UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

CASE NO. 08-60687-CIV-JORDAN

DAVID MERRIKEN
Plaintiff

vs.

AMERICAN MARITIME OFFICERS VACATION PLAN, et al.
Defendants

ORDER GRANTING MOTION TO DISMISS AND CLOSING CASE

The defendants have moved to dismiss the amended complaint filed by David Merriken on statute of limitations grounds. For the reasons which follow, those motions [D.E. 28, 30] are granted, and the complaint is dismissed.

I. THE ALLEGATIONS IN THE FIRST AMENDED COMPLAINT

Mr. Merriken filed his initial complaint on May 8, 2008, alleging retaliatory discharge in violation of 29 U.S.C. § 1140, a provision of ERISA, and seeking various types of relief under 29 U.S.C. § 1132, another provision of ERISA [D.E. 1]. One of the defendants moved to dismiss the complaint, arguing that Mr. Merriken's ERISA claim was time-barred by the applicable four-year statute of limitations [D.E. 5]. Rather than responding to the motion to dismiss, Mr. Merriken chose to amend his complaint, as he had a right to do.

A. THE RETALIATORY DISCHARGE CLAIM

In his amended complaint [D.E. 8], Mr. Merriken contends that the defendants – a number of pension and benefit plans (which collectively constitute multi-employer ERISA plans) and the American Maritime Officers Union – improperly terminated him as the executive director of the plans on June 28, 2000. Specifically, Mr. Merriken alleges that in 1999 he brought financial improprieties in the administration of the plans to the attention of the attorneys, accountants, officials, and trustees of the plans and the Union. When those individuals did not correct the problems, he brought the improprieties to the attention of the U.S. Attorney's Office and cooperated with the federal government's investigation into criminal activities relating to the plans and the

Union (e.g., bribery, embezzlement, and graft). He even worked undercover for the government and wore a concealed wire to record conversations with others in 1999 and 2000. Eventually, seven individuals associated with the plans were indicted and found guilty of federal criminal charges in the Southern District of Florida in 2006 or 2007.

The sole count of the amended complaint is for retaliatory discharge in violation of 29 U.S.C. § 1140. Mr. Merriken alleges that the defendants terminated him because he "provided information and testimony or was about to testify in an inquiry or proceeding" on the plans' violations of federal law. Mr. Merriken seeks equitable relief under 29 U.S.C. § 1132, including reinstatement and back pay, reinstatement of all fringe benefits and seniority rights, restitution in the form of back pay and interest, front pay in lieu of reinstatement, attorney's fees and costs, and other equitable relief which may be proper.

B. THE STATE COURT WHISTLEBLOWER/TORTIOUS INTERFERENCE ACTION

On June 12, 2002, Mr. Merriken filed a two-count complaint in Florida state court against the defendants. The first claim, a whistleblower claim under Fla. Stat. § 448.102, was against all the defendants. The second claim, for tortious interference, was against the Union.

On February 11, 2003, the state court, on the defendants' motions, stayed the action pending resolution of the criminal charges noted above. The state court lifted the stay on January 23, 2007, and set the case for trial in February of 2008.

In January of 2008, the defendants moved to dismiss Mr. Merriken's claims, arguing that they were completely preempted by ERISA, and that the trial court therefore did not have subject-matter jurisdiction. The trial court denied the motion, and the defendants filed petitions for writ of certiorari/prohibition with the Fourth District Court of Appeal. On April 23, 2008, the Fourth District held that Mr. Merriken's state-law whistleblower claim against the defendants was preempted by ERISA, but that the tortious interference claim against the Union was not preempted. *See American Maritime Officers Union v. Merriken,* 981 So.2d 544, 547-49 (Fla. 4th DCA 2008). The Fourth District denied rehearing on June 11, 2008, and the Florida Supreme Court denied a petition for review on September 18, 2008. *See American Maritime Officers Union v. Merriken,* 2008 WL 4292185 (Fla. 2008).

C. The Amended Complaint's Allegations Concerning the Statute of Limitations

The amended complaint in this case contains a number of pages addressing the applicable statute of limitations. Mr. Merriken alleges that his claim under § 1140 of ERISA is governed by a four-year statute of limitations. He also alleges, however, that the limitations period was tolled for 47 months and 12 days (from February 11, 2003, to January 23, 2007), the period of time that his state-court whistleblower/tortious interference action against the defendants had been stayed by the state court. According to Mr. Merriken, with this tolling, the limitations period was extended to June 10, 2008, and his lawsuit is timely because it was filed on May 8, 2008. In addition, Mr. Merriken alleges that the defendants have waived any statute of limitations defense because of their conduct in the state court action. Finally, he alleges that under federal law this action was really filed against the defendants on June 14, 2002, when the defendants were served with process in the state court whistleblower/tortious interference action.

II. Applicable Standard

On a motion to dismiss under Rule 12(b)(6), all of the complaint's well-pleaded factual allegations are accepted as true, and all reasonable inferences are drawn in favor of the plaintiff. The factual allegations must be sufficient to "raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly,* 127 S.Ct. 1955, 1965 (2007). "It is sufficient if the complaint succeeds in identifying facts that are suggestive enough to render [the required elements of proof] plausible." *Watts v. Florida International University,* 495 F.3d 1289, 1295 (11th Cir. 2007).

