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United States Court of Appeals
Tenth Circuit

September 27, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

WILLIAM M. FULKERSON,

Plaintiff - Appellant,

v.

COMMISSIONER, SSA,

Defendant - Appellee.

No. 21-2001
(D.C. No. 1:20-CV-01145-WJ-SCY)
(D. N.M.)

ORDER AND JUDGMENT*

Before **HARTZ**, **PHILLIPS**, and **EID**, Circuit Judges.

William M. Fulkerson appeals pro se from a district-court order that dismissed his employment-discrimination case as untimely and barred by res judicata. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm the district court's dismissal of Mr. Fulkerson's Title VII, Rehabilitation Act, and due-process claims on the ground of res judicata, but we reverse and remand on Mr. Fulkerson's whistleblowing claim so that it can be dismissed for lack of jurisdiction.

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* After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore 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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

Background

Mr. Fulkerson worked in a variety of positions at the Social Security Administration (SSA) from 1989 to 2013. In 2002 he began working as a Section Manager "in the SSA Mega Teleservice Center (TSC) located in Albuquerque, New Mexico." *Fulkerson v. Colvin*, No. 16-CV-889-BRB-KBM, 2018 WL 1726245, at *1 (D.N.M. Apr. 6, 2018) (*Fulkerson I*).

While on a leave of absence after being diagnosed with Hepatitis C and depression in 2004, Mr. Fulkerson filed an EEO complaint against the TSC Director, claiming disability discrimination. He returned to work in 2005 and was reassigned to a Staff Assistant position. He then filed another EEO complaint, this time for retaliation.

In 2012, Mr. Fulkerson filed two more EEO complaints. He alleged disability discrimination and the creation of "a hostile work environment in retaliation for his prior EEO activity," which caused him to suffer posttraumatic stress disorder (PTSD). *Id.* at *2. He accepted a disability retirement in October 2013.

In 2016, through counsel, Mr. Fulkerson sued the SSA for (1) disability discrimination in violation of the Americans with Disabilities Act (ADA), and (2) retaliation by subjecting him to a hostile work environment in violation of Title VII. He sought damages for the SSA's alleged discriminatory practices and for being forced to retire. The SSA moved for summary judgment. The district court dismissed the ADA claim, explaining that "[t]he Rehabilitation Act of 1973 . . . is the exclusive remedy for federal employees alleging disability discrimination against the United States or its agencies." *Fulkerson I*, 2018 WL 1726245, at *4. As for the Title VII claim, the district

court addressed ten adverse actions the SSA allegedly committed against Mr. Fulkerson, including "subjecting [him] to a hostile work environment in retaliation for [his] 2004 and 2005 EEO complaints," *id.* at *5, and concluded that none survived summary judgment. Mr. Fulkerson did not appeal the district court's decision to this court.

Instead, Mr. Fulkerson turned to the Merit Systems Protection Board (MSPB), filing two Individual Right of Action (IRA) appeals under the Whistleblower Protection Act (WPA) from decisions issued by the Office of Special Counsel on his administrative complaints. *See Fulkerson v. Soc. Sec. Admin.*, No. DE-1221-19-0042-W-1, 2020 WL 3498783 (M.S.P.B. June 24, 2020); *Fulkerson v. Soc. Sec. Admin.*, No. DE-1221-18-0410-W-1, 2018 WL 5115962 (M.S.P.B. Oct. 16, 2018). He complained, among other things, that the SSA retaliated against him for whistleblowing. The MSPB dismissed both IRA appeals as untimely, except that it docketed separately his claim in one appeal that his retirement was an unlawful constructive discharge. It proceeded to dismiss that claim on the ground that the circumstances prompting Mr. Fulkerson's retirement did not rise to the level of constructive discharge. *See Fulkerson v. Soc. Sec. Admin.*, No. DE-0752-20-0323-I-1, 2020 WL 5879676 (M.S.P.B. Sept. 30, 2020).

