



acknowledges that since 1992, he has tested positive for HIV, meaning that he is infected with the Human Immunodeficiency Virus known to cause Acquired Immune Deficiency Syndrome (AIDS). Plaintiff relates he was infected when he accidentally stuck himself with a needle contaminated with the blood of a patient who had AIDS. R.C. 4112.02 prohibits discrimination on the basis of race, color, religion, sex, national origin, disability, age or ancestry by an employer, labor organization, person negotiating a housing accommodation, proprietor of a place of public accommodation or creditor. Although plaintiff's condition is listed as a recognized disability under R.C. 4112.01(A) (13) and (16)(a)(iii),<sup>1</sup> plaintiff fails to explain how the actions taken by defendant are subject to review by this court under the provisions listed in Revised Code §4112 et seq. Plaintiff has not alleged that there was an employment, tenancy or lending relationship between the parties. Additionally, plaintiff admitted upon cross-examination that he did not inform the Board of his HIV status at the hearing and that defendant was most likely unaware of plaintiff's HIV status until he petitioned for reinstatement some two years later.

{¶4} Initially, the court notes that R.C. 2743.16(A), the statute of limitations for commencing actions in this court, states as follows: "Subject to division (B) of this section, civil actions

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R.C. 4112.01 (A)(13) "Disability" means a physical or mental impairment that substantially limits one or more major life activities, including the functions of caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working; a record of a physical or mental impairment; or being regarded as having a physical or mental impairment.

"(16)(a) Except as provided in division (A)(16)(b) of this section, 'physical or mental impairment' includes any of the following:

"(ii) Any mental or psychological disorder, including, but not limited to, mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities;

"(iii) Diseases and conditions, including, but not limited to, orthopedic, visual, speech, and hearing impairments, cerebral palsy, autism, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, human immunodeficiency virus infection, mental retardation, emotional illness, drug addiction, and alcoholism."

against the state permitted by sections 2743.01 to 2743.20 of the Revised Code shall be commenced no later than two years after the date of accrual of the cause of action or within any shorter period that is applicable to similar suits between private parties." The Supreme Court of Ohio explained that "[t]he rationale underlying statutes of limitations is fourfold: to ensure fairness to defendant; to encourage prompt prosecution of causes of action; to suppress stale and fraudulent claims; and to avoid the inconvenience engendered by delay, specifically the difficulties of proof present in older cases." *O'Stricker v. Jim Walter Corp.* (1983), 4 Ohio St.3d 84, 88, citing *Harig. v. Johns-Manville Products Corp.* (1978), 284 Md. 70, 75. In the instant case, plaintiff's first cause of action arose in February 1998 when the Board permanently revoked his license. Plaintiff filed his original complaint in this court on September 11, 2000.

{¶5} During the trial, plaintiff argued that as a result of having HIV he developed HIV-encephalopathy or dementia. According to plaintiff, his treating psychiatrist, Dr. Nalluri, did not diagnose him with HIV-encephalopathy or dementia until some time after May 1999 and plaintiff testified that he recovered his mental faculties some time after appropriate treatment measures were instituted.

{¶6} The court infers that plaintiff is asserting that the statute of limitations should be tolled as a result of his alleged mental infirmity. R.C. 2743.16(C) states that the period of limitations prescribed by division (A) of this section shall be tolled pursuant to R.C. 2305.16 of the Revised Code, which states as follows: "if a person entitled to bring any action \*\*\*, is, at the time the cause of action accrues, within the age of minority or of unsound mind, the person may bring it within the respective times limited by those sections, after the disability is removed."

{¶7} Plaintiff did not present any witnesses other than himself. He offered two exhibits: one, an affidavit from Dr. Nalluri describing plaintiff's alleged mental impairment; the other, a document entitled "HIV-encephalopathy" that appears to be a description of the condition, which was taken from a medical textbook.

{¶8} The Supreme Court of Ohio has held that "[w]here a plaintiff claims to have been of unsound mind at the time a cause of action accrues, so as to suspend the statute of limitations, which claim is denied by the defendant, plaintiff has the burden of proving that he was suffering from some species of mental deficiency or derangement, so as to be unable to look into his affairs, properly consult with counsel, prepare and present his case and assert and protect his rights in a court of justice \*\*\*."

*Bowman v. Lemon* (1926), 115 Ohio St. 326 at syllabus.

{¶9} Upon consideration of all the testimony and evidence submitted, the court finds that plaintiff has failed to present sufficient evidence that shows he was unable to understand the nature of the proceedings against him. In addition, Defendant's Exhibit A demonstrates that plaintiff appeared at the two-day license revocation hearing; that he testified; that he subpoenaed witnesses; and that he offered exhibit evidence to the hearing officer. Therefore, the court finds that plaintiff has failed to prove, by a preponderance of credible evidence, that he was of unsound mind such that the statute of limitations would be tolled.

Even assuming this court could find that plaintiff's complaint was timely filed, plaintiff failed to submit any evidence showing defendant discriminated against him at the hearing based on his HIV status. Indeed, plaintiff testified that he did not notify defendant of his HIV status at the time of the hearing because he was embarrassed to do so.

{¶10} Additionally, plaintiff did not present any evidence to show that defendant discriminated against him when it refused to consider his petition for reinstatement. After review of the relevant case law, the court finds that the Board has consistently taken the position that it does not have any statutory authority to entertain a petition for reinstatement once a license has been permanently revoked. See *Bouquett v. State* (1991), 74 Ohio App.3d 203; *DeBlanco v. Ohio State Medical Bd.* (1992), 78 Ohio App.3d 194; *Roy v. State Medical Board* (1995), 101 Ohio App.3d 352. There is nothing in the record to show defendant discriminated against plaintiff based on his HIV status. Consequently, plaintiff cannot prevail on either of the claims of discrimination based upon his HIV status. Accordingly, judgment should be rendered in favor of defendant on those claims.

