Appendix A

United States Court of Appeals for the Fifth Circuit

No. 22-30561
Summary Calendar

United States Court of Appeals
Fifth Circuit
FILED
July 26, 2023
Lyle W. Cayce
Clerk

WILLIAM R. ABBOTT,

Plaintiff—Appellant,

versus

LORETTA OTIS-SANDERS; SHELLEY POWER; SHELIA LYONS; N. PATTERSON; UNITED STATES BUREAU OF PRISONS; SEKOU MA'AT,

Defendants—Appellees.

Appeal from the United States District Court
for the Western District of Louisiana
USDC No. 2:22-CV-1271

Before JONES, HAYNES, and OLDHAM, *Circuit Judges*.

PER CURIAM:*

William R. Abbott, federal prisoner # 57819-083, filed an action under *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), asserting that the defendants had violated the Prison Rape Elimination Act, 34 U.S.C. § 30301, *et seq.* (PREA), and his Eighth

* This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

Amendment right against cruel and unusual punishment by ignoring and failing to act upon his complaints that he had been sexually harassed by his cellmate. The district court dismissed the complaint as time-barred. No abuse of discretion has been shown. *See Harris v. Hegmann*, 198 F.3d 153, 157 (5th Cir. 1999); *Jacobsen v. Osborne*, 133 F.3d 315, 319 (5th Cir. 1998).

We need not reach the issue of whether *Bivens* applies to the particular facts of this case. As the Supreme Court has explained, *Bivens* is a "more limited federal analog to [42 U.S.C.] § 1983." *Hernandez v. Mesa*, 140 S. Ct. 735, 747 (2020)(internal quotations omitted). Accordingly, we refer to §1983 for aid in determining issues such as applying the statute of limitations. *See, e.g., Alford v. United States*, 693 F.2d 498, 499 (5th Cir. 1982); *see also Kelly v. Serna*, 87 F.3d 1235, 1238 (11th Cir. 1996).

Abbott argues that the district court should have applied the four-year limitation period of 28 U.S.C. § 1658(a). Under the analogous § 1983, Abbott had one year in which to file his complaint. *See Jacobsen*, 133 F.3d at 319. Insofar as Abbott sought to raise a stand-alone claim under the Prison Rape Elimination Act (PREA), he cites no case in support of his position that the PREA established a private action for such a claim.

Abbott contends that the limitation period was tolled while he exhausted his administrative remedies. *See Harris*, 198 F.3d at 157-58. Even if we assume that the limitation period was tolled during the 61 days when Abbott's untimely prison grievance proceeding was pending, the limitation period still elapsed long before Abbott filed his complaint. *See id.* at 157-58.

The district court's judgment is AFFIRMED. Abbott's motion for appointment of counsel is DENIED.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

WILLIAM R ABBOTT #57819-083	**CASE NO. 2:22-CV-01271 SEC P**
VERSUS	**JUDGE JAMES D. CAIN, JR.**
LORETTA OTIS-SANDERS ET AL	**MAGISTRATE JUDGE KAY**

ORDER

Before the court is a Motion to Alter or Amend Judgment [doc. 19] filed by plaintiff William Abbott and seeking reconsideration of the court's ruling dismissing his *Bivens* action based on the borrowed one-year statute of limitations for personal injury claims under Louisiana law. Abbott maintains that the court ought to have applied the four-year federal statute of limitations at 28 U.S.C. § 1658 for causes of action arising under federal laws passed after 1990, because his suit arises under the Prison Rape Elimination Act ("PREA"), 34 U.S.C. § 30301 *et seq.*

This position is without merit. The courts have repeatedly affirmed that nothing in the PREA suggests that Congress intended to create a private right of action for inmates to sue prison officials. *Krieg v. Steele*, 599 F. App'x 231, 232–33 (5th Cir. 2015); *see also De'lonta v. Clarke*, 2012 WL 4458648 (W.D. Va. Sep. 11, 2012) (collecting cases), *aff'd*, 548 F. App'x 938 (4th Cir. 2013). Accordingly, the court correctly applied the borrowed

statute of limitations under *Bivens* to Abbott's claims and his motion is **DENIED.**

THUS DONE AND SIGNED in Chambers this 18th day of August, 2022.

JAMES D. CAIN, JR.
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

WILLIAM R. ABBOTT **REG. # 57819-083**	:	**DOCKET NO. 22-cv-01271** **SECTION P**
VERSUS	:	**JUDGE JAMES D. CAIN, JR.**
LORETTA OTIS-SANDERS, ET AL	:	**MAGISTRATE JUDGE KAY**

REPORT AND RECOMMENDATION

Before the court is a civil rights complaint [doc. 1] filed pursuant to *Bivens v. Six Unknown Named Agents,* 91 S.Ct. 1999 (1971), by plaintiff William R. Abbott, who is proceeding pro se and *in forma pauperis* in this matter. Abbott is an inmate in the custody of the Federal Bureau of Prisons and is currently incarcerated at the Federal Correctional Institute at Oakdale, Louisiana. He names Loretta Otis-Sanders, Shelley Power, Shelia Lyons, N. Patterson, the US Bureau of Prisons and Sekou Ma'at as defendants.

This matter has been referred to the undersigned for review, report, and recommendation in accordance with the provisions of 28 U.S.C. § 636 and the standing orders of this court. For the reasons stated below, **IT IS RECOMMENDED** that the suit be **DISMISSED WITH PREJUDICE**.

