

**IN THE UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF WEST VIRGINIA  
AT CHARLESTON**

**LOLA RAKES,**

Plaintiff,

Vs.

**Civil Action No.: 2:09-0018**

**FRANKLIN RUSH**, individually, and in his official capacity as a correctional officer and **GORDON CLARK**, individually, and in his capacity as an investigator of **The West Virginia Division of Corrections**, and **THE WEST VIRGINIA DIVISION OF CORRECTIONS**, an agency of the State of West Virginia; and, **JOHN DOE**, unknown person or persons,

Defendants.

**PLAINTIFF'S RESPONSE TO MOTIONS TO DISMISS**

Now comes the Plaintiff, Lola Rakes, by her counsel Michael A. Woelfel, and moves the Court to deny Defendants' motions to dismiss. January 12, 2009, Defendants Doe, Clark and the West Virginia Division of Corrections (DOC) jointly filed a motion to dismiss. A similar motion was filed on behalf of Defendant Rush on January 16, 2009.

**FACTS AS ALLEGED BY PLAINTIFF**

For the purposes of this Motion, the facts stated by the Division of Corrections are not disputed. However, the legal theories of the DOC contained in its "Statement of Facts" are in dispute.

Opposing counsel is correct that Plaintiff's Notice of Claim was in error as it alleged these events occurred in 2006.<sup>1</sup>

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<sup>1</sup> Exhaustion of State Administrative remedies prior to filing a § 1983 claim is not required. *The Constitutional Party of West Virginia v. WV DNR, et al.*, Cv. No. 20800061 (N. D. W. Va. 2009).

Lola Rakes was convicted of property crimes, mostly involving checks. She was delivered to the custody of the DOC March 6, 2003, with a stated minimum discharge date of November 7, 2029.

Plaintiff was released on parole August 23, 2007. "Good time" accumulation significantly contributed to her early release.

The West Virginia legislative has established a process for rewarding a DOC inmate for good conduct. *W. Va. Code* § 28-5-27. Plaintiff's indeterminate sentences were such that she had a minimum discharge date of November 7, 2029. (Exhibit 1) One day of "good time" is granted for each day an inmate exhibits good conduct. "Good time" is, however, forfeited for periods involving disciplinary violations. The threats of pretextual allegations of misconduct by a high ranking prison official such as Rush or Clark would serve to dramatically lengthen Ms. Rakes' period of incarceration – a fate to be avoided at all costs. She gave notice to State officials per West Virginia Code § 55-17-3 on September 11, 2008, and filed suit October 23, 2008.

Rakes was appointed legal counsel related to her parole by Order entered August 1, 2008 (Exhibit 2) and retained the undersigned on September 11, 2008. She did not speak with any attorney from 2003 until August, 2008. Her last day at the Lakin facility was February 8, 2007 (Exhibit 1). Plaintiff is on supervised parole by the DOC.

Defendant Gordon Clark is, or was, an investigator employed by the DOC. He obstructed Plaintiff from pursuing her legal remedies. Clark became aware that Rakes was planning to try and locate a lawyer who would agree to represent her in a civil suit against the DOC. Plaintiff believes this information came to Clark through the reading of her outgoing mail. Clark's subsequent admonitions to Lola Rakes deterred her from pursuing civil or criminal actions and included

the following intimidating, threatening remarks (or words of similar substance and effect):

- a. If you keep this up, we will bring solicitation charges against you.
- b. I have probable cause to go through your mail because you may have intentions to escape.
- c. You're guilty of "coercion of an officer" which is the same as solicitation of prostitution.
- d. If you pursue any of this, your time will be quite hard.
- e. This is my facility. I work for the DOC and this ain't going to happen.
- f. Miss Rakes, are you paying attention and watching what you write?
- g. A particularly favored expression used by Clark was - If you say anything, you're a sitting duck and will do your entire time.
- h. Don't try to sue, you'll lose.

Defendant Rush was an Assistant Warden at the Anthony Correctional Center (ACC). He was apparently allowed to resign his position when his sexual abuse visited upon Ms. Rakes could no longer be ignored by the ACC administration. Rush has not been punished in any manner for his sexual abuse against Plaintiff which occurred on 20 or more occasions. Rush obstructed Plaintiff from pursuing her legal remedies by virtue of his threatening of her on multiple occasions with retaliation.

Lt. David Masters plead guilty in the Circuit Court of Greenbrier County (Exhibit 3) arising from his felonious sexual misconduct imposed on a female inmate at ACC during this same time frame. Former ACC correctional officer, Billy Jack, plead guilty to a misdemeanor charge in Greenbrier County for having "grabbed" a female inmate's buttocks "for personal (sexual) gratification" (Exhibit 4). Sexual abuse of inmates by staff was pervasive.

