UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JACK DARRELL HEARN;

DONNIE LEE MILLER; and,

JAMES WARWICK JONES

Plaintiffs

V.

CAUSE NO. 1:18-cv-00504-LY

SHEILA VASQUEZ, in her Official Capacity as Manager of the Texas Department of Public Safety-Sex Offender Registration Bureau; and,

STEVEN McCRAW, in his Official Capacity as Director of the Texas Department of Public Safety; and,

Defendants

PLAINTIFFS' TRIAL BRIEF ON CONTINUING VIOLATION DOCTRINE

COME NOW Plaintiffs Jack Darrell Hearn ("**Plaintiff Hearn**"), Donnie Lee Miller ("**Plaintiff Miller**") and James Warwick Jones ("**Plaintiff Jones**"), and, pursuant to the Federal Rules of Civil Procedure files this *Trial Brief on the Continuing Violation Doctrine,* and in this connection would show unto the Court as follows:

I.

SCOPE OF THE TRIAL BRIEF

The Plaintiffs adhere to their prior objections (Dkt.#38) to Defendants' attempt to raise a limitations defense on the virtual eve of trial. And while Plaintiffs also reserve their right to conduct additional discovery and amend their complaint in the event Defendants seek, and are

belatedly granted, leave to file an answer, leave to amend modify the Court's scheduling order, and leave to properly challenge Plaintiffs' claims in a motion to dismiss based on an affirmative defense of limitations; Plaintiffs in this Trial Brief would inform the Court why Defendants' limitations defense, if leave is sought to raise that defense, would be "futile" and without merit as a matter of law.

II.

FEDERAL ORIGINS AND CURRENT APPLICATION OF THE DOCTRINE IN THE FIFTH CIRCUIT

The U.S. Supreme Court first adopted the "continuing violation" doctrine in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). In *Havens Realty* the Court considered whether a statute of limitations defense foreclosed the plaintiffs' claims which alleged the defendants had engaged in "racial steering" in violation of Section 812(a) of the Fair Housing Act of 1968, 42 U.S.C. Section 3612(a)("FHA"). The Court observed that "[s]tatutes of limitations such as that contained in § 812(a) are intended to keep stale claims out of the courts," but that "[w]here the challenged violation is a continuing one…the staleness concern disappears."[1] The Court further ruled that a "wooden application of § 812(a)" would "ignor[e] the continuing nature of the alleged violation [and] only undermin[e] the broad remedial intent of Congress embodied in the Act."[2] Thus, the Court ultimately ruled that "where a plaintiff, pursuant to the Fair Housing Act, challenges not just one incident of conduct violative of the Act, but an unlawful practice that continues into the limitations period, the complaint is timely when it is filed."[3]

[1] *Havens Realty Corp. v. Coleman*, *supra,* 455 U.S. at 380.
[2] Id., 455 U.S. at 380.
[3] Id., 455 U.S. at 380-381.

In *Heath v. Bd. Of Supervisors for S. Univ. & Agric. & Mech. Coll.*, 850 F.3d 731 (5th Cir. 2017) the Fifth Circuit recognized that the "continuing violation" doctrine, as originally adopted in *Havens Realty Corp. v. Coleman*, *supra*, extends generally to all claims brought under 42 U.S.C. Section 1983 ("Section 1983"), including those that do not allege racial or racially-based employment discrimination.[4] This view is consistent with the legislative history of Section 1983, which unambiguously discloses Section 1983 was intended to afford "a remedy to all people, including whites" that "may be deprived of rights to which they are entitled under the Constitution." *Monell v. New York City Dept. of Soc. Servs*., 436 U.S. 658, 683 (1978).

