



accordance with defendant's written policy. Plaintiff drafted a chart identifying the dates when he was underpaid and attached the chart to his complaint. The chart shows the latest date of underpayment as being April 9, 2001. Plaintiff did not file his complaint in this matter until October 24, 2003.

{¶4} R.C. 2743.16 provides, in relevant part:

{¶5} "(A) Subject to division (B) of this section, civil actions 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."

{¶6} It is clear from plaintiff's complaint that his cause of action for breach of contract accrued at the latest, on April 9, 2001, the last day he did not receive "call-back" pay. Thus, the allegations of plaintiff's complaint conclusively establish a bar to recovery by application of the statute of limitations. In responding to defendant's motion to dismiss, plaintiff has filed his own affidavit wherein plaintiff avers that he did not learn of defendant's call-back pay policy until September 26, 2001, and that defendant's employees failed to provide plaintiff access to payment records until November 26, 2001, at which time plaintiff was informed that he would have to sue defendant if he wanted to receive back pay. Plaintiff argues that these facts either change the accrual date of his cause under the discovery rule or otherwise provide a legal basis for avoidance of the affirmative defense.

However, in resolving a Civ.R. 12(B)(6) motion, a court is confined to the averments set forth in the complaint. *State ex rel. Alford v. Willoughby Civ. Serv. Comm.* (1979), 58 Ohio St.2d 221, 223. None of the "facts" set forth in plaintiff's affidavit are contained in his complaint. Moreover, even if plaintiff had alleged such facts in the complaint, those facts, if admitted, do not provide any legal basis for avoidance of the period under the statute of limitations.

{¶7} Under the discovery rule, constructive knowledge of the facts rather than actual knowledge of their legal significance is enough to start the statute of limitations running. See *Flowers v. Walker* (1992), 63 Ohio St.3d 546, 549. By plaintiff's own admission he learned of defendant's call-back policy on September 26, 2001. Plaintiff also

had knowledge that the hours he had worked in the relevant time period may have qualified him for call-back pay. The fact that he did not, at that time, know the total amount of the underpayment does not toll the running of the statutory limitations period. See *Lynch v. Dial Finance Company of Ohio No. 1, Inc.* (1995), 101 Ohio App.3d 742. Consequently, even if the court were to apply the “discovery rule” in determining the date when plaintiff’s claim accrued, his complaint was still filed more than two years thereafter.

{¶8} Additionally, plaintiff’s assertion that defendant misled him into believing that he would be paid is insufficient to justify relief from the running of the statute. Plaintiff admits that defendant told him as early as November 26, 2001, that it would not provide him with the pay documents he requested and that he would have to sue. At that point, plaintiff still had 23 months to file his claim.

{¶9} In short, defendant’s motion to dismiss is well taken and shall be granted.

{¶10} This case came before the court for determination upon defendant’s motion to dismiss. For the reasons set forth in the decision filed concurrently herewith, defendant’s motion is GRANTED. Therefore, plaintiff’s action is DISMISSED. 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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JOSEPH T. CLARK  
Judge

Entry cc:

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