

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS

U.S. DISTRICT COURT  
DISTRICT OF KANSAS

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UNITED STATES OF AMERICA,  
AS THE ASSIGNEE OF JOHN SALISBURY,

Plaintiff,

vs.

Case No. 86-4357

RADONNA KUEKELHAN,

Defendant.

MEMORANDUM AND ORDER

This is an action brought by the United States as assignee of John Salisbury pursuant to the provisions of the Federal Employees Compensation Act (FECA), 5 U.S.C. §8101 et seq. This matter is presently before the court upon defendant's motion for judgment on the pleadings. The court has heard oral argument on this motion and is now prepared to rule.

In the complaint filed on November 13, 1986, the United States alleges that on November 3, 1984, John Salisbury, a United States postal carrier, was attacked and injured by two pit bulldogs owned by the defendant. The United States further alleges that it has provided injury compensation benefits to Salisbury as a result of the attack and will be required to provide further benefits in the future. Salisbury has assigned to the United States all causes of action he might have against the defendant arising from the attack. The United States seeks damages for the injuries suffered by Salisbury based on theories of strict liability and negligence.

In the instant motion, defendant contends that this action is barred by the applicable statute of limitations. Recognizing that



Exhibit A

the FECA contains no explicit statute of limitations, both sides have taken different positions as to the applicable statute of limitations. Defendant argues that this action is barred by the application of the Kansas two-year statute of limitations contained in K.S.A. 60-513 for actions based on negligence. The United States contends that this case is not barred based on the application of either the three-year or six-year limitations periods contained in 28 U.S.C. §2415.

The question presented by defendant's motion is whether state statutes of limitations should apply to actions brought by the United States as an assignee under the FECA. The question is apparently one of first impression. Neither side has pointed the court to a case directly in point, and the court has been unable to discover any past precedent.

In Marshall v. Intermountain Electric Co., Inc., 614 F.2d 260 (10th Cir. 1980), the Tenth Circuit considered whether state limitation periods should apply to an action brought by the Secretary of Labor on behalf of a discharged employee under the Occupational Safety and Health Act of 1970 (OSH Act), 29 U.S.C. §660(c). The Tenth Circuit concluded, after noting that the OSH Act did not contain a statute of limitations, that state statutes of limitation did not apply because the action was serving important federal as well as private interests. Id., at 262. The court's review of the law in this area is directly applicable to the issue before the court:

In [a case where a federal statute contains no explicit limitations period], Congress is usually deemed to have intended that the most analogous state statute of limitations should apply. See Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 462, 95 S.Ct. 1716, 44 L.Ed.2d 295 (1975); UAW

v. Hoosier Cardinal Corp., 383 U.S. 696, 16 S.Ct. 1107, 16 L.Ed.2d 192 (1966); O'Sullivan v. Felix, 233 U.S. 318, 322, 34 S.Ct. 596, 58 L.Ed. 980 (1914). However, that doctrine has been applied only to private suits brought under federal statutes.<sup>3</sup> A state statute of limitations does not apply, even in the absence of a federal limitations period, if it is inconsistent with the underlying policies of the federal statute. See Occidental Life Insurance Co. v. EEOC, 432 U.S. 355, 367, 97 S.Ct. 2447, 53 L.Ed.2d 402 (1977); Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 465, 95 S.Ct. 1716, 44 L.Ed.2d 295 (1975); UAW v. Hoosier Cardinal Corp., 383 U.S. 696, 701, 86 S.Ct. 1107, 16 L.Ed.2d 192 (1966); Board of County Commissioners v. United States, 308 U.S. 343, 351-52, 60 S.Ct. 285, 84 L.Ed. 313 (1939). Nor will a state limitations period be applied to an action brought by the federal government to vindicate public rights or public interests, absent a clear showing of contrary congressional intent. See United States v. Summerlin, 310 U.S. 414, 416, 60 S.Ct. 1019, 84 L.Ed. 1283 (1940); Board of County Commissioners v. United States, 308 U.S. 343, 350-51, 60 S.Ct. 285, 84 L.Ed. 313 (1939); United States v. Minnesota, 270 U.S. 181, 196, 46 S.Ct. 298, 70 L.Ed. 539 (1926); Chesapeake & Delaware Canal Co. v. United States, 250 U.S. 123, 125-27, 39 S.Ct. 407, 63 L.Ed. 889 (1919); Cassidy Commission Co. v. United States, 387 F.2d 875, 880 (10th Cir. 1967).

3. An action which, although brought in the name of the United States, involves no public rights or interests may be subject to a state statute of limitations. In such a case the federal government functions as a mere conduit for the enforcement of private rights which could have been enforced by the private parties themselves. United States v. Beebe, 127 U.S. 338, 343-48, 8 S.Ct. 1083, 32 L.Ed. 121 (1888). See also La Republique Francaise v. Saratoga Vichy Spring Co., 191 U.S. 427, 437-38, 24 S.Ct. 145, 48 L.Ed. 247 (1903); Moran v. Horsky, 178 U.S. 205, 213-14, 20 S.Ct. 856, 44 L.Ed. 1038 (1900); United States v. American Bell Tel Co., 167 U.S. 224, 264-66, 17 S.Ct. 809, 42 L.Ed. 144 (1897); United States v. Des Moines Nav. & Ry., 142 U.S. 510, 538-39, 12 S.Ct. 308, 35 L.Ed. 1099 (1892).