The continuing violation doctrine is not a "tolling" doctrine which would be governed by State law, but an "accrual" doctrine that is governed by federal law.[5] In order to conform Fifth Circuit decisional law to the Supreme Court's decision in *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), the Fifth Circuit in *Heath v. Bd. Of Supervisors for S. Univ. & Agric. & Mech. Coll.*, *supra,* overruled several of its prior decisions and reaffirmed its prior decision in *Stewart v. Mississippi Transport Commission*, 586 F.3d 321 (5th Cir. 2009). Under the *Stewart/Heath* standard, whether the continuing violation doctrine applies depends on: 1) whether the plaintiff has demonstrated the occurrence of a series of unlawful acts that are related; 2) whether, after the initial unlawful act, the defendants intervened in a way that severed the prior act from subsequent unlawful acts which occurred during the limitations period

[4] *Heath v. Bd. Of Supervisors for S. Univ. & Agric. & Mech. College*, *supra,* 850 F.3d at 740, *citing inter alia*, *Shomo v. City of New York* , 579 F.3d 176, 182 (2d Cir. 2009) (finding that, under *Morgan*, the continuing violation doctrine "can apply when a prisoner challenges a series of acts that together comprise an Eighth Amendment claim of deliberate indifference to serious medical needs"); *see also, Neel v. Rehberg*, 577 F.2d 262, 263-264 (5th Cir. 1978); and, *Heard v. Sheahan*, 253 F.3d 316, 320 (7th Cir. 2001).

[5] *Heath v. Bd. Of Supervisors, supra,* 850 F.3d at 739-740.

immediately preceding the filing of the plaintiff's complaint; and 3) whether an equitable defense, such as laches, overrides application of the doctrine.[6]

In accord with *Nat'l R.R. Passenger Corp. v. Morgan*, *supra*, the Fifth Circuit in *Heath* also expressly disapproved its prior decisional law which had held the continuing violation doctrine did not apply when, due to "degree of permanence" of the defendant's unlawful practice or policy, the plaintiff "was or should have been aware of a duty to assert his rights within the statute of limitations."[7]

Prior to *Nat'l R.R. Passenger Corp. v. Morgan*, *supra*, there was a circuit split concerning application of the "practice" or "policy" theory, often referred to as the "systemic" theory, which commonly supports application of the continuing violation doctrine. The Ninth Circuit had held a "continually operative policy" could be challenged "at any time" provided the plaintiff "remained subject" to the policy at the time his complaint was filed.[8] In contrast, the Sixth Circuit had ruled the continuing maintenance of an unlawful policy by a defendant, after an initial unlawfully act in accordance with policy, would not alone constitute a continuing violation *unless* the plaintiff demonstrated he was actually subjected to a subsequent unlawful act, undertaken pursuant to the challenged policy, during the limitations period immediately preceding the filing of the plaintiff's complaint.[9] In *Nat'l R.R. Passenger Corp. v. Morgan*, *supra*, the Supreme Court resolved this circuit split by ruling that a claim will not be time-barred so long as all acts which constitute the claim are part of the same unlawful practice or policy, and

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[6] *Heath v. Bd. Of Supervisors for S. Univ. & Agric. & Mech. College*, *supra,* 850 F.3d at 738; and id., 850 F.3d at 740; *see also*, *Nat'l R.R. Passenger Corp. v. Morgan*, *supra,* 536 U.S. at 121-122.

[7] *Heath v. Bd. Of Supervisors for S. Univ. & Agric. & Mech. College*, *supra,* 850 F.3d at 739.

[8] Reid, *Confusion in the Sixth Circuit: The Application of the Continuing Violation Doctrine to Employment Discrimination*, 60 U. Cin. L. Rev. 1335, 1355 and n. 159 (1992)("Reid"); see also Wright, *Civil Rights – Time Limitations for Civil Rights Claims-Continuing Violation Doctrine*, 71 Tenn. L. Rev. 383, 391 and n. 86 (2004)("Wright").

[9] Reid, *supra*, 60 U. Cin. L. Rev. at 1355-1356 and n. 160; Wright, *supra*, 71 Tenn. L. Rev. at 391-392 and nn. 85 and 86.

at least one act falls within the time period immediately preceding the filing of the plaintiff's complaint.[10] In this regard, the Supreme Court's decision in *Morgan* approved the approach previously adopted by the Fifth Circuit in *Abrams v. Baylor Coll. of Medicine*, 805 F.2d 528, 533-534 (5th Cir. 1986)("We hold…that to establish a continuing violation, a plaintiff must show some application of the illegal policy to him (or to his class) within the [limitations period] preceding the filing of his complaint.").[11]

AFFIRMATIVE ACTS BY DEFENDANTS LIMITATION PERIOD

IMMEDIATELY PRECEDING PLAINTIFFS' ORIGINAL COMPLAINT

In Plaintiffs' view, the answer to whether the continuing violation doctrine applies to this case depends on whether Defendants have applied an illegal policy to Plaintiffs (i.e., one which deprived them of their constitutional rights under *Santobello v. New York*, 404 U.S. 257 (1971)), within the limitations period that preceded the filing of their original complaint on June 18, 2018 (Dkt.#2).[12] The limitations period for Section 1983 cases filed in Texas is two (2) years;[13] thus, under the continuing violation doctrine, the two-year the limitations period that preceded the filing of Plaintiffs' original complaint was June 19, 2016.