On page 12 of their memorandum, Counsel for Defendant Rush, Clark and Doe asserts that the plaintiff “worked closely enough with her attorney such that she successfully obtained parole.” This statement is incorrect. While any factual dispute must be viewed in a light most favorable to the plaintiff, Exhibit 1 confirms Plaintiff’s assertion that parole counsel was initially appointed for Ms. Rakes on August 1, 2008. Prior to that, she had proceeded *pro se* with regard to her parole application and sentence reconsideration request (Exhibit 3). Rakes had not spoken to any attorney during the interim.

Plaintiff was administratively transferred from ACC to Lakin on June 3, 2005. Soon after the transfer, Defendant Clark convinced Plaintiff to reveal her abuse by Rush and subjected Plaintiff to a voice stress analysis examination. He came to believe her allegations to be true. During the course of his investigation, Clark visited ACC on numerous occasions and interacted with Rush prior to Rush’s resignation. Plaintiff does not know whether these two interacted after Rush’s resignation.

The threats of Clark were initiated once he had administered the voice stress analysis examination to Ms. Rakes and he determined she was being truthful about the sexual abuses of her by Rush.

The threats of Defendants Rush and Clark were taken to heart by Rakes. Clark’s admonitions, some cryptic, some sarcastic, some direct, effectively deterred her from taking appropriate measures to exercise her civil rights in any legal proceedings. Reliance on Rush’s and Clark’s threats and intimidation was reasonable under her particular circumstances. Ms. Rakes refrained from revealing these events to anyone with the power to assist her until September, 2008, when she confided in undersigned counsel.

Lola Rakes was keenly aware that retaliation can be visited upon an inmate by staff in a variety of forms:

1. Accumulated "good time" which can be applied to parole can be taken away for pretextual misconduct, thereby dramatically lengthening a period of incarceration.
2. Placement in punitive segregation as disciplinary action for pretextual allegations of misconduct.
3. Consideration for parole can be delayed per *W. Va. Code* § 62-12-13(b)2 and (b)3 arising from pretextual allegations of misconduct.
4. Placement of an inmate's quarters with a violent and aggressive inmate.
5. Use of unwarranted "write-ups."
6. Placement in administrative segregation (solitary confinement).

Plaintiff stalwartly resisted revealing Rush's sexual abuses while she was at ACC. When she reluctantly did so to Defendant Clark at Lakin, she met with serious threats and intimidation from Clark. Ms. Rakes' fear of reprisal from Rush during her incarceration at ACC was reasonable and, in her situation, well-founded. It bears mentioning that:

- (a) Rush held a second-in-command position at ACC.
- (b) Rush frequently threatened her, e.g., "if anyone finds out about this, you will finish your sentence" [Plaintiff's stated minimum discharge date was in 2029, Exhibit 1].
- (c) Rush was well-acquainted with high-level supervisory personnel at Lakin via his frequent interaction with these colleagues at the West Virginia Corrections Training Academy and otherwise.
- (d) Rush's full participation in the conspiracy with Rush to conceal these abuses will be more fully revealed through discovery.
- (e) You're the one that will get in trouble because I'll lie out of it. - Rush

- (f) I've worked for the DOC for 20 plus years, they won't believe you, they'll believe me. - Rush

Rush worked 8:00 a.m. through 4:00 p.m. as assistant warden at ACC. He would, however, often return at night and sign Plaintiff out of her cell for "painting duty" from 1:00 or 2:00 a.m. until 6:00 or 7:00 a.m. Pretextual conduct such as this was common at the facility.

A day after questioning at ACC by Clark as to her sexual abuse by Rush, Lola Rakes was given a pointed lesson in pretextual justice. This exercise in rehabilitation would result in Rakes' transfer from ACC to the harsher, more restrictive environs of Lakin:

Plaintiff was called to one of the ACC offices and told she had been given an assignment to work in the mailroom. This puzzled Rakes as it was rare, under any circumstances, for an inmate to handle United States Mail. Lola reported for work and immediately was instructed to walk to the rear of the building and retrieve a cart which had the newly arrived mail stacked upon it. Lola returned to the office with the mail. A female staff member directed Lola's attention to a package sitting atop the other mail and asked Lola to examine the item. The package identified Inmate Lola Rakes as addressee and identified Lola's aunt Beverly Jean Adkins as the addressor. The package was opened by the staff member who stated "you better hope I don't find any contraband in here." The package contained 10 skeins of yarn and some crochet hooks. Inside each skein was a plastic sandwich bag filled with tobacco.

The Plaintiff was immediately transferred to Lakin. The aunt had not mailed the package. The matter has been reported to the FBI.