{¶11} Plaintiff also seeks to have this court declare as void the Board's decision revoking his license or to order the Board to convene a hearing upon plaintiff's petition for reinstatement. Plaintiff contends that at the time of the license revocation hearing, he was experiencing AIDS-related dementia; that he was mentally incompetent to understand the nature of the proceedings; and that he was incompetent at the time he waived his right to legal counsel. This court finds that even if the claim were timely filed, the court lacks jurisdiction to review administrative determinations of the Board.

{¶12} The jurisdiction of the Court of Claims is described in R.C. 2743.02(A)(1) which states, in part: "The state hereby waives its immunity from liability and consents to be sued, and have its liability determined, in the court of claims created in this chapter in accordance with the same rules of law applicable to suits between private parties, \*\*\*. To the extent that the state has previously consented to be sued, this chapter has no

applicability." Defendant has previously consented to be sued and plaintiff had a right to appeal the administrative decision. See R.C. 4731.22(B) and (C).<sup>2</sup> In *Marion Ob/Gyn, Inc. v. Ohio State Med. Bd.* (May 4, 2000), Franklin App. No. 99AP-436, the Tenth District Court of Appeals discussed this issue. "When considering an appeal from a medical board's order, a common pleas court must uphold the order if it is supported by reliable, probative and substantial evidence, and is in accordance with law. R.C. 119.12; *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621."

{¶13} In the instant case, no matter how he characterizes his claims for relief, plaintiff should have raised these concerns through the administrative appeal process set forth in R.C. 4731.22(C), and the right for further appeal to the court of common pleas pursuant to R.C. Chapter 119. The fact that plaintiff did not pursue his right to appeal in 1998 does not create a cause of action in this court. This court has previously determined that an action in the Court of Claims cannot be a substitute for the right of appeal to another court. *Midland v. Indus. Comm.* (1992), 63 Ohio Misc.2d 311.

{¶14} Plaintiff also argues that defendant violated his rights to due process. It has been consistently held that this court is without jurisdiction to consider claims for relief premised upon

R.C. 4731.22 states, in pertinent part:

"(B) The board, by an affirmative vote of not fewer than six members, shall, to the extent permitted by law, limit, revoke, or suspend an individual's certificate to practice, refuse to register an individual, refuse to reinstate a certificate, or reprimand or place on probation the holder of a certificate for one or more of the following reasons: \*\*\*

"(C) Disciplinary actions taken by the board under divisions (A) and (B) of this section shall be taken pursuant to an adjudication under Chapter 119. of the Revised Code, except that in lieu of an adjudication, the board may enter into a consent agreement with an individual to resolve an allegation of a violation of this chapter or any rule adopted under it. A consent agreement, when ratified by an affirmative vote of not fewer than six members of the board, shall constitute the findings and order of the board with respect to the matter addressed in the agreement. If the board refuses to ratify a consent agreement, the admissions and findings contained in the consent agreement shall be of no force or effect."

alleged violations of either the Ohio or United States Constitution. See, e.g., *Graham v. Board of Bar Examiners* (1994), 98 Ohio App.3d 620; *White v. Chillicothe Correctional Institution* (Dec. 29, 1992), Franklin App. No. 92-AP1229. See, also, *Jett v. Dallas Indep. School Dist.* (1989), 491 U.S. 701; *Burkey v. Southern Ohio Correctional Facility* (1988), 38 Ohio App.3d 170.

{¶15} Again, assuming this court could find jurisdiction over this matter, Ohio courts have held that "[w]here a physician is fully apprised of the violations being considered by the board and is given a full opportunity to respond before an impartial board, due process has been satisfied." *Korn v. Ohio State Med. Bd.* (1988), 61 Ohio App.3d 677; *Vaughn v. Ohio St. Med. Bd.* (Nov. 30, 1995), Franklin App. No. 95APE-645. As stated above, plaintiff did not prove that he was of unsound mind at any time during the proceedings before the Board. Additionally, plaintiff was given adequate notice of the conduct that defendant was investigating. Moreover, the Board conducted a full hearing. (Defendant's Exhibit A.) Defendant argued that plaintiff never told the Board members about his illness nor did he convey that the conduct for which he was being disciplined was precipitated by dementia. Plaintiff has failed to present sufficient credible evidence to show that the Board should have recognized that he was mentally incompetent to participate. The Ohio Supreme Court has noted that even the presence of mental illness does not necessarily equate with incompetency. *State v. Berry*, 72 Ohio St.3d 354, 362, 1995-Ohio-310. The record before this court supports a finding that plaintiff was provided all the due process that was owed to him.

{¶16} Plaintiff also asserts that he was incompetent to represent himself in the proceedings and that his lack of effective counsel should serve to void the proceedings. According to the report of the hearing examiner, plaintiff was advised of his right

to be represented by counsel and he waived such right. The United States Supreme Court has explained that: "[T]he competence that is required \*\*\* to waive his right to counsel is the competence to waive the right, not the competence to represent himself." *Godinez v. Moran* (1993), 509 U.S. 389, 399. For the foregoing reasons, the court concludes that plaintiff has failed to prove that he is entitled to relief on any of the claims presented. Accordingly, judgment is rendered in favor of defendant.

{¶17} This case was tried to the court on the issue of liability. The court has considered the evidence and, for the reasons set forth in the decision filed concurrently herewith, judgment is rendered in favor of defendant. Court costs are assessed against plaintiff. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

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J. WARREN BETTIS  
Judge

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