IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

NATHANIEL BORRELL DYER, Plaintiff, v. ATLANTA INDEPENDENT SCHOOL SYSTEM, Defendant.	:	CIVIL ACTION FILE NO. 1:18-CV-03284-CAP

DEFENDANT'S REPLY IN SUPPORT OF MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

Defendant Atlanta Independent School System ("AISS") files this reply in support of its Motion to Dismiss, showing this Court the following:

ARGUMENT AND CITATION TO AUTHORITY

I. PLAINTIFF'S RESPONSE EXCEEDS THE PAGE LIMITATION ESTABLISHED BY LOCAL RULE 7.1(D).

Local Rule 7.1(D) states that "[a]bsent prior permission of the court, briefs filed in support of a motion or in response to a motion are limited to twenty-five (25) pages." Plaintiff's Response to Defendant's Motion to Dismiss spans thirty-four (34) pages. (Doc. 8 at 1-34). Defendant respectfully requests that this Court either disregard any argument made after the twenty-fifth page of Plaintiff's response or

require Plaintiff to file an amended response that complies with the Local Rules.

II. THE TWO-YEAR LIMITATIONS PERIOD BARS ALL CLAIMS BASED ON EVENTS THAT PREDATE JUNE 4, 2016.

Plaintiff does not dispute that a two-year statute of limitations governs his claims or that the events referenced in his Complaint that occurred before June 4, 2016, fall outside of that limitations period. Instead, Plaintiff seems to suggest that the so-called "discovery rule" suspended the statute of limitations. Under that rule, the statute of limitations does not run until the plaintiff knows, or reasonably should know, the cause of his or her injury. *M.H.D. v. Westminster Sch.*, 172 F.3d 797, 804 (11th Cir. 1999) (citing *King v. Seitzingers, Inc.*, 160 Ga. App. 318, 318, 287 S.E.2d 252, 254 (1981)). Plaintiff is incorrect.

While state law determines the length of statutes of limitations, "[f]ederal law determines when the statute of limitations begins to run." *Lovett v. Ray*, 327 F.3d 1181, 1182 (11th Cir. 2003) The statute of limitations accrues, setting the limitations clock running, when "the plaintiffs know or should know (1) that they have suffered the injury that forms the basis of their complaint and (2) who has inflicted the injury." *Chappell v. Rich*, 340 F.3d 1279, 1283 (11th Cir. 2003); *see also Brown v. Ga. Bd. of Pardons & Paroles*, 335 F.3d 1259, 1261 (11th Cir. 2003) (stating that the statute of limitations runs "from the date the facts which would support a cause of action are apparent or should be apparent to a person with a reasonably prudent

regard for his rights.").

According to the Supreme Court, a § 1983 claim accrues "when the plaintiff has 'a complete and present cause of action.'" *Wallace v. Kato*, 549 U.S. 384, 388 (2007) (quoting *Bay Area Laundry and Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192, 201, (1997)); *see also TRW Inc. v. Andrews,* 534 U.S. 19, 37 (2001) (Scalia, J., concurring) ("The injury-discovery rule…is bad wine of recent vintage. Other than our recognition of the historical exception for suits based on fraud…we have deviated from the traditional rule and imputed an injury-discovery rule to Congress on only one occasion.") (citations omitted). The Eleventh Circuit has recognized that the constructive knowledge component of the accrual rule "can cause it to function as an occurrence rule, holding a plaintiff 'should have known' about an injury at the moment it occurs." *Foudy v. Indian River Cty. Sheriff's Office*, 845 F.3d 1117, 1123 (11th Cir. 2017); *see Rozar v. Mullis,* 85 F.3d 556, 562 (11th Cir. 1996) (finding equal protection claims accrued when an allegedly unconstitutional county board vote was taken because that is when the plaintiff's alleged injury occurred).

Plaintiff's entire argument on the statute of limitations question consists entirely of copied-and-pasted text from various websites without a shred of analysis

of how the principles Plaintiff references apply to the facts.[1] To the extent they violated Plaintiff's First Amendment rights, each of the pre-June 4, 2016, incidents Plaintiff cites as a basis for his § 1983 claim furnished "'a complete and present cause of action'" the moment they happened. *Kato*, 549 U.S. at 388. When those incidents occurred, Plaintiff must have known or should have known both that he suffered a constitutional injury and the identities of the individuals who caused those injuries. He has set forth no reason to conclude otherwise. Accordingly, this Court should conclude that any claim premised on the events in the Complaint that predate June 4, 2016, accrued the moment those events took place. Any such claims, therefore, are time-barred by the two-year statute of limitations.