### **STANDARD OF REVIEW**

In addressing these motions and the issue of the applicability of equitable estoppel, “the plaintiff’s ‘[f]actual allegations must be enough to raise a right to relief above the speculation level.’ *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1965 (2007). ‘[O]nce a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint.” *Id.* at 1969. “A complaint attacked by a Rule 12(b)(6) motion to dismiss will survive if it contains enough facts to state a claim to relief that is plausible on its face.” *Id.* at 1974.

A motion to dismiss for failure to state a claim should not be granted “unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

### **APPLICABLE LAW-STATUTE OF LIMITATIONS**

It is undisputed that, but for her state law privacy claim, a two year statute of limitations governs plaintiff’s state and federal claims. The statute governing the privacy claim is one year. Plaintiff’s claims were not brought within either time frame. Incarceration will not toll the statute of limitations.

### **EQUITABLE MODIFICATION OF THE STATUTE OF LIMITATIONS**

Mission Statement – Anthony Correctional Center

“It is a mission of Anthony Correctional Center to provide a safe,<sup>2</sup> secure, and healthy alternative correctional environment that offers young men and woman a comprehensive, evidence-based, and gender-responsive model of care

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<sup>2</sup> Upon information, at least 14 female inmates have come forward and complained of sexual misconduct imposed against them by staff at the Anthony Center since 2005.

and supervision focusing on increased personal responsibility and accountability and attainment of tools necessary for long-term success.”

This Court and The West Virginia Supreme Court have recognized the potential applicability of an equitable modification of the statute of limitations. *Independent Fire Insurance Company No.1 v. West Virginia Human Rights Commission*, 376 S.E.2d 614 (W. Va. 1988), *Morales v. Robinson*, 2007 WL 1074836 (S.D. W. Va. 2007). This Court, however, noted that estoppel principles ought be applied with caution and “only when equity clearly requires that it be done.” *Id.* at 15.

Plaintiff asserts that Defendants should be estopped from asserting the defense of applicable statutes of limitation as Plaintiff was deliberately obstructed from filing her claims while she was in the presence of Rush and in the presence of Clark.

“Obstruction must be by a positive act, mere silence will not toll the running of the statute of limitations . . .” *Hundley v. Martinez*, 151 W. Va. 997, 158 S.E.2d 159 (1967). The provisions of the “West Virginia Tort Claims and Insurance Reform Act” are relevant to this discussion. *W. Va. Code* § 29-12A-6(c) states “... the periods of limitations set forth in this section shall be tolled for any period during which the political subdivision or its representative have committed fraud . . . “

Application of *W. Va. Code* § 55-2-17 bears examination as this statute reflects the public policy of this state. In the case of *Dultine v. Savas*, 455 F.Supp. 153 (N.D. W. Va. 1978) the Court interpreted and applied equitable principles in the context of *W. Va. Code* § 55-2-17 and concluded as follows:

“In light of these facts, the tolling of the statute by the application of § 55-2-17 is an equitable solution to what would otherwise be an unjust and harsh result. Indeed, *W. Va. Code* § 55-2-17 is in keeping with equitable principles

which have been applied to estop one . . . from asserting the defense of statute of limitation . . .”

The Court continued, . . . “ In general, the Court may exercise its equitable jurisdiction and apply the doctrine of estoppel under appropriate facts to preclude a defendant from utilizing the statute of limitations as a bar, even in the absence of an express statutory basis for tolling the period”. . .

West Virginia jurists have applied this remedy for worthy plaintiffs for well over a century. “A party who by his acts, declarations, or admissions, or by failure to act or speak under circumstances when he should do so, either designedly or with willful disregard of the interests of others, induces or misleads another to conduct or dealings which he would not have entered upon but for this misleading influence, will not be allowed afterwards to come in and assert his right to the detriment of the person so misled. That would be a fraud.”

*Norfolk & W.R. CO. v. Perdue*, 40 W. Va. 442, 21 S.E. 755 (1895).

The Court’s attention is further directed to the statutory “fraudulent concealment doctrine and obstruction of prosecution” under *W. Va. Code* § 55-2-17. That statute provides in pertinent part . . .:

. . . “Where any such right as is mentioned in this article shall accrue against a person . . . if such person shall . . . by . . . concealing himself [or herself], or by any other indirect ways or means, obstruct the prosecution of such right, . . . the time that such obstruction may have continued shall not be computed as any part of the time within which the said right might or ought to have been prosecuted.”

While Plaintiff seeks the Court’s invocation of the doctrine of equitable estoppel against each Defendant, it is clear that the standard for its invocation is clearly higher as applied against a state agency than as against an individual defendant. *Samsell v. State Line Development Company, Inc.*, 154 W. Va. 48,

174 S.E.2d 318 (1970). It is conceded by plaintiff that when the state acts in its governmental capacity, as exists in this matter, this remedy should rarely, if ever, be deemed applicable. However, their misdeeds should serve to estop these individual Defendants from asserting the defense of the statute of limitations.