The duty to register which Plaintiffs challenge was first unlawfully imposed against them after they completed their terms of community supervision more than 20 (twenty) years ago, when the Texas Sex Offender Registration Program ("TSORP") was amended in 1997. Were Plaintiffs' claims directed solely at the passage of TSORP, or directed solely at Defendants'

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[10] *Nat'l R.R. Passenger Corp. v. Morgan*, *supra,* 536 U.S. at 122 (ruling a claim "will not be time barred so long as all acts which constitute the claim are part of the same [practice]… and at least one act falls within the time period").
[11] *See also*, *Hendrix v. City of Yahoo, Miss*., 911 F.2d 1102, 1103 (5th Cir. 1990)(observing the continuing violation doctrine analytically encompasses two types of cases).
[12] *Abrams v. Baylor Coll. of Medicine*, *supra*, 805 F.2d at 533-534 ("We hold…that to establish a continuing violation, a plaintiff must show some application of the illegal policy to him (or to his class) within the [limitations period] preceding the filing of his complaint.")
[13] *Piotroski v. City of Houston*, 237 F.3d 567, 576 and n. (5th Cir. 2001), citing Tex. Civ. Prac. & Rem. Code Ann. § 16.003(a) (Vernon Supp. 1998).

initial application of TSORP act at that time, Plaintiffs' claims would be based on events outside the limitations period and therefore time-barred. However, there is no genuine dispute that Defendants have continued to apply to this date the policy about which Plaintiffs complain "into the limitations period" that preceded the filing of Plaintiffs' original complaint. That is the feature of this case which renders Plaintiffs' claims timely under the "continuing violation" doctrine.

Chapter 62 of the Texas Code of Criminal Procedure ("Chapter 62"), as a matter of State policy, imposed affirmative duties on Defendants to act, and there is no factual dispute that Defendants have affirmatively performed some if not all of those duties within the limitations period that preceded the filing of Plaintiffs' original complaint. Wholly apart from the exhaustive duties and burdens imposed on Plaintiffs since 1997 (which have been directly related to the requirement that Plaintiffs register under Chapter 62); Defendants, in their official capacities as agents of the State of Texas and the Texas Department of Public Safety ("Department"), have continuously had, at all times relevant to this suit, certain "corresponding duties and powers…in relation to [a] person required to register."[14] These duties include, but are not limited to, a continuing duty to:

1) determine which local law enforcement authority serves as Plaintiffs' primary registration authority;[15]

2) designate the local registering authority to which Plaintiffs *must appear and register* (or verify their registration) at least annually;[16]

3) maintain a computerized central database containing the information required for Plaintiffs' registration;[17]

[14] Article 62.002(b), Texas Code of Criminal Procedure.
[15] Article 62.004(a), Texas Code of Criminal Procedure.
[16] Article 62.05(b), and Article 62.058(a), Texas Code of Criminal Procedure.
[17] Article 62.005(a), Texas Code of Criminal Procedure.

4) post on any department website related to the database any photographs of Plaintiffs that are available through the process of Plaintiffs obtaining or renewing their personal identification certificates or driver's licenses;[18]

5) update the photographs of Plaintiffs in the database and on the website annually, or as those photographs otherwise become available through the renewal process for Plaintiffs' personal identification certificates or driver's licenses;[19]

6) provide any licensing authority with notice of any person, including Plaintiffs, who are required to register and who hold or seek a license that is issued by the authority;[20]

7) send notice identifying any person required to register, including Plaintiffs, who is or will be employed, carrying on a vocation, or a student at a public or private institution of higher education, to various public authorities or agencies;[21]

