FILED
United States Court of Appeals
Tenth Circuit

June 27, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

LUZ DEL CARMEN PONCE,

Plaintiff - Appellant,

v.

UNIFIED POLICE DEPARTMENT OF GREATER SALT LAKE,

Defendant - Appellee.

No. 22-4070
(D.C. No. 2:21-CV-00429-BSJ)
(D. Utah)

ORDER AND JUDGMENT*

Before **MORITZ**, **EID**, and **CARSON**, Circuit Judges.

Luz Del Carmen Ponce appeals the district court's order dismissing with prejudice her first amended complaint (FAC), which asserted claims for discrimination and retaliation under Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000e-2(a)(1), 2000e-3(a). Exercising jurisdiction under 28 U.S.C. § 1291, we reverse and remand for further proceedings.

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* 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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

I

Ms. Ponce was a peace officer with the Unified Police Department of Greater Salt Lake (UPD). In August 2015, she was terminated for: (1) dereliction of duty; (2) insubordination; (3) misrepresentation; and (4) altering a firearm. Following an unsuccessful intra-department appeal, Ms. Ponce appealed to the Peace Office Merit Commission (POMC). *See* Utah Code Ann. § 17-30a-403(4)(a) ("A merit system officer . . . may, within 10 calendar days after the internal department appeal decision [is made], make an appeal in writing to the [POMC].)."

The POMC held a hearing in December 2015, at which both UPD and Ms. Ponce were represented by counsel. In January 2016, the POMC issued a decision that sustained the violations except the charge that Ms. Ponce altered her firearm; it also sustained the decision to terminate her employment. Specifically, the POMC found that the violations for dereliction of duty, insubordination, and misrepresentation were supported by substantial evidence and that the decision to terminate Ms. Ponce's employment was not an abuse of discretion. Ms. Ponce filed a motion for reconsideration, which was denied. The parties agree that Ms. Ponce did not raise any claims or arguments regarding discrimination or retaliation during either the department or POMC proceedings.

Ms. Ponce could have, but did not, appeal the POMC's decision to the Utah Court of Appeals. *See id.* § 17-30a-404(1) ("A person may appeal a final action or order of the [POMC] to the Court of Appeals for review."). Instead, following the disciplinary proceedings, Ms. Ponce filed a charge of discrimination with the Utah

Labor Commission. Eventually, she filed suit under Title VII for gender and national origin discrimination and retaliation for reporting discrimination and a hostile work environment.

UPD moved to dismiss the FAC on two grounds: 1) the claims were barred by the doctrine of issue preclusion and 2) the FAC failed to state plausible claims for relief. At a hearing on the motion, UPD argued that the claims were precluded under our decision in *Atiya v. Salt Lake County*, 988 F.2d 1013 (10th Cir. 1993), which holds that

> a federal district court in a proceeding under 42 U.S.C. § 1983 *must* give a state agency's fact-finding the same preclusive effect to which it would be entitled in the state's court *if* the state agency: (1) was acting in a judicial capacity; (2) resolved disputed issues of fact properly before it; and (3) the parties had an adequate opportunity to litigate the issues in dispute.

Id. at 1019 (citing *Univ. of Tenn. v. Elliott*, 478 U.S. 788, 799 (1986)). UPD acknowledged that "*Atiya* is a [§] 1983 case, not a Title VII case," but nonetheless urged the district court to apply *Atiya*'s rule of preclusion because "both [*Atiya* and Ms. Ponce's cases are] about termination and retaliation." Aplt. App. at 220-21.

The district court, however, did not decide whether Ms. Ponce's Title VII claims were precluded under *Atiya*, and if not, whether the FAC stated plausible claims for relief. Rather, the court decided to dismiss the FAC for its own reason, ruling that Ms. Ponce failed to exhaust her remedies when she decided not to appeal the POMC's decision to the Utah Court of Appeals and it therefore lacked jurisdiction to consider her claims. The court explained its reasoning as follows:

> That's the record, [that the POMC found that the termination was justified], and you forewent the opportunity to test something. In a sense you failed to exhaust your administrative remedies that are available. And it's for, among others, that reason that you failed to state a claim because you failed to exhaust the remedy available in the state procedure that's available to you to either contest or to raise and to appeal.
>
> And I think that the failure to do that justifies [UPD's] motion to dismiss. One could either argue that at that point in time, the adverse action, the reason for the adverse action had been determined, it had nothing to do with the (inaudible) say, "Well, I've got a parallel cause of action under [Title VII]."
>
> Well, [Ms. Ponce] may have