The Court's attention is directed to Chief Judge Maxwell's Opinion in a civil rights suit filed in the Northern District. "Under West Virginia law, Mr. Tesack must show that one or more of the Defendants deliberately and positively obstructed the prosecution of his action". *Tesack v. Waterford Park, Inc.*, 689 F. Supp. 604 (N.D. W. Va. 1988). Alleged mistreatment complained of by Mr. Tesack is miniscule in comparison to the acts of Rush and Clark. Discovery is expected to clarify the relationship between these men and the nature and extent if their contact relative to the Plaintiff both before and after Rush's resignation.

When contemplating Plaintiff's likelihood of reporting him and seeking legal counsel, Defendant Rush was rightly terrified of exposure to potential prosecution under West Virginia statutes or for federal civil rights violations or to a civil suit. This terror motivated Rush to threaten Rakes to remain silent and further served as a motivator for his colleague Clark to effectively silence her to protect Rush as well as protect the reputation of the DOC.

In *Morales*, supra, this Court found that the Plaintiff had failed "to demonstrate that the statute of limitations should be tolled" and further found her delay in filing suit "unreasonable as a matter of law." By way of example, while Morales alleged a single contact with the phantom prosecutor, Ms. Rakes was in the presence of Rush the entire time she spent at ACC and in the presence of Clark the entire time she was at Lakin. She exited Lakin February 8, 2007, for the final time. While Morales was, as the Court found, "not deterred" (*Morales* at p.16) by threats, to the contrary Rakes was so deterred and her fear and silence were reasonable.

In addition, while the purported Morales prosecutor had no contact with her for more than four (4) years prior to suit being filed, Rakes was in the presence of Clark as late as February 8, 2007, and in the custody of the DOC continuously through August 24, 2007.

### **PLAINTIFF'S PLEADING IS PROPER**

The Defendants suggest that the Complaint filed by the Plaintiff may be deficient in terms of appropriately raising the estoppel issue advocated by the Plaintiff. However, "The fact that estoppel has not been pled by appellant is of no consequence. Rule 8(c) of the West Virginia Rules of Civil Procedure only requires that estoppel be set forth as an affirmative defense '[i]n pleading to a preceding pleading . . . .', Since estoppel is being invoked to bar a defendant from relying on an affirmative defense which was raised in an answer to the complaint and because no further response pleadings were required following the filing of the answer, *W. Va. R. Civ. P. 7(a)*, Ara was not required to plead estoppel to permit its application. See 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1278 (1969) (discussing lack of need to plead any affirmative defenses to affirmative defenses raised by an answer because Rule 8(d) treats all affirmative defenses as automatically denied)." *Ara v. Erie Insurance Co.*, 182 W. Va. 266, 387 S.E.2d 320 (1989).

Accordingly, Plaintiff's Complaint meets the general notice pleading standard imposed by *W. Va. R. Civ. P. 8(A)*.

### **THE JOHN DOE MOTION TO DISMISS IS PREMATURE**

Plaintiff has yet to determine every individual who acted in violation of her civil rights. Defendants Rush and Clark were highly ranked officials with substantial influence within the DOC who may have secured assistance in

silencing Plaintiff. Discovery will shed light on these events and allow any unknown tortfeasors to be identified and held accountable.

Plaintiff asserts that the motion filed on behalf of unknown person or persons for dismissal, with prejudice, of Plaintiff's claims as time-barred is not appropriate as the motion lacks sufficient ripeness at this time.

Plaintiff requests that any ruling on the Doe motion to dismiss be held in abeyance for a reasonable period of time so as to allow discovery to occur.

### **CONCLUSION**

Elimination of sexual abuse in prisons such as the Anthony Center has become a national priority. (Exhibit 6) The individual Defendants seek to be rewarded for their outrageous behavior by securing a dismissal of this suit.

Contrary to the facts in the Morales case, a reasonable person could glean from the facts existent herein that Ms. Rakes was obstructed by Defendants Rush and Clark and further find that her fear and silence had a rational basis. She refrained from instituting this civil action because she took seriously the threats of Rush and Clark. Her suit was filed within two years of her final transfer from the Lakin Correctional Center out from under the watchful eye of Defendant Clark.

It is respectfully submitted that in the context of the totality of these unique and troubling facts and circumstances, Lola Rakes is deserving of equity.

Plaintiff respectfully urges the Court to deny the Defendants' motions to dismiss. In the alternative, she urges the Court to hold disposition of these motions in abeyance until she is able to engage in discovery.

Lola Rakes  
Plaintiff  
By Counsel

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Defendants.

**CERTIFICATE OF SERVICE**

I, Michael A. Woelfel, Counsel for Plaintiff, hereby certifies that on March 3, 2009, I electronically file the foregoing Plaintiff's Response to Motions to Dismiss with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following CM/ECF participants:

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