III. AISS'S RESTRICTIONS ON PLAINTIFF'S SPEECH WERE REASONABLE.

Both parties agree that the Board's public comment sessions constitute a limited public forum. (Doc. 2-1 at 11-13; Doc. 8 at 18). "In limited public forums, to avoid infringing on First Amendment rights, the governmental regulation of speech only need be viewpoint-neutral and 'reasonable in light of the purpose served by the forum.'" *Galena v. Leone*, 638 F.3d 186, 198 (3d Cir. 2011). To determine

[1] The verbatim text of the portion of Plaintiff's response concerning the statute of limitations issue can be found on these two sites: (1) https://gatrialattorney.com/the-statute-of-limitations-for-georgia-tort-cases/, and (2) http://www.statutes-of-limitations.com/state/Georgia.

whether a restriction on speech in a limited public forum passes constitutional muster, the court must analyze whether the restriction on speech is a valid time, place, or manner restriction. *Id.* at 199. A restriction on speech is a valid time, place, or manner restriction if it (1) is justified without reference to the content of the regulated speech, (2) is narrowly tailored to serve a significant governmental interest,[2] and (3) leaves open alternative channels for communication of the information. *Id.* Defendant's restriction on Plaintiff's speech meets these three requirements.

a. The Board's Restriction on Plaintiff's Speech Was Content-Neutral.

"Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert, Ariz.*, 135 S.Ct. 2218, 2227 (2015). On the other hand, a regulation is content neutral if "it is justified without reference to the content of the regulated speech." *Ward v. Rock Against Racism*, 491 U.S. 781, 782 (1989). In a limited public forum, the government may restrict speech based on its content as long as the restriction is "viewpoint neutral and reasonable in light of the forum's purpose." *Barrett v. Walker Cty. Sch. Dist.*, 872 F.3d 1209, 1225 (11th Cir. 2017);

[2] Plaintiff admits that Defendant has a significant governmental interest. (Doc. 8 at 19).

Eichenlaub v. Twp. of Indiana, 385 F.3d 274, 280 (3d Cir. 2004).

Multiple courts have held that removing a disruptive person from a public meeting like a city council meeting or a school board meeting can be a reasonable time, place, or manner restriction. And because the content neutrality of the restriction is one of the elements of a time, place, or manner restriction, these courts have also found that removal of a disruptive person from a public meeting is a content neutral act.

For instance, in *Eichenlaub v. Township of Indiana,* plaintiff was "repetitive and truculent" and "repeatedly interrupted the chairman of the meeting" until he was removed from the meeting. 385 F.3d at 281. The court specifically recognized that the chairman's desire for ejecting the plaintiff from the meeting derived from a "*content-neutral* desire to prevent his badgering, constant interruptions, and disregard for the rules of decorum." *Id.* (Emphasis added). The court ultimately held, "Restricting such behavior is the sort of time, place, and manner regulation that passes muster under the most stringent scrutiny for a public forum." *Id.*

Four years later in *Olasz v. Welsh*, the Third Circuit found that the removal of a speaker from a meeting to constrain his "badgering, constant interruptions, and disregard for the rules of decorum" constituted an appropriate time, place, and manner regulation. 301 F. Appx 142, 146 (3d Cir. 2008). Similarly, in *Mesa v.*

Hudson County Board of Chosen Freeholders, the District Court of New Jersey held that the removal of a combative speaker who "insisted on speaking on a topic not under discussion and then refused to sit down" constituted a valid time, place, or manner restriction. 2011 WL 4592390 *1 (D.N.J. 2011).

Plaintiff's behavior at Board meetings is equally disruptive, if not worse, than the plaintiffs in *Eichenlaub, Olasz,* and *Mesa.* The plaintiffs in all three cases displayed a disregard for the rules of decorum by disrupting the meetings from which they were ultimately removed, and the plaintiff in *Mesa*, specifically, was "combative" and refused to sit down when directed.

Under our facts, Plaintiff directed racially-charged insults at Board and AISS employees. This behavior clearly violated Board Policy BC's requirement that members of the public "demonstrate mutual respect, fair play, and orderly decorum," (Doc. 2-2 at 2), and it is the sort of "disruptive" and "combative" behavior that is sufficient to justify removal from a meeting. On several occasions, Plaintiff refused to leave without being escorted by law enforcement officers, causing further disruption to an already diverted meeting. Based on these cases, Defendant was justified in removing Plaintiff from its meetings.

b. The Restriction on Plaintiff's Speech Was Narrowly Tailored to Serve the Board's Interest in Holding Orderly and Civil Meetings.

A time, place, or manner restriction is narrowly tailored "so long as it promotes a substantial government interest that would be achieved less effectively absent the regulation" and is "not substantially broader than necessary to achieve the government's interest." *Ward,* 491 U.S. at 799. Defendant's restriction on Plaintiff's speech meets this requirement.