8) provide local law enforcement authorities with a form for registering persons which describes the registration information Plaintiffs must disclose, and "any other information" Plaintiffs must disclose as "required by the department";[22]

9) provide local law enforcement authorities with a form which describes the duties which Plaintiffs "have or may have";[23]

10) inform local law enforcement authorities in the new area within Texas where any registrant, including Plaintiffs, may relocate and of the registrant's duty to register there;[24] and,

11) inform or notify law enforcement agencies, in States other than Texas, when any Texas registrant, including Plaintiffs, has relocated his residence in the other State.[25]

Furthermore, under State policy dictated by Chapter 62, Defendants may:

1) provide to a commercial social networking site any online identifier established or used by a registrant who uses the social networking site, is seeking to use the social networking site, or is precluded from using the social networking site.[26]

Additional discovery may be necessary to determine whether Defendants during the relevant period fulfilled *all* their mandatory duties under Chapter 62 related to Plaintiffs (or

[18] Article 62.005(c), Texas Code of Criminal Procedure.
[19] Article 62.005(c), Texas Code of Criminal Procedure.
[20] Article 62.005(e) and (f), Texas Code of Criminal Procedure.
[21] Article 62.005(h), Texas Code of Criminal Procedure.
[22] Article 62.051(b) and (c)(9), Texas Code of Criminal Procedure.
[23] Article 62.051(d), Texas Code of Criminal Procedure.
[24] Article 62.055(f), Texas Code of Criminal Procedure.
[25] Article 62.055(h), Texas Code of Criminal Procedure.
[26] Article 62.0061(a), Texas Code of Criminal Procedure.

exercised their discretionary authority to disclose Plaintiffs' online identifiers to commercial social networking sites). At this juncture however, the database maintained by Defendants already reveals several things. First, Defendants' database discloses that during the limitations period that preceded the filing of Plaintiffs' original complaint: 1) Defendants "updated" each of Plaintiffs' photographs on the database; 2) Defendants publicly reported on the database that each Plaintiff had timely "verified" their registration information as required by Chapter 62; and 3) Defendants publicly reported on the database that each Plaintiff had involuntarily disclosed "information required by the department."[27]

It is true the Supreme Court in several cases has ruled "present *effects*" caused by a prior application of an unlawful policy, when application of the policy has only occurred *outside* a limitations period, cannot alone establish a continuing violation. However, as the Supreme Court has also observed, those cases "establish only" that for purposes of the continuing violation doctrine a plaintiff must show that a "present *violation*" has occurred within the limitations period preceding the filing of a plaintiff's complaint. *Lewis v. City of Chicago*, 560 U.S. 205, 214 (2010). In other words, as the Court stated, "it does not follow" that no new actionable claim may be deemed timely, or that "no new claims [can] arise," when a State through its agents implements a prior unlawful (or unconstitutional) policy sometime "down the road" and does so within an applicable limitations period that precedes the filing of a complaint. Id., 560 U.S. at 214. Under Texas statutory law, as shown above, Defendants were required to "implement," and in fact did "implement" with regard to Plaintiffs, the unconstitutional policy which Plaintiffs contend violated their constitutional rights under *Santobello v. New York*, *supra*.

[27] https://records.txdps.state.tx.us/SexOffenderRegistry/Search (last visited 8/19/2019).

Determination of whether Defendants' actions during the limitations period violated Plaintiffs' plea agreements will necessarily require the Court to resolve whether Plaintiffs are presently being required to register lawfully, notwithstanding Plaintiffs' substantive due process rights under *Santobello v. New York*, *supra*. In short, because it is undisputed Defendants applied a policy which allegedly breached Plaintiffs' plea agreements within the limitations period that preceded the filing of Plaintiffs' original complaint; and that Defendants did so in violation of Plaintiffs' plea agreements and corresponding constitutional rights under *Santobello v. New York*, *supra*; any limitations defense, *properly pled* by Defendants, would be futile and must be overruled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true copy of this document was served on Defendants Sheila Vasquez and Steven McCraw, using the electronic CM/ECF filing system, via electronic service on their Attorney of Record, Assistant Texas Attorney General Seth Dennis, on this 19th day of August, 2019.

/s/*Richard Gladden*