The application of the aforementioned rules to the instant case requires an examination of the FECA and the nature of the claims asserted by the United States in this action. The United States brings this action under the provisions of 5 U.S.C. §8131.

Section 8131(a) grants the government the power to force an employee who has obtained compensation from the government under the FECA arising from the liability of a third party to prosecute an action against the third party or to assign his rights to the government. Section 8131(c) governs the rights of the United States upon assignment by the employee. This section provides as follows:

The Secretary may prosecute or compromise a cause of action assigned to the United States. When the Secretary realizes on the cause of action, he shall deduct therefrom and place to the credit of the Employees' Compensation Fund the amount of compensation already paid to the beneficiary and the expense of realization or collection. Any surplus shall be paid to the beneficiary and credited on future payments of compensation payable for the same injury. However, the beneficiary is entitled to not less than one-fifth of the net amount of a settlement or recovery remaining after the expenses thereof have been deducted.

Defendant has taken the position, relying on Boeing Airplane Co. v. Perry, 322 F.2d 589 (10th Cir. 1963), that the United States is asserting a claim based on subrogation. Thus, defendant contends that the United States has stepped into the shoes of John Salisbury in this case and is acting only as a mere conduit for the enforcement of private rights. These circumstances, defendant argues, renders this action barred by the state statute of limitations which would be applied to any action brought by Salisbury.

The United States, relying on United States v. Summerlin, 310 U.S. 414 (1940), contends that state statutes of limitations do not apply to actions brought by the United States absent its own consent. The United States asserts that it has not consented to application of state statutes of limitations here. Further, the United States argues that state statutes of limitations do not apply

even if the United States is asserting a claim under a subrogation right. The United States contends that here they are acting in their governmental capacity and, thus, state statutes of limitations simply do not apply.

The aforementioned provisions of the FECA confer upon the United States the right to recover, upon assignment, the reasonable value of benefits furnished to its injured employee. With the assignment, the United States obtains a substantive right to bring an action for damages. See Arnold v. Aermotor, Inc., 244 F.Supp. 589, 591-92 (E.D.Pa. 1965). This action is not brought solely to vindicate purely private rights as suggested by the defendant. This action falls outside the holdings of the cases cited by the defendant in which the government brought actions solely for the benefit of private parties. See Occidental Life Insurance Co. v. EEOC, 432 U.S. 355, 383 (1977) (Rehnquist, J., dissenting in part). The United States is seeking to recover damages for the public treasury. This action, of course, may also be beneficial to the injured employee since he may recover some monies under the provisions of 5 U.S.C. §8131(c). Thus, this is a hybrid action--one in which the United States seeks to enforce public as well as private rights. As such, state statutes of limitations do not apply to bar this action even though no federal period of limitations is provided by FECA. See Marshall v. Intermountain Electric Co., Inc., supra, at 263. The doctrine of laches, however, may be applied. Id. The defendant has not asserted laches as a defense. Accordingly, we shall not consider it.

Defendant has misread Boeing Airplane and misunderstands its application to this case. Defendant principally relies upon the

following statement from Boeing Airplane for support of her position in this case: "By the assignment, the United States succeeded to the interest of the widow in the state created right of action, i.e., it stands in the widow's shoes. And, it cannot acquire a greater right or different status than the widow-beneficiary." 322 F.2d at 591-92. The United States under the FECA stands in the shoes of the subrogee only to the extent that its right to recover depends upon the determination under state law as to when the circumstances create tort liability in some person. The United States does not stand in the shoes of the subrogee for the purposes of the application of state limitations periods. See United States v. Summerlin, *supra*, at 417.

The appropriate statute of limitations here is contained in 28 U.S.C. §2415. Under either the three-year or six-year limitations period contained in 28 U.S.C. §2415, this action is timely. Accordingly, the court shall deny defendant's motion to dismiss based on the application of the state statute of limitations.

Even assuming that state limitations periods applied to this action, we would still deny defendant's motion. Where the United States acquires a derivative claim, whether by assignment, subrogation, or other means, and that claim is not barred by the state statute of limitations, the state statute ceases to run against the government at the time of such acquisition. Guaranty Trust Co. v. United States, 304 U.S. 126, 141-42 (1938); Industrial Indemnity Insurance Co. v. United States, 757 F.2d 982, 985 (9th Cir. 1985); United States v. Sellers, 487 F.2d 1268, 1269 (5th Cir. 1973). Here, the United States acquired Salisbury's claim within the state statute of limitations and filed this action within three

years after the assignment. This action was thus timely filed. See United States v. McReynolds, 628 F.Supp. 76, 78 n. 3 (N.D.Miss. 1986).

IT IS THEREFORE ORDERED that defendant's motion to dismiss be hereby denied.

IT IS SO ORDERED.

Dated this 15<sup>th</sup> day of December, 1987 at Topeka, Kansas.

  
United States District Judge