

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

JERRY JEROME ANDERSON,

Plaintiff,

vs.

CIVIL ACTION
No. 05-3401-SAC

WILLIE SCOTT, et al.,

Defendants.

ORDER

Plaintiff proceeds pro se on a complaint filed while plaintiff was incarcerated in a federal correctional facility in South Carolina. Plaintiff has paid the initial partial filing fee assessed by the court under 28 U.S.C. § 1915(b)(1), and is granted leave to proceed in forma pauperis. Plaintiff remains obligated to pay the remainder of the \$250.00 district court filing fee in this civil action,¹ through payments from his inmate trust fund account as authorized by 28 U.S.C. § 1915(b)(2).

Plaintiff seeks relief for the alleged violation of his constitutional rights by the former warden at United States Penitentiary in Leavenworth, Kansas (USPLVN) and a USPLVN physician. Plaintiff alleges the defendants failed to investigate and take immediate corrective action in 1992 when the USPLVN physician examined plaintiff's x-rays and questioned whether the hard object

¹Plaintiff filed his complaint prior to April 9, 2006, the date the district court filing fee increased from \$250.00 to \$350.00.

in plaintiff's knee could be residual drain material from plaintiff's 1972 knee surgery. The court reviewed these allegations and directed plaintiff to show cause why the complaint should not be dismissed because plaintiff's claims were time barred.²

In response plaintiff points again to his "discovery," during his 2004 inspection of his medical records, that defendants failed to act in 1992 to remove the hard object observed in plaintiff's knee that plaintiff claims was the source of his knee pain. He further contends the limitations period did not begin running until the end of the continuing injury to his knee. The court disagrees.

State law determines the applicable statute of limitations and accompanying tolling provisions for § 1983 actions. Fratus v. DeLand, 49 F.3d 673, 675 (10th Cir. 1995). Under Kansas law, the two year limitations period for filing person injury actions applies to plaintiff's claim. See Baker v. Board of Regents of State of Kan., 991 F.2d 628, 630-31 (10th Cir. 1993). This limitations period begins to run when the cause of action accrues according to federal law, namely "when a plaintiff knows or has reason to know of the injury which is the basis of the action." Id. at 632. See also K.S.A. 60-513(c) ("A cause of action arising out of the rendering of or the failure to render professional services by a health care provider shall be deemed to have accrued at the time of the

²The court also found plaintiff's allegations of negligence and medical malpractice were insufficient to state a cognizable constitutional claim upon which relief can be granted, and further found plaintiff could not rely on the doctrine of respondeat superior to establish liability against either defendant.

occurrence of the act giving rise to the cause of action, unless the fact of injury is not reasonably ascertainable until some time after the initial act, then the period of limitation shall not commence until the fact of injury becomes reasonably ascertainable to the injured party, but in no event shall such an action be commenced more than four years beyond the time of the act giving rise to the cause of action.").

In the present case, plaintiff documents a June 2001 grievance he submitted at a Tennessee federal facility to complain of intensifying knee pain, and an x-ray technician's assessment four months earlier of a broken wire in plaintiff's knee. This awareness in 2001 of a medical problem arising from his 1972 knee surgery clearly defeats plaintiff's attempt to establish an accrual date that made his filing of the instant complaint in October 2005 timely on any claim against the two USPLVN defendants for failing to take action in 1992. Additionally, courts in this district have recognized that the continuing violation doctrine does not apply to complaints seeking relief based on the alleged violation of a litigant's constitutional rights.³ See e.g. Sellers v. Butler, 2007 WL 2042513, **12-13 (D.Kan. July 12, 2007)(discussing continuing violation doctrine and citing cases).

The court thus finds plaintiff's claims are time barred, and

³Nor has plaintiff identified an injurious act falling within the applicable statutory limitations period that might support application of the continuing violation doctrine in this case. See e.g., Tiberi v. Cigna Corp., 89 F.3d 1423, 1430-31 (10th Cir. 1996)(under New Mexico law, claim of fraud and mistake accrues, and limitations period runs, from date of the last injury).

concludes the complaint should be dismissed as stating no claim for relief. See 28 U.S.C. § 1915(e)(2)(B)(ii) ("Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that...the action...fails to state a claim on which relief may be granted").

IT IS THEREFORE ORDERED that plaintiff is granted leave to proceed in forma pauperis, with payment of the remainder of the \$250.00 district court filing fee to proceed as authorized by 28 U.S.C. § 1915(b)(2).

IT IS FURTHER ORDERED that the complaint is dismissed as stating no claim for relief.

IT IS SO ORDERED.

DATED: This 22nd day of August 2007 at Topeka, Kansas.

s/ Sam A. Crow
SAM A. CROW
U.S. Senior District Judge