The most recent restriction on Plaintiff's speech suspends Plaintiff from entering AISS property, participating in AISS meetings, or communicating with AISS or Board employees from February 6, 2018, through February 5, 2019. (Doc. 1 at Appx. J). This temporary restriction is narrowly tailored to achieve the Board's interest in maintaining decorum and conducting orderly, efficient meetings. The most recent restriction should not be considered in isolation; rather, this Court should evaluate it in light of the Board's prior unsuccessful attempts at lesser restrictions on Plaintiff's speech.

On January 15, 2016, former Board Chairman Courtney English suspended Plaintiff's ability to speak during public comment session for six months. (Doc. 1 at Appx. E). Plaintiff was still permitted to attend Board meetings and enter AISS property. (Doc. 1 at Appx. E). However, Plaintiff blatantly disregarded the

suspension and attempted to speak at the following Board meeting, so AISS issued him a trespass warning. (Doc. 1 at ¶¶ 22-25). Shortly after the first suspension ended, on October 10, 2016, Plaintiff ignored AISS's previous warnings, and during public comment session, he referred to AISS students with the racial epithet "sambos" and ridiculed AISS officials by calling them "[a]ll these fools." (Doc. 1 at Appx. H). As a result of Plaintiff's repeated refusal to maintain decorum during Board meetings, the Board suspended Plaintiff from speaking at meetings or entering AISS property until January 1, 2018. (Doc. 1 at Appx. H).

Once the second suspension ended, Plaintiff resumed his disruption of Board meetings through the use of racist, offensive speech. On February 5, 2018, Plaintiff passed out unsolicited flyers to attendees of the February Board meeting. These flyers contained the phrase "unnigged coming soon" and a doctored photograph of AISS Superintendent Carstarphen wearing a football jersey with the name "FALCOONS" on the back. (Doc. 1 at Appx. J). This last episode led to the suspension that serves as the basis for Plaintiff's First Amendment claim.

Defendant attempted to place lesser restrictions on Plaintiff's speech, but they did not work. Unfortunately, Plaintiff has shown with astounding predictability that whenever he is allowed to attend AISS and Board meetings, he will disrupt those meetings. In an effort to curtail Plaintiff's offensive, disruptive conduct, Defendant

incrementally placed greater restrictions on Plaintiff's speech. Although banning a member of the public from participating in meetings is an unfortunate measure to have to take, here, the Defendant's decision to do so was narrowly tailored based on the ineffectiveness of lesser measures. Plaintiff's suspension from AISS activity is not permanent, and Plaintiff may resume his involvement after February 5, 2019. *Cf. Barna v. Bd. of Sch. Dir. of Panther Valley Sch. Dist.*, 143 F. Supp. 3d 205 (M.D.Pa. 2015) (holding a *permanent* ban from Board of School Directors meetings was not narrowly tailored to achieve interest in conducting orderly meetings).

Plaintiff's First Amendment rights are not absolute. *Heffron v. Int'l Soc'y for Krishna Consciousness*, 452 U.S. 640, 647 (1981) ("[T]he First Amendment does not guarantee persons the right to communicate their views at all times and places or in any manner that may be desired."). Defendant should not be forced to allow Plaintiff to hijack its meetings by hurling racial slurs, epithets, and insults at AISS officials and students. Rather, First Amendment jurisprudence allows government entities, like the Board, to take reasonable measures to protect their interests. Given Plaintiff's habitual disregard for decorum and civility during Board meetings, the one-year suspension imposed on Plaintiff was reasonable.

c. Plaintiff Has Sufficient Alternative Channels to Communicate His Message.

The cases upon which Plaintiff relies for the proposition that he does not have

adequate alternative channels to communicate his message are unpersuasive because the vast majority of the cases were decided prior to 1990. A person's options for disseminating a message and communicating with others has changed drastically since 1990, as the Internet, personal computers, smart phones, video conferencing, and social media have become imbedded in daily living. Prior to 1990, Plaintiff's argument that "physical presence" and "proximity" are vital attributes of an alternative mode of communication may have made sense. However, the widespread use of modern technology negates that argument. Plaintiff has ample channels through which he can communicate with community members and other elected officials.

In response to Plaintiff's highly offensive, racially-charged language directed at AISS employees and students, AISS suspended Plaintiff's ability to enter AISS property and speak with Board and AISS employees. This decision came after several unsuccessful attempts to curtail Plaintiff's conduct. The restriction on Plaintiff's speech is narrowly tailored to achieve Defendant's interest in conducting orderly meetings and allows Plaintiff alternative channels through which he can still communicate his message. As such, the restriction on speech is a reasonable time, place, and manner restriction, and thus constitutional under the First Amendment.