"A statute of limitations bar is 'an affirmative defense, and . . . plaintiffs are not required to negate an affirmative defense in [their] complaint.' . . . [A] Rule 12(b)(6) dismissal on statute of limitations grounds is appropriate only if it is 'apparent from the face of the complaint' that the claim is time-barred." *La Grasta v. First Union Securities, Inc.,* 358 F.3d 840, 845 (11th Cir. 2004) (internal citations omitted).

III. Discussion

The defendants argue that Mr. Merriken's retaliatory discharge claim under § 1140 of ERISA is governed by a four-year statute of limitations and that no tolling is appropriate because the state court whistleblower/tortious interference action was filed in a court without subject-matter jurisdiction. Mr. Merriken responds, contrary to what he alleged in the amended complaint, that his

§ 1140 claim is not governed by any statute of limitations period. Instead, Mr. Merriken asserts, his retaliatory discharge claim is governed by the doctrine of laches because he is seeking equitable relief under § 1132 of ERISA. After reviewing the parties' memoranda and the governing authorities, I conclude that Mr. Merriken's complaint is time-barred.

Although § 1140 does not contain a statute of limitations, the Eleventh Circuit has held that, for actions brought under § 1140 in Florida, the applicable statute of limitations is four years. *See Byrd v. MacPapers, Inc.*, 961 F.2d 157, 159-60 (11th Cir. 1992) (suit by widow against her husband's employer for benefits wrongly denied because husband's termination was allegedly a retaliatory discharge under ERISA). *See also Musick v. Goodyear Tire & Rubber Co.*, 81 F.3d 136, 138-39 (11th Cir. 1996) (explaining decision in *Byrd*). The Eleventh Circuit has also held that tolling of a limitations period is not appropriate for the period of time that a state-court action was pending if the state court lacked subject-matter jurisdiction (i.e., if the federal courts had exclusive jurisdiction). *See, e.g., Booth v. Carnival Corp.*, 522 F.3d 1148, 1152 (11th Cir. 2008) (noting "this circuit's well-settled principle that filing in a court without competent jurisdiction does not toll the statute of limitation"); *Hairston v. Travelers Cas. & Sur. Co.*, 232 F.3d 1348, 1352-53 (11th Cir. 2000) (because federal courts have exclusive jurisdiction over claims under National Flood Insurance Program policies, action filed in state court – which lacked subject-matter jurisdiction – did not toll statute of limitations).

Mr. Merriken does not dispute the ruling in *Byrd*. Nor does he argue that tolling of the limitations period is appropriate here.[1] Instead, he shifts gears from the allegations in the amended complaint and now argues that his § 1140 claim seeking relief under § 1132 is purely equitable, *see Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 209-10 (2002) (relief available is the type of equitable relief typically available in equity), so that only the doctrine of laches applies. I disagree.

It is true, as Mr. Merriken says, that federal equitable claims under statutes without a limitations period are normally governed by the doctrine of laches. *See, e.g., Holmber v. Armbrecht*, 327 U.S. 392, 395-96 (1946) (purely equitable claim founded on federal law which is silent as to

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[1]Mr. Merriken has therefore forfeited any arguments relating to tolling or waiver, and I do not discuss those allegations in the amended complaint any further.

limitations period is governed by laches: "Traditionally and for good reasons, statutes of limitation are not controlling measures of equitable relief."); *Erkins v. Bryan,* 785 F.2d 1538, 1543 (11th Cir. 1986) (suit for accounting of union funds under 29 U.S.C. § 501(a)-(b), which did not contain a statute of limitations, was governed by doctrine of laches).

For purposes of this order, I will assume that all of the relief sought by Mr. Merriken is equitable relief within the meaning of *Knudson,* 534 U.S. at 209-10. The problem for Mr. Merriken is that the Eleventh Circuit expressly held in *Byrd* that there is a four-year statute of limitations for retaliatory discharge claims under § 1140 of ERISA filed in Florida. The Eleventh Circuit, moreover, has continued to adhere to *Byrd,* borrowing the forum state's most analogous statute of limitations for claims under § 1140. *See, e.g., Musick,* 81 F.3d at 138-39. *Byrd* is binding, and controls here. Because Mr. Merriken has forfeited any arguments relating to tolling or waiver, his retaliatory discharge claim is untimely.[2]

IV. Conclusion

Mr. Merriken was terminated on June 28, 2000. His claim for retaliatory discharge under § 1140 of ERISA, which was filed on May 8, 2008, is time-barred under the applicable four-year statute of limitations.

The amended complaint is dismissed with prejudice on statute of limitations grounds. This case is closed, and all pending motions are denied as moot.

DONE and ORDERED in chambers in Miami, Florida, this 29th day of September, 2008.

Adalberto Jordan
United States District Judge

Copy to: All counsel of record

[2]For whatever it is worth, I have not found any federal cases applying the doctrine of laches to a retaliatory discharge action under § 1140 of ERISA or holding that laches displaces the analogous statute of limitations borrowed from the forum state.