

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

OTIS LEAVELL WILLIAMS,

Plaintiff,

v.

CASE NO.12-3201-SAC

STATE OF KANSAS, et al.,

Defendants.

MEMORANDUM AND ORDER

This matter is a civil rights action filed pursuant to 42 U.S.C. § 1983 by a prisoner in state custody. Plaintiff proceeds pro se and seeks leave to proceed in forma pauperis.

The motion to proceed in forma pauperis

This motion is governed by 28 U.S.C. § 1915(b). Pursuant to §1915(b)(1), the court must assess as an initial partial filing fee twenty percent of the greater of the average monthly deposit or average monthly balance in the prisoner's account for the six months immediately preceding the date of filing of a civil action.

Having examined the financial records submitted by the plaintiff, the court finds the average monthly deposit to his account is \$44.49, and the average monthly balance is \$8.59. The court therefore assesses an initial partial filing fee of \$8.50, twenty percent of the average monthly deposit, rounded to the lower half dollar.¹

¹ Plaintiff will be required to pay the balance of the \$350.00 filing fee in installments calculated pursuant to 28 U.S.C. § 1915(b)(2).

Screening

A federal court must conduct a preliminary screening of any case in which a prisoner seeks relief from a governmental entity or an officer or employee of a governmental entity. See 28 U.S.C. § 1915A(a). In conducting this screening, the court must identify any cognizable claim and must dismiss any claim that is frivolous, malicious, or fails to state a claim upon which relief may be granted. See 28 U.S.C. §1915A(b).

To avoid a summary dismissal, the complaint must present "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 US. 544, 570 (2007). The court must accept the well-pleaded allegations as true, and must construe them in the light most favorable to the plaintiff. *Id.* at 555. However, "when the allegations in a complaint, however true, could not raise a [plausible] claim of entitlement to relief," the matter must be dismissed. *Id.* at 558.

The statute of limitations for a complaint filed pursuant to §1983 "is drawn from the personal-injury statute of the state in which the federal district court sits." *Mondragon v. Thompson*, 519 F.3d 1078, 1082 (10th Cir. 2008). In Kansas, the applicable limitation period is the two-year statute of limitations for "injury to the rights of another." K.S.A. §60-503(a)(4); see *Garcia v. Univ. of Kan.*, 702 F.2d 849, 851 (10th Cir. 1983).

While state law is used to determine the statute of limitations, federal law determines when the federal claim accrues. See *Baker v. Bd. of Regents*, 991 F.2d 628, 632 (10th Cir. 1993). "A § 1983 action accrues when facts that would support a cause of action are or should be apparent." *Fogle v. Pierson*, 435 F.3d 1242, 1258 (10th

Cir.) (internal citation omitted), *cert. denied*, 549 U.S. 1059 (2006).

Here, plaintiff claims his father died in October 2007 as a result of inadequate medical attention by employees of the Kansas Department of Corrections. Even assuming that plaintiff could establish standing to present this claim, the plaintiff's failure to present the claim until September 2012 places the matter far outside the two-year limitation period. Accordingly, the court is considering the dismissal of this matter on the ground that it is not timely.

IT IS, THEREFORE, BY THE COURT ORDERED that on or before December 28, 2012, plaintiff shall submit an initial partial filing fee of \$8.50 to the clerk of the court. Any objection to this order must be filed on or before the date payment is due.

IT IS FURTHER ORDERED that on or before December 28, 2012, plaintiff shall show cause why this matter should not be dismissed due to his failure to present the claim within the two-year limitation period.

A copy of this order shall be transmitted to the plaintiff.

IT IS SO ORDERED.

DATED: This 26th day of November, 2012, at Topeka, Kansas.

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