IV. PLAINTIFF'S PROCEDURAL DUE PROCESS CLAIM LACKS MERIT BECAUSE PLAINTIFF HAS NOT IDENTIFIED A DEPRIVATION OF A PROTECTED PROPERTY INTEREST.

Much of Plaintiff's response to AISS's arguments for dismissal of his procedural due process claim concerns whether AISS provided adequate post-deprivation remedies. But Plaintiff's analysis begs a central question: did AISS deprive Plaintiff of a protected property interest when it suspended him from attending Board meetings for a year?

Plaintiff appears to argue that because he had a First Amendment right to speak at Board meetings, he must have had a Fourteenth Amendment right to attend those meetings. But that arguments ignores a critical distinction between the constitutional right to free speech and the right to procedural due process. Freedom of speech emanates from the text of the First Amendment; whereas, procedural due process rights originate not in the Constitution, but instead from "existing rules or understandings that stem from an independent source such as state law." *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972). For Plaintiff to maintain a viable procedural due process claim, state law must confer upon Plaintiff a "legitimate claim of entitlement" to attend and participate in meetings of the Atlanta School Board. *Id.*

Plaintiff merely presumes that he had a protected property right in attending

Board meetings. But in his response, he identified no independent source, such as state law or a contract, that created a substantive government benefit of attending and speaking at Board meetings. He also failed to point to a source of law that entitled him to procedural safeguards in the event he was excluded from a Board meeting. The undersigned found no cases in this circuit establishing a protected property interest in attending board of education meetings, and Plaintiff cited none. Hence, this Court should conclude that Plaintiff had no protected property interest in attending Board meetings. Absent that protected interest, his procedural due process claim fails.

AISS also argued in its in initial brief that the Georgia Open Meetings Act, O.C.G.A. §§ 50-14-1, *et seq.* ("GOMA"), provided an adequate state remedy. Plaintiff did not rebut this argument. He merely asserted, "When Plaintiff contacted the Office of the Attorney General, they stated they had no remedy for his situation." (Doc. 8 at 30). Plaintiff failed to explain why GOMA would not apply to his grievance against AISS or why the remedies available under GOMA are inadequate to rectify his alleged constitutional injury. Thus, this Court should find that GOMA affords Plaintiff an adequate state remedy, which precludes a procedural due process claim under § 1983.

V. PLAINTIFF HAS FAILED TO POINT TO A WAIVER OF AISS'S SOVEREIGN IMMUNITY FROM HIS STATE-LAW CLAIMS.

Plaintiff's response focuses on whether Eleventh Amendment sovereign immunity bars his claims under § 1983. That argument misses the mark completely. AISS does not contend that it is immune from Plaintiff's federal claims. Instead, AISS maintains that sovereign immunity under the Georgia Constitution, Ga. Const. art. I, § 2, ¶ IX, bars Plaintiff's state law claims for slander, discrimination, retaliation, and harassment. And Plaintiff does not dispute those claims arise under state law.

As he is the party seeking to overcome sovereign immunity, Plaintiff must point to a legislative act that waives AISS's sovereign immunity. *Bomia v. Ben Hill Cty. Sch. Dist.*, 320 Ga. App. 423, 426, 740 S.E.2d 185, 189 (2013). Specifically, Plaintiff must point to a legislative act that provides that AISS's sovereign immunity is waived and identifies "the extent of such waiver." Ga. Const. art. I, § 2, ¶ IX(e). But the Georgia General Assembly has never passed a legislative act that waives AISS's sovereign immunity from state-law claims for slander, discrimination, retaliation, or harassment. It is impossible, therefore, for Plaintiff to identify a legislative waiver of AISS's sovereign immunity from those claims. Because no waiver exists, sovereign immunity deprives this Court of subject matter jurisdiction to consider Plaintiff's state law claims. *Cameron v. Lang*, 274 Ga. 122, 126, 549

S.E.2d 341, 346 (2001); *Dep't of Transp. v. Dupree*, 256 Ga. App. 668, 671, 570 S.E.2d 1, 5 (2002). Those claims must be dismissed.

CONCLUSION

For the reasons set forth above and in its principal brief, AISS asks this Court to grant this Motion and dismiss Plaintiff's claims with prejudice.

Respectfully submitted this 29th day of August, 2018.

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing was prepared using Times New Roman font, 14-point type, which is one of the font and print selections approved by the Court in L.R. 5.1(B).

This 29th day of July, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of August, 2018, I served a copy of the foregoing **DEFENDANT'S REPLY IN SUPPORT OF MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM** upon the following via CM/ECF and first-class mail:

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