FILED
United States Court of Appeals
Tenth Circuit

August 16, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

RODNEY S. RATHEAL,

Plaintiff - Appellant,

v.

UNITED STATES OF AMERICA,

Defendant - Appellee.

No. 20-4099
(D.C. No. 2:19-CV-00969-DB)
(D. Utah)

ORDER AND JUDGMENT*

Before **MATHESON**, **BRISCOE**, and **McHUGH**, Circuit Judges.

This appeal stems from a settled civil injunctive action the Securities and Exchange Commission ("SEC") filed against Rodney S. Ratheal and his company, Premco Western, Inc. (the "Premco case"), and the SEC's online postings about the settlement. In his lawsuit against the United States, Ratheal asserted claims under the Federal Tort Claims Act ("FTCA") arising from the investigation and postings. The district court held that the claims were barred under the discretionary function

---

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

exception to the FTCA's waiver of sovereign immunity and dismissed the complaint pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction. Ratheal appeals that order.[1] Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I. BACKGROUND

Following its investigation, the SEC filed the Premco case in December 2012. At about the same time, consistent with its standard practice, the agency published a litigation release on its website, summarizing the allegations in the SEC's complaint and the terms of the settlement. In April 2017, Ratheal discovered "2016 whistleblower postings online" where the SEC listed him as a basis for rewarding whistleblowers who assist in fraud investigations. R. at 7. The posting included a copy of the litigation release and a link to the complaint in the Premco case.

Ratheal filed this suit in 2019, asserting claims for negligence, misrepresentation, and abuse of process based on the SEC investigation and postings.[2] The government moved to dismiss the complaint, arguing that the claims were barred by the discretionary function exception.[3] A magistrate judge issued a

[1] Ratheal's pro se status entitles him to a liberal reading of his filings. *Ledbetter v. City of Topeka*, 318 F.3d 1183, 1187 (10th Cir. 2003).

[2] This is Ratheal's second lawsuit involving essentially the same claims. He filed the first suit in 2017 against the SEC, an SEC attorney, and two non-governmental defendants. The SEC defendants moved to dismiss on several grounds, including that Ratheal named them, instead of the United States, as defendants. He agreed to dismissal of his claims against the SEC defendants without prejudice so he could file his claims against the United States.

[3] The government also sought dismissal on other grounds, but the district court did not address those issues because it dismissed the complaint on immunity grounds.

report and recommendation concluding that the discretionary function exception barred all of Ratheal's claims, and recommending that the court dismiss the complaint without prejudice for lack of jurisdiction.

Ratheal filed an objection to the report and recommendation. As pertinent here, he argued that the magistrate judge's discretionary-function determination was based on the "false premise that the challenged conduct . . . [was] the SEC's discretion to investigate." R. at 415. He explained that rather than challenging the decision to undertake the investigation, his claims challenged what he characterized as the SEC employees' decisions to (1) "breach their respective duties to properly and fairly implement SEC investigative, settlement, and enforcement processes and procedures," R. at 415; and (2) make postings "falsely implying guilt and fraud not justified by the No Admit No Deny settlement," *id.* at 416. He argued that the implementation and posting decisions did not fall within the discretionary function exception. He also argued that his abuse of process claim was not subject to dismissal under the discretionary function exception because 28 U.S.C. § 2680(h)'s law-enforcement exception to the intentional-tort exception to the FTCA's waiver of sovereign immunity applied to that claim.

The district court overruled his objections, adopted the magistrate judge's report and recommendation, and dismissed the complaint without prejudice.

II. DISCUSSION

A. Legal Standards

We review the district court's dismissal for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) de novo. *Holt v. United States*, 46 F.3d 1000, 1003 (10th Cir. 1995), *abrogated on other grounds by Cent. Green Co. v. United States*, 531 U.S. 425, 437 (2001). We also review de novo its determination that the discretionary function exception applies. *Garcia v. U.S. Air Force*, 533 F.3d 1170, 1175 (10th Cir. 2008).

The FTCA waives sovereign immunity for actions against the United States resulting from injuries caused by the negligent acts of its employees while acting in the scope of their employment. 28 U.S.C. § 1346(b)(1). This waiver is limited by a number of statutory exceptions, including the discretionary function exception at issue here. *See id.* § 2680(a). The discretionary function exception is jurisdictional, and it was Ratheal's burden to establish subject matter jurisdiction. *Garcia*, 533 F.3d at 1175. To avoid dismissal of his claims under the discretionary function exception, he needed to "allege facts that place [his] claim[s] facially outside the exception." *Franklin Sav. Corp. v. United States*, 180 F.3d 1124, 1130 (10th Cir. 1999).