I.
BACKGROUND

Plaintiff filed the instant civil rights suit on May 11, 2022, alleging that between March 2020 and November 2020, he complained to the defendants about the "illicit sexual behavior" of his cell mate, Elliot Duke, and sought a housing reassignment, to no avail. Doc. 1. Among other complaints, he alleges that Duke, a "transgender person" (*id.* at p. 16), stripped to underwear

exclusively to lounge without bedcovering in assigned bunk (*id.* at p. 17), stripped off shirt and bra to walk around for extended periods of time (*id.*) to examine chest for extended periods of time (*id.*), and to shave his chest and underarms (*id.* at 18). He filed grievances related to his complaints and the lack of response by the defendants but concedes that they were "untimely." *Id.* at p. 21.

II.
LAW & ANALYSIS

A. Frivolity Review

Abbott has been granted leave to proceed *in forma pauperis* in this matter. Accordingly, his complaint is subject to screening under 28 U.S.C. § 1915(e)(2), which provides for *sua sponte* dismissal of the complaint or any portion thereof if the court determines that it is frivolous or malicious, fails to state a claim upon which relief may be granted, or seeks monetary relief against a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2)(B)(i)–(iii).

A complaint is frivolous if it lacks an arguable basis in law or fact. *Gonzalez v. Wyatt*, 157 F.3d 1016, 1019 (5th Cir. 1998). A complaint fails to state a claim upon which relief may be granted if it is clear the plaintiff cannot prove any set of facts in support of his claim that would entitle him to relief. *Doe v. Dallas Indep. Sch. Dist.*, 153 F.3d 211, 215 (5th Cir. 1998). When determining whether a complaint is frivolous or fails to state a claim upon which relief may be granted, the court must accept plaintiff's allegations as true. *Horton v. Cockrell*, 70 F.3d 397, 400 (5th Cir. 1995) (frivolity); *Bradley v. Puckett*, 157 F.3d 1022, 1025 (5th Cir. 1998) (failure to state a claim).

B. Section 1983

Federal law provides a cause of action against any person who, under the color of state law, acts to deprive another of any right, privilege, or immunity secured by the Constitution and laws of the United States. 42 U.S.C. § 1983. In order to hold the defendant liable, a plaintiff must allege

facts to show (1) that a constitutional right has been violated and (2) that the conduct complained of was committed by a person acting under color of federal law; that is, that the defendant was a government actor. *See West v. Atkins*, 108 S. Ct. 2250, 2254–55 (1988). A *Bivens* action is the counterpart for those acting under color of federal law of a suit brought under § 1983. *E.g., Abate v. Southern Pacific Transp. Co.*, 993 F.2d 107, 110 n. 14 (5th Cir. 1993).

C. Limitations

Plaintiff complains of actions that occurred between February 2020 and November 2020.

There is no federal statute of limitations for actions brought pursuant to §1983. Federal courts presiding over §1983 claims must borrow the statute of limitations provisions of the state in which the federal court sits. *See Owens v. Okure*, 109 S. Ct. 573, 574 (1989); *see also Elzy v. Roberson*, 868 F.2d 793 (5th Cir. 1989). Plaintiff's §1983 claim is therefore governed by Louisiana's statute of limitations provisions, which is one year. *See Elzy*, 868 F.2d at 794. This prescriptive period "commences to run from the day injury or damage is sustained." La.Civ.Code 3492. "Although state law controls the statute of limitations for §1983 claims, federal law determines when a cause of action accrues." *Rodriguez*, 963 F.2d at 803 (citing *Brummett v. Camble*, 946 F.2d 1178, 1184 (5th Cir. 1991)). Under the federal standard, a cause of action accrues when "the plaintiff becomes aware that he has suffered an injury or has sufficient information to know that he has been injured." *Id.* (citing *Helton v. Clements*, 832 F.2d 332, 335 (5th Cir.1987)). Plaintiff had one year from the date of the alleged harassment to file the instant suit, or by November 2021, at the latest, to file suit. He did not raise the claim until well over one year later, after the limitations period had passed.

The statute of limitations applicable to a *Bivens* action "is tolled while a prisoner fulfills 42 U.S.C. § 1997e's administrative exhaustion requirement." See *Starks v. Hollier*, 295 F. App'x 664,

665 (5th Cir. 2008) (citing *Wright v. Hollingsworth*, 260 F.3d 357, 359 (5th Cir. 2001)); *Clifford v. Gibbs*, 298 F.3d 328, 333 (5th Cir. 2002) (holding that, because the PLRA requires a prisoner to exhaust his administrative remedies, the prisoner is entitled to equitable tolling of the applicable limitations period while he exhausts the remedies). However, Abbott admits that his administrative remedies were not timely filed. Therefore, as he failed to properly exhaust his administrative remedies, his complaint is time-barred.

III.
CONCLUSION

For reasons stated above, **IT IS RECOMMENDED** that the instant suit be **DISMISSED WITH PREJUDICE**.

Pursuant to 28 U.S.C. § 636(b)(1)(C) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties have fourteen (14) days from receipt of this Report and Recommendation to file written objections with the Clerk of Court. Failure to file written objections to the proposed factual findings and/or the proposed legal conclusions reflected in this Report and Recommendation within fourteen (14) days of receipt shall bar an aggrieved party from attacking either the factual findings or the legal conclusions accepted by the District Court, except upon grounds of plain error. *See Douglass v. United Services Automobile Ass'n*, 79 F.3d 1415, 1429–30 (5th Cir. 1996).

THUS DONE AND SIGNED in Chambers this 17th day of June, 2022.

KATHLEEN KAY
UNITED STATES MAGISTRATE JUDGE