UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-7156
Summary Calendar

JOSEPH P. LINCK, JR.,

Plaintiff-Appellant,

versus

BROWNSVILLE NAVIGATION DISTRICT, etc., ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Texas
(CA B 91 158)

(August 27, 1993)

Before GARWOOD, JONES and EMILIO M. GARZA, Circuit Judges.[*]

GARWOOD, Circuit Judge:

In this section 1983 action, plaintiff-appellant, Joseph Linck (Linck), appeals the order of the district court dismissing "without prejudice" his federal constitutional claims as barred by the statute of limitations under Federal Rule of Civil Procedure

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[*] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

12(b)(6) and dismissing "without prejudice" his pendent state claims for lack of subject matter jurisdiction. We affirm.

Facts and Proceedings Below

On August 1, 1988, Linck was hired by the Brownsville Navigation District to serve as the general manager of the Port of Brownsville, Texas, for two years. Linck's contract was subject to annual review by the Board of Commissioners for the Port of Brownsville (the Board). On August 9, 1989, at the end of Linck's first year of service, the Board held a hearing in which it reviewed Linck's first year of service. Linck, though present and with notice that this matter was going to be considered, was not afforded an opportunity to actively participate in this hearing. At the hearing, the Board decided to fire Linck. At the end of the hearing, the Board informed Linck of its decision, stating that its termination decision was based on his unsatisfactory performance. The Board did not give Linck the opportunity to rebut, defend against, or appeal the Board's decision, but there is no allegation in Linck's complaint that he requested such an opportunity at or after the Board meeting.

On September 9, 1991, two years and one month after the Board's meeting, Linck filed this lawsuit. Linck claimed that his federal constitutional rights to due process, equal protection, and free speech were violated and he sought damages under 42 U.S.C. § 1983 (1988). Linck also raised five pendent claims, four that his rights under the Texas Constitution were violated and one state law bad faith claim.

Linck's complaint alleged that the actions of the Board, on

August 9, 1989, in firing him violated his federal constitutional rights. The complaint alleges in this connection that at the August 9 meeting the Board "decided to term his performance 'unsatisfactory'; so 'unsatisfactory' that they could not afford to allow him to remain active as Port Director/General Manager beyond their adjournment that night. Neither could they afford to provide him opportunity in public forum to rebut, defend against or appeal the judgment reached in private closed session and acted upon without supporting data." The complaint then alleged that "`Linck' has been denied an appeal hearing, public or otherwise, in which he might hear in detail, and defend himself on, the points of Board dissatisfaction and/or the propriety of suspension without the process outlined in the Employees Policy Handbook which was incorporated into his contract." This latter paragraph does not state when Linck's right to appeal was denied or by what method the Board communicated its denial of the right to appeal to Linck.

Linck alleges that he was fired for political reasons and for his failure to kowtow to the individual desires of particular board members as evidenced by the fact that during his one-year tenure, Linck increased the Port's tonnage and posted a profit of $136,000, up from a loss of $2,300,000 the year before he began work.

Instead of filing a responsive pleading, defendants-appellees, the Brownsville Navigation District and several individual Board members, filed an amended motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), urging that, among other things, the suit was barred by the two-year statute of limitations. In a response filed December 10, 1991, Linck replied to this motion by stating

that he would amend his complaint within sixty days of the filing of this response. Linck never filed such an amended complaint.

Sixty-two days later, on February 10, 1992, the district court signed a two-and-a-half-page "Order," determining that Linck's claims under section 1983 were barred by the two-year statute of limitations because Linck only alleged that his constitutional rights were violated on August 9, 1989, and suit was not brought until September of 1991. In this same order, the district court ordered Linck's federal constitutional claims dismissed without prejudice; and his state constitutional claims and bad faith claim were similarly ordered dismissed without prejudice.[1] The district court's order did not state that any subsequent attempt by Linck to seek leave to amend his complaint would be denied. No separate document judgment was issued in connection with this order.[2] Linck filed a notice of appeal within thirty days of the entry of the district court's order of dismissal.

Discussion

Linck raises two issues on appeal. First, he contends that the statute of limitations had not run on the federal constitutional claims alleged in his complaint.

To determine the statute of limitations period in a section

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[1] The state claims were dismissed for lack of supplemental federal jurisdiction since the jurisdiction-conferring claims were dismissed.

[2] The fact that no judgment was entered on a separate document violates Federal Rule of Civil Procedure 58. We elect, however, to treat this nonjurisdictional requirement as waived, the parties having failed to raise any question in that respect on appeal. *Theriot v. ASW Well Service, Inc.*, 951 F.2d 84, 85-88 (5th Cir. 1992).

1983 action, the federal courts borrow the forum state's personal injury statute of limitations or prescriptive period. *Ali v. Higgs*, 892 F.2d 438, 439 (5th Cir. 1990). "In Texas, the applicable period is two years. Tex. Civ. Prac. & Rem. Code Ann. § 16.003(a) (Vernon 1986)." *Id.*

Federal law, however, determines the time from which the limitation period commences to run. *See generally Cervantes v. IMCO, Halliburton Services*, 724 F.2d 511, 513 (5th Cir. 1984). Under federal law, the period begins to run at the time that the plaintiff learns of the acts constituting the violation of his constitutional rights. *Chardon v. Fernandez*, 102 S.Ct. 28 (1981) (limitations period began when employees learned that they would be fired at a specified date in the future and not at the later date when their employment terminated). Subsequent conduct that "`gives present effect to the past illegal act and therefore perpetuates the consequences of [a constitutional violation]'" does not delay the time when the limitations period begins to run. *Delaware State College v. Ricks*, 101 S.Ct. 498, 504 (1980)(citation omitted).

