordingly, it is hereby

ORDERED as follows:

1. Plaintiff Glendrick Gardner's Complaint [Record No. 1] is **DISMISSED** with prejudice.

2. This matter is **DISMISSED** and **STRICKEN** from the Court's docket.

Dated: October 4, 2021.

Danny C. Reeves, Chief Judge
United States District Court
Eastern District of Kentucky