The discretionary function exception preserves sovereign immunity for claims based on a federal agency's or employee's "exercise or perform[ance] . . . [of] a discretionary function or duty," regardless of whether "the discretion involved be abused." 28 U.S.C. § 2680(a). Whether the exception applies depends on the nature of the agency's conduct as evaluated under the two-part test established in *Berkovitz*

ex. rel Berkovitz v. United States, 486 U.S. 531, 536 (1988). When both elements are met, the conduct is protected as a discretionary function and sovereign immunity bars any claim involving that conduct. *Garling v. United States Env't Prot. Agency*, 849 F.3d 1289, 1295 (10th Cir. 2017).

At the first step of the *Berkovitz* test, we consider whether the government function in question was "discretionary," meaning whether it was "a matter of choice for the acting employee." *Berkovitz*, 486 U.S. at 536. "Conduct is not discretionary if a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow" because in those circumstances, "the employee has no rightful option but to adhere to the directive." *Garcia*, 533 F.3d at 1175 (internal quotation marks omitted). Where no "statutes, regulations, or policies prescribing a specific course of action for [agency] employees to follow in investigating potential . . . violations," the first prong of the discretionary function test is satisfied. *Garling*, 849 F.3d at 1296.

If the conduct was discretionary, we move to the second step, where we consider whether the conduct required the "exercise of judgment based on public policy considerations." *Id.* "When established governmental policy, as expressed or implied by statute, regulation, or agency guidelines, allows a Government agent to exercise discretion, it must be presumed that the agent's acts are grounded in policy when exercising that discretion." *United States v. Gaubert*, 499 U.S. 315, 324 (1991). Thus, to survive a motion to dismiss, the plaintiff must allege facts that "would support a finding that the challenged actions are not the kind of conduct that

can be said to be grounded in the policy of the regulatory regime." *Id.* at 324-25. The focus of this inquiry is "on the nature of the actions taken and on whether they are susceptible to policy analysis." *Id.* at 325; *see also Lopez v. United States*, 376 F.3d 1055, 1057 (10th Cir. 2004) (explaining that we "need not find that a government employee made a conscious decision regarding policy considerations in order to satisfy the second prong of the *Berkovitz* test").

B. The District Court's Ruling

The district court concluded that all of Ratheal's claims, including the abuse of process claim, which was based largely on the whistleblower posting, stemmed from the SEC's 2012 investigation and settled civil action. The court explained that because such postings are intended "to incentivize the public to come forward and help aid in SEC investigations," posting them "should be considered a part of the investigation process." R. at 427 n.2. In so concluding, the court rejected Ratheal's argument that the abuse of process claim survived the motion to dismiss because it fell within § 2680(h)'s law enforcement proviso.

The court then applied the *Berkovitz* test and held that both prongs were met. It concluded the first prong was satisfied because Ratheal had "not identified any prescribed duty applicable to investigations . . . [or] supported any of his allegations with any specific statute, regulation, or policy that governs SEC investigation procedures." R. at 427. Accordingly, the court held that the investigation, including the subsequent postings, was "discretionary, meaning it was a matter of judgment or choice." *Id.* (internal quotation marks omitted). Turning to the second prong, the

district court observed that under 15 U.S.C. § 78u(a)(1), the SEC has discretion to "make such investigations as it deems necessary" to determine whether the target of the investigation has committed any violations, and "to publish information concerning any such violations" as it "deem[s] necessary or proper to aid in the enforcement of" the laws and regulations it is charged with enforcing. The court held that the SEC employees' investigative and posting decisions under § 78u(a)(1) required "the exercise of judgment based on considerations of public policy," R. at 427 (internal quotation marks omitted), and were thus covered by the discretionary function exception under *Gaubert*. In so holding, the court rejected Ratheal's argument that the exception did not bar his claims because the challenged conduct occurred at the implementation level, not the design/policy-making level.

C. Analysis

1. The District Court Was not Required to Treat the Motion to Dismiss as a Motion for Summary Judgment

Ratheal first contends the district court erred by not treating the motion to dismiss as a motion for summary judgment. We disagree.

A Rule 12(b)(1) challenge to subject matter jurisdiction can be either facial or factual. *See Holt*, 46 F.3d at 1002. A facial attack "questions the sufficiency of the complaint," and when "reviewing a facial attack on the complaint, a district court must accept the allegations in the complaint as true." *Id.* A factual attack goes beyond allegations in the complaint and challenges the facts on which subject matter jurisdiction depends. *Id.* at 1003. When reviewing a factual attack, a court "may not

presume the truthfulness of the complaint's factual allegations," and may consider affidavits and other documents to resolve disputed jurisdictional facts under Rule 12(b)(1) without converting the motion to a summary judgment motion. *Id.*

However, when the question of the applicability of the discretionary function exception is intertwined with the merits of the case, the government's motion to dismiss should be construed as a motion for summary judgment. *Id.* Although we have said that "[t]he jurisdictional question is intertwined with the merits of the case if subject matter jurisdiction is dependent on the same statute which provides the substantive claim in the case," *id.,* we later clarified that "the focus of the inquiry is not merely on whether the merits and the jurisdictional issue are under the same statute," *Sizova v. Nat'l Inst. of Standards & Tech.*, 282 F.3d 1320, 1324 (10th Cir. 2002). Instead, whether a motion to dismiss must be converted to a motion for summary judgment depends on whether "resolution of the jurisdictional question requires resolution of an aspect of the substantive claim." *Id.* (internal quotation marks omitted).