Mr. Fulkerson then filed the instant litigation. In his pro se complaint he states it is intended to rectify his attorneys' failures in *Fulkerson I* "to present appropriate arguments and evidence," R. at 4, and the district court's findings regarding his credibility and PTSD diagnosis date, *id.* at 7. He alleges that his 2005 reassignment was in retaliation for filing EEO complaints and being a witness "in other EEO issues against the [SSA]," and was the start of a "campaign to get rid of [him]" by exposing him to a

hostile work environment. *Id.* at 5. He also alleges that when he engaged in "whistleblowing on the hostile work environment," the SSA retaliated against him. *Id.* at 14. Finally, he alleges that the SSA caused his PTSD and forced his retirement. Based on these allegations, he brought four claims for relief: (1) disability discrimination in violation of the Rehabilitation Act; (2) retaliation in violation of Title VII; (3) violation of the WPA and the Whistleblower Protection Enhancement Act (WPEA); and (4) violation of due process.

The district court sua sponte reviewed the complaint and noted that it appeared barred by res judicata, because it arises from the facts in *Fulkerson I*, and untimely, because the events at issue occurred no later than 2013. The district court ordered Mr. Fulkerson to show cause why the case should not be dismissed.

Mr. Fulkerson responded that he did not have a full and fair opportunity to litigate his claims in *Fulkerson I* because that case was decided at the summary-judgment stage. He contended his lawsuit was timely based on the continuing-violation doctrine because the SSA's legal filings after his retirement resulted in "unwarranted adverse rulings." *Id.* at 92. Further, he noted that an MSPB judge had rejected the SSA's attempt to dismiss his MSPB constructive-discharge appeal on the grounds of res judicata and the statute of limitations. Mr. Fulkerson concluded by asserting that the decision in *Fulkerson I* was erroneous and had to be challenged.

The district court ordered Mr. Fulkerson to file an "amended complaint to show that this case is not barred by the statute of limitations or *res judicata*." *Id.* at 97. Mr. Fulkerson responded by filing a document labelled "Plaintiff's Amended

Complaint," which included only legal arguments against dismissal and more attacks on *Fulkerson I*.

The district court dismissed Mr. Fulkerson's case with prejudice, stating he had not shown his case was timely and not barred by res judicata. We need address only the res judicata ground of the district court's decision.

Discussion

We review de novo a district court's application of res judicata to the facts. *See City of Eudora v. Rural Water Dist. No. 4*, 875 F.3d 1030, 1035 (10th Cir. 2017). Because Mr. Fulkerson is pro se, we liberally construe his pleadings. *See Andrews v. Heaton*, 483 F.3d 1070, 1076 (10th Cir. 2007).

"The doctrine of res judicata, or claim preclusion, will prevent a party from litigating a legal claim that was or could have been the subject of a previously issued final judgment." *Lenox MacLaren Surgical Corp. v. Medtronic, Inc.*, 847 F.3d 1221, 1239 (10th Cir. 2017) (internal quotation marks omitted). Three elements are required for claim preclusion to apply: "(1) a final judgment on the merits in an earlier action; (2) identity of parties or privies in the two suits; and (3) identity of the cause of action in both suits." *Id.* (brackets and internal quotation marks omitted). "[A] cause of action includes all claims or legal theories of recovery that arise from the same transaction, event, or occurrence. All claims arising out of the transaction must therefore be presented in one suit or be barred from subsequent litigation." *Wilkes v. Wyo. Dep't of Emp. Div. of Lab. Standards*, 314 F.3d 501, 504 (10th Cir. 2002) (internal quotation marks omitted).

These three elements were satisfied here. *Fulkerson I* ended in a final judgment and involved the same parties as this case. And the Title VII, Rehabilitation Act, and due-process claims all arise from the core operative allegations in *Fulkerson I*. In particular, both cases include the same "Retaliation in Violation of Title VII" claim alleging that Mr. Fulkerson's "complaints about the discriminatory practices in the work place w[ere] the motivating factor for continuing the hostile work environment and ultimately forcing Plaintiff to retire." R. at 17; Complaint at 5, *Fulkerson v. Colvin*, No. 16-CV-889-BRB-KBM (D.N.M. Aug. 4, 2016). Thus, this claim is barred.

Mr. Fulkerson asserts that this court is bound by the MSPB judge's conclusion that res judicata did not bar his constructive-discharge appeal. But he provides no authority or even an explanation for why this is so. Despite Mr. Fulkerson's pro se status, this "court cannot take on the responsibility of serving as [his] attorney in constructing arguments and searching the record." *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005). At a minimum, Mr. Fulkerson must provide "more than a generalized assertion of error." *Id.* at 841 (internal quotation marks omitted). Moreover, if we are bound by a decision of the MSPB, why are we not bound by its ultimate conclusion that there is no merit to Mr. Fulkerson's constructive-discharge claim?