Here, the district court held that the limitations period began to run on August 9, 1989, because that was the day that the Board decided to terminate Linck and the day that the Board communicated its decision to him.

Linck contends that his complaint alleged that his constitutional rights continued to be violated after this date because his employment contract extended through July 1, 1990, and because he was denied the right to appealsQto whom he does not saysQthe Board's August 9, 1989, decision.

Linck's complaint, however, does not support the spin he puts on it in his appellate brief. Linck's complaint alleged that his federal constitutional rights were violated by the Board's decision to terminate him on August 9, 1990. Linck did not allege that his federal constitutional rights were violated after that date. The mere fact that his employment contract extended beyond that date, and that the Board may have breached its contractual obligations to Linck after that date by "waffling" on the payment of salary, does not mean that Linck's constitutional rights were violated after that date. *See Ricks*, 101 S.Ct. at 505 ("Where, as here, the only challenged employment practice occurs before the termination date, the limitations periods necessarily commences to run before that date."). While a government employee may have a property interest in the economic aspects of an employment contract, an allegation merely that the government "waffled on the payment of salary" is insufficient to allege the existence or deprivation of a property interest. Linck's allegations are too conclusory to survive dismissal inasmuch as Linck's complaint did not refer to any specific actions of the Board after August 9, 1989, as depriving him of salary or of violating his constitutional rights, nor does he allege a date on which such "waffling" occurred, nor does "waffling" constitute a deprivation of property without due process. There is no allegation that Linck has not been paid his salary, and no claim is asserted for salary or for breach of contract to pay salary.

Moreover, the mere failure of a state to comply with its own procedural rules does not per se constitute a violation of due

process. *Smith v. City of Picayune*, 795 F.2d 482, 488 (5th Cir. 1986); *Jett v. Dallas Independent School District*, 798 F.2d 748, 754 & n.3 (5th Cir. 1986), *aff'd in part and remanded in part on other grounds,* 109 S. Ct. 2702 (1989).

Similarly, although urged in his brief, Linck did not allege that the Board ever acted to deny his right to appeal after August 9, 1989. His complaint implied that this decision to deprive him of the right to a hearing or an appeal (to whom is not stated) was made on August 9, 1989. Paragraph M of Linck's complaint stated that "`Linck' has been denied an appeal hearing, public or otherwise, in which he might hear in detail, and defend himself on, the points of Board dissatisfaction and/or the propriety of suspension without the process outlined in the Employees Policy Handbook which was incorporated into his contract."[3] The language of this paragraph does not suggest that Linck applied for and was denied his contractual right to appeal after August 9, 1989, but rather suggests that the Board, by taking the action that it did on August 9 in its closed door session, denied him the right to appeal on August 9. Our interpretation of this paragraph is supported by the two prior paragraphs in Linck's complaint. There was no allegation that Linck attempted to appeal the Board's August 9 decision or that such appeal was acted upon in an unconstitutional manner. Moreover, the fact that the Board might have later denied

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[3] As observed above, the failure to afford procedures specified in an employee handbook does not amount to a denial of due process unless such procedures would be constitutionally required even though not specified in the handbook. *See Smith*, 795 F.2d at 488; *Jett*, 798 F.2d at 754 & n.3.

Linck the right to appeal would not have stopped the limitations period from commencing on August 9 for the unconstitutional act occurring on August 9. The statute of limitations is not tolled merely because a party appeals an act believed to be unconstitutional. *Ricks*, 101 S.Ct. at 505. While unconstitutional acts occurring during the appeals process are actionable and the statute of limitations for those actions commences running when they occur, Linck did not allege that the defendants engaged in any unconstitutional acts during the appeals process or even that such an appeals process occurred. *Griffen v. Big Spring Independent School Dist.*, 706 F.2d 645, 649 (5th Cir.), *cert. denied*, 104 S.Ct. 525 (1983).

Like the plaintiff in *Ricks*, 101 S.Ct. 504, and unlike the plaintiff in *Rubin v. O'Koren*, 644 F.2d 1023 (5th Cir. 1981), Linck failed to either claim, or to allege any facts showing, unconstitutional acts by the defendants occurring after August 9, 1989. Since Linck's lawsuit was not filed until September 1991, his action was barred by the two-year statute of limitations.

Second, Linck contends that the district court should have allowed him to amend his complaint. We agree that ordinarily leave to amend should be afforded when a Rule 12(b)(6) motion is sustained. But in the present context, Linck's complaint on appeal in this respect is wholly without merit. The district court never prevented Linck from amending his complaint. In Linck's response to the defendant's motion to dismiss, Linck stated that he was going to amend his complaint within sixty days after the response

was filed.[4] Linck never amended his complaint. The district court waited sixty-two days after Linck offered to amended his complaint before acting on the defendants' motion.[5] Moreover, after Linck's claims were dismissed by the district court, Linck never sought to amend his complaint. *See Whitaker v. Houston*, 963 F.2d 831, 836 (5th Cir. 1992). Instead, he simply filed this appeal. Linck has ignored the two opportunities to amend his complaint given to him in the court below and therefore may not complain on appeal about not having been allowed to amend.

Conclusion

Accordingly, the judgment of the district court is

AFFIRMED.

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[4] Note that at this point in time, Linck did not need the court's permission to amend his complaint since no "responsive" pleading had been filed by the defendants.

[5] It is Linck's fault and only Linck's fault that he did not file an amended complaint with the district court during the sixty-day period in which he said he would act. Indeed, Linck never requested more time from the district court in which to amend.