Here, the district court answered the jurisdictional question as a matter of law, without resolving any factual disputes or substantive aspects of Ratheal's claims. Accordingly, it properly applied the Rule 12(b)(1) standard, not the standards applicable to a summary judgment motion. *See Lopez*, 376 F.3d at 1057; *Sizova*, 282 F.3d at 1324.

Moreover, although Ratheal filed a motion for summary judgment after the motion to dismiss was fully briefed, he did not ask the district court—either in that

motion or in his objection to the magistrate's report and recommendation—to treat the motion to dismiss as a motion for summary judgment. He thus waived any challenge to the district court's failure to do so. *See Lopez*, 376 F.3d at 1057. And in any event, he does not explain how applying the summary judgment standard—viewing all well-pled facts in the light most favorable to him and drawing all reasonable inferences in his favor[4]—would have made a difference, given that the court did not resolve any factual disputes.

2. The Abuse of Process Claim Does not Fall under the Law Enforcement Proviso

Ratheal next contends the district court erred by concluding the law enforcement proviso does not apply to his abuse of process claim. We disagree.

The first clause of § 2680(h) excludes certain state law intentional tort claims from the FTCA's waiver of sovereign immunity. *See* 28 U.S.C. § 2680(h). That provision is known as the intentional tort exception. *See Garling*, 849 F.3d at 1295. The second clause of § 2680(h) carves out an exception to the intentional tort exception and waives sovereign immunity for six torts, including abuse of process, when the claim stems from the "acts or omissions" of federal "law enforcement officers." 28 U.S.C. § 2680(h). To determine whether a claim falls within the law enforcement proviso, courts look to the substance of the claim, not how the plaintiff labeled it in the complaint. *Garling*, 849 F.3d at 1298. "[A] plaintiff may not recast

[4] *See Dewitt v. Sw. Bell Tel. Co.*, 845 F.3d 1299, 1306 (10th Cir. 2017).

a negligence tort as an intentional tort to take advantage of the law enforcement exception to § 2680(h)." *Id.* (internal quotation marks omitted).

Under Utah law, "[t]he misuse of legal process becomes actionable when it is used primarily to accomplish a purpose for which it is not designed." *Hatch v. Davis*, 147 P.3d 383, 389 (Utah 2006) (internal quotation marks omitted).[5] Thus, to constitute an abuse of process, the challenged conduct must be "a perversion of the process to accomplish some improper purpose." *Id.* (internal quotation marks omitted).

Ratheal's abuse of process claim alleged that SEC agents "falsely and wrongly listed and posted online, [his] name under Fraud as the basis for awarding whistleblower funds." R. at 10. In his opposition to the motion to dismiss, he explained that the SEC "abused [the] No Admit No Deny process by implying a 'truth' that was not true by listing [him] under Fraud when there had been no conviction or admission." *Id.* at 166; *see also id.* at 169 (stating that SEC agents abused process by "posting fraudulent online Whistleblower notices and documents falsely listing [him] under fraud").

[5] The issues of subject matter jurisdiction and the meaning of terms used in the FTCA are matters of federal law, but liability issues are determined by state law. *Molzof v. United States*, 502 U.S. 301, 305 (1992); *Franklin v. United States*, 992 F.2d 1492, 1495 (10th Cir. 1993) (explaining that under § 1346(b)(1), "we resolve questions of liability under the FTCA in accordance with the law of the state where the alleged tortious activity took place").

Based on these allegations, the district court concluded the "complaint attempt[ed] to bring intentional tort claims without alleging intentional tort facts," and did not allege "facts showing that the SEC had the required ulterior purpose for an abuse of process claim in Utah." R. at 429 (internal quotation marks omitted). We agree. And despite Ratheal's characterization of these allegations as asserting an abuse of process claim, we also agree with the district court's determination that, at best, the alleged facts amount to a defamation claim grounded in negligence, which is not one of the torts listed in the law enforcement proviso. Ratheal cannot avoid application of the discretionary function exception by casting a defamation claim as an abuse of process claim. *See Garling*, 849 F.3d at 1298.