The Rehabilitation Act claim in the instant litigation is simply the ADA claim from *Fulkerson I* with a different label. *Compare* R. at 16 ("Defendant discriminated against Plaintiff in the terms and conditions of his employment on the basis of his disabilities, in violation of the Rehabilitation Act of 1973."), *with* Complaint at 4, *Fulkerson v. Colvin*, No. 16-CV-889-BRB-KBM (D.N.M. Aug. 4, 2016) ("Defendant

discriminated against Plaintiff in the terms and conditions of his employment on the basis of his disabilities, in violation of the ADA."). It too is barred. *See* 18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 4411 (3d ed. 2021) ("[O]rdinarily[,] theories growing out of different federal statutes constitute a single claim or cause of action whenever that result is suggested by a transactional approach."); Restatement (Second) of Judgments § 24 cmt. c (1982) ("That a number of different legal theories casting liability on an actor may apply to a given episode does not create multiple transactions and hence multiple claims.").

The due-process claim alleges that the SSA filed motions that prevented him from obtaining a "full hearing" on his employment claims. R. at 18. This claim is barred, as any errors underlying the judgment in *Fulkerson I* should have "be[en] corrected on appeal or other available proceedings to modify the judgment or to set it aside, and not made the basis for a second action on the same claim." Restatement (Second) of Judgments § 19 cmt. a (1982).

On a related point, Mr. Fulkerson invokes the "exception to the application of claim preclusion where the party resisting it did not have a full and fair opportunity to litigate the claim in the prior action," *Lenox MacLaren Surgical Corp.*, 847 F.3d at 1239 (internal quotation marks omitted). He argues this exception applies because *Fulkerson I* was resolved through summary judgment, which, he says, "do[es] not meet the level of process necessary to uphold a Federal employee's Constitutional rights." Aplt. Opening Br. at 5. But "the Supreme Court has made it abundantly clear that summary judgment has a proper role to play in civil cases, and thus granting summary judgment does not

violate a plaintiff's right to due process." *Burks v. Wis. Dep't of Transp.*, 464 F.3d 744, 759 (7th Cir. 2006) (brackets and internal quotation marks omitted); *see also Shannon v. Graves*, 257 F.3d 1164, 1167 (10th Cir. 2001) ("The Seventh Amendment is not violated by proper entry of summary judgment, because such a ruling means that no triable issue exists to be submitted to a jury.").

Finally, as for Mr. Fulkerson's WPA/WPEA claim, its precise contours are unclear. To the extent the claim is a freestanding federal whistleblower retaliation claim, it is preempted by the Civil Service Reform Act. *See Steele v. United States*, 19 F.3d 531, 533 (10th Cir. 1994). To the extent the claim seeks review of the MSPB's IRA decisions, the district court lacked jurisdiction. *See* 5 U.S.C. § 7703(b)(1)(B) (providing that a final MSPB order in a whistleblower retaliation case is reviewable by "the United States Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction"); *Young v. Merit Sys. Prot. Bd.*, 961 F.3d 1323, 1327-28 (Fed. Cir. 2020) (agreeing with the MSPB that IRA appeals to the MSPB "are never 'mixed cases'" and cannot provide a whistleblowing claim for district court review); *cf., e.g.*, *Baca v. Dep't of the Army*, 983 F.3d 1131, 1137 (10th Cir. 2020) (observing that a federal court of appeals has jurisdiction to review a "whistleblower retaliation claim[ ] aris[ing] before the MSPB" as an IRA appeal). Thus, Mr. Fulkerson's WPA/WPEA claim is jurisdictionally barred.

Conclusion

We affirm to the extent the district court applied res judicata and dismissed Mr. Fulkerson's Title VII, Rehabilitation Act, and due-process claims. We reverse insofar as the district court applied res judicata and dismissed Mr. Fulkerson's WPA/WPEA claim. We remand the case with instructions to dismiss that claim without prejudice for lack of jurisdiction.

Entered for the Court

Harris L Hartz
Circuit Judge