STATE OF VERMONT

SUPERIOR COURT
Washington Unit

CIVIL DIVISION
No. 21-CV-4141

ANDREW BOYENS,
Plaintiff,

v.

THOMAS ANDERSON, et al.,
Defendants.

RULING ON DEFENDANTS' MOTION TO DISMISS

Plaintiff Andrew Boyens alleges that he was wrongfully terminated in violation of 21 V.S.A. § 495b from his position as a Public Safety Answering Point Emergency Communication Dispatcher for the Vermont Department of Public Safety after he was denied a reasonable accommodation for the limitation caused by his disability, and the State then determined that he could not perform an essential function of his job. Defendants include the State and several state employees in their personal capacity who were involved in some way in Mr. Boyens' eventual termination. Defendants have filed a motion to dismiss arguing: (1) the claim is barred vis-à-vis all defendants by the 3-year limitations period at 12 V.S.A. § 512 (personal injury); (2) all three individual capacity defendants have absolute or qualified immunity; and (3) there are no sufficiently pleaded facts to support a punitive damages remedy.

Limitations period, 12 V.S.A. § 512

Prior to the hearing on Defendants' motion, Mr. Boyens did not dispute that the 3-year limitations period for personal injuries, 12 V.S.A. § 512, applies to his claim. Defendants argue that the claim accrued no later than June 29, 2017 (and likely earlier). Mr. Boyens formally requested a reasonable accommodation. On June 29, Mr. Boyens was formally notified that the request was denied and of the consequences: the State would follow its internal policy to (a) attempt to place him in another position and, (b) if unable, his employment would be terminated. In the ensuing September, it terminated his employment because it had not been able to place him elsewhere.

Mr. Boyens first filed a federal action, in which he raised his state claims, on July 1, 2020, close but more than 3 years later. Defendants thus argue that the limitations period expired *before* the federal suit was filed.

Mr. Boyens argues (a) that this case was timely filed under 28 U.S.C. § 1367(e); (b) the continuing tort doctrine applies to extend the accrual date; and (c) the limitations period should be treated as tolled while he was exhausting his administrative remedies before the EEOC and the Vermont Human Rights Commission.

In the federal case, the district court eventually declined supplemental jurisdiction over the state claims and dismissed the case. Mr. Boyens then promptly filed this lawsuit. Under 28 U.S.C. § 1367(d), "The period of limitations for any claim" for which a party has asked the federal court to assert supplemental jurisdiction "shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period." Mr. Boyens argues that his claim here is timely because he filed within 30 days of the denial of supplemental jurisdiction. Section 1367(d), however, *tolls* a limitations period. Only a limitation period that is running can be tolled. Section 1367(d) does not revive a state law claim that expired before it had ever gotten filed.

As to the date of accrual, Mr. Boyens argues that, under the continuing tort doctrine, his claim accrued when the last discriminatory act occurred, which he claims was his actual termination in September. Ordinarily, "[a] cause of action accrues 'upon the discovery of facts constituting the basis of the cause of action or the existence of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery.'" *Jadallah v. Town of Fairfax*, 2018 VT 34, ¶ 17, 207 Vt. 413; accord *Earle v. State,* 170 Vt. 183, 190 (1999) ("A cause of action is generally deemed to accrue at the *earliest* point at which a plaintiff discovers an injury and its possible cause."). Generally, in a disability discrimination case, a wrongful termination claim accrues "when the employer notifies the employee of the decision to terminate his or her employment, *or the date that the employee is determined to be unfit for duty, even though the actual loss of the job is a date in the future*." 2 Americans with Disab.: Pract. & Compliance Manual § 7:277 (footnotes omitted, emphasis added). With reference to the accommodation itself, the claim accrues when the "accommodation was provided, or denied, or the date the employee knew or reasonably should have been aware that the employer was unlikely to afford a reasonable accommodation."[1] *Id*. (footnotes omitted). The operative date in this case is no later than June 29, 2017, when Mr. Boyens was formally notified of the denial of an accommodation and its consequences.

Mr. Boyens has asserted no arguable basis for applying the continuing tort doctrine in the circumstances of this case. Usually that rule applies where the tortious conduct is not a singular event but some course of conduct that an inflexible accrual date determination perversely would enable further wrongful conduct without liability. One court describes the problem as follows: "A contrary rule, barring any recovery for a continuing tort when the victim did not sue within the limitations period after discovery, would have the perverse result of conferring on the tortfeasor the right to continue the tortious conduct and harm the victim anew." *Jung v. Mundy, Holt & Mance, P.C.*, 372 F.3d 429, 434 (D.C. Cir. 2004). Nothing like that is the case here.

Finally, Mr. Boyens implies that the limitations period should be treated as tolled while he exhausted his administrative remedies before both the EEOC and the Vermont Human Rights Commission. Mr. Boyens cites no authority, and the court is aware of none, requiring that administrative proceedings of the EEOC would toll his state law claim. Nor does he cite any authority requiring any administrative action before the Human Rights

[1] This "should have been aware" standard is what prompts Defendants to argue that the actual accrual date was well before June 29. Because a June 29 accrual date renders the limitations period expired prior to the filing of the federal complaint, it is unnecessary to address whether the actual accrual date occurred earlier.

Commission whatsoever, much less that any undertaken would toll the claim he asserts here. See 9 V.S.A. § 4554.

Under 12 V.S.A. § 512, Mr. Boyens' claim expired shortly before he filed his federal lawsuit, and it remained expired when his filed this lawsuit.

At the hearing on Defendants' motion, Mr. Boyens pointed for the first time to the new six-year limitation period for certain discrimination claims, including those pursuant to 21 V.S.A. § 495b. 12 V.S.A. § 525. He did not argue clearly, however, that § 525 applies to this case rather than § 512. After the hearing, he filed a letter of supplemental authority citing 12 V.S.A. § 525 and asserting without explanation that it applies retroactively, but he again did not clearly argue that § 525 applies to this case rather than § 512. Instead, he said, "Plaintiff persists in his view that the refiling of his complaint after dismissal by the federal court was timely given the state of the law as briefed in his opposition to defendants' motion to dismiss, and is not abandoning that issue. Nonetheless, plaintiff believes that the Court should be notified of this very recent statutory amendment." Mr. Boyens' Letter of Supplemental Authority at 2 (filed September 8, 2022).

New § 525 took effect on passage, and it was signed into law on May 31, 2022, long after Mr. Boyens' claim expired in 2020. 2021, Adj. Sess., No. 147, § 40. Mr. Boyens does not explain what he means by retroactivity in this context, and the court declines to analyze whether, in an appropriate case, § 525 would operate to extend a running but not yet expired limitations period.

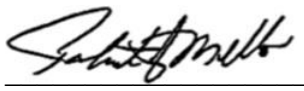
The pertinent question here is whether it operates to *revive* an already expired claim. Nothing in Act 147 indicates any intent to revive expired claims. Surely the legislature knows how to do that when it so desires. See, e.g., 12 V.S.A. § 522(d), (e). Section 525 does not revive Mr. Boyens' expired claim.

Because Mr. Boyens' claim is time-barred as to all Defendants, it is unnecessary to consider the other asserted grounds for dismissal.

Order

For the foregoing reasons, Defendants' motion to dismiss is granted. Counsel for Defendants shall submit a form of judgment. V.R.C.P. 58(d).

SO ORDERED this 23rd day of September, 2022.



Robert A. Mello
Superior Judge