3. The Design/Implementation Distinction is Inapplicable

We also reject Ratheal's contention that the discretionary function exception does not apply to his claims because the challenged conduct—the manner of the investigation and the subsequent postings—involved the SEC's implementation of its investigative policies, not discretionary policy decisions.

His argument is based on *Whisnant v. United States*, 400 F.3d 1177 (9th Cir. 2005), in which the Ninth Circuit construed its past precedent as holding that "the *design* of a course of governmental action is shielded by the discretionary function exception, whereas the *implementation* of that course of action is not." 400 F.3d at 1181. Whisnant was an employee of a government contractor who brought FTCA claims against the United States based on his exposure to toxic mold at a naval base commissary. At step one of the discretionary function analysis, the court recognized

that "[n]o statute, policy, or regulation prescribed the specific manner in which the commissary was to be inspected or a specific course of conduct for addressing mold." *Id.* at 1181. But applying the design/implementation distinction at step two, the court held that Whisnant's claims were not barred because he "alleged negligence in the implementation, rather than the design, of government safety regulations, and the governmental decisions [he] claim[ed] were negligent concerned technical and professional judgments about safety rather than broad questions of social, economic, or political policy." *Id.* at 1185; *see also id.* at 1183 ("Cleaning up mold involves professional and scientific judgment," not a policy decision.).

Relying on this design/implementation distinction, Ratheal maintains that his claims are not barred because they challenge decisions SEC employees made during the implementation stage of the investigation, not policy-based design decisions. But this circuit has not adopted the Ninth Circuit's design/implementation distinction, and we decline to apply it to Ratheal's claims because, even if it is a valid distinction in the right case, it is inapposite here for at least two reasons.

First, *Whisnant* makes clear that the distinction applies to governmental decisions involving safety concerns. As the court explained, "[t]he decision to adopt safety precautions may be based in policy considerations, but the implementation of those precautions is not [because] safety measures, once undertaken, cannot be shortchanged in the name of policy." *Id.* at 1182 (alteration and internal quotation marks omitted). Ratheal's claims plainly do not involve safety concerns or any other scientific or technical matter to which the design/implementation distinction might

apply. And to the extent the distinction applies in other contexts where the government designs procedures its employees implement, Ratheal does not identify investigation procedures the SEC adopted at a policy level that its employees violated at the implementation stage. His unspecific reference to "SEC investigative, settlement, and enforcement processes and procedures," R. at 415, is insufficient to satisfy his burden to "allege facts that place [his] claim[s] facially outside the [discretionary function] exception," *Franklin*, 180 F.3d at 1130.

Moreover, while *Whisnant* drew the distinction between policy design and implementation, it also made clear that the "implementation of a government policy is shielded where the implementation itself implicates policy concerns." 400 F.3d at 1182 n.3 (emphasis omitted). What distinguished the mold situation in *Whisnant* is that there was no legitimate reason for the commissary not to eliminate the toxic mold—there were no policy judgments to be made at the implementation stage. That is not the case here. SEC employees responsible for following the agency's policies have significant discretion to make judgment calls throughout the course of their investigations, including with respect to publishing information concerning violations. *See* 15 U.S.C. § 78u(a)(1). Under *Gaubert*, we presume that the policy-implementing employees' decisions during the investigation, including their decision to post the litigation release and whistleblower notice, were "grounded in policy," 499 U.S. at 324, and the allegations in Ratheal's complaint provide no basis for concluding otherwise. *See also Dalehite v. United States*, 346 U.S. 15, 36 (1953) ("Where there is room for policy judgment and decision there is discretion. It

necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable."), *partially overruled on other grounds by Rayonier, Inc. v. United States*, 352 U.S. 315 (1957).[6] Accordingly, the design/implementation distinction did not save Ratheal's claims, and the district court properly dismissed them under the discretionary function exception. *See Garling*, 849 F.3d at 1296 (recognizing that when Congress delegates broad authority to an agency to implement and enforce federal laws, the discretionary function exception bars tortious investigation claims where no statutes, regulations, or policies prescribe "a specific course of action for [agency] employees to follow in investigating potential [] violations").

III. CONCLUSION

We affirm the district court's judgment dismissing the complaint under Rule 12(b)(1) for lack of subject matter jurisdiction.

Entered for the Court

Carolyn B. McHugh
Circuit Judge

[6] Even the Ninth Circuit does not apply the design/implementation distinction in the context of government investigations like the one at issue here. *See Gonzalez v. United States*, 814 F.3d 1022, 1035 (9th Cir. 2016) (affirming discretionary function dismissal of claims based on decisions made during the course of an FBI investigation and declining to apply design/implementation distinction, explaining that "agents responsible for following the Attorney General's Guidelines are still imbued with an enormous amount of discretion and judgment in the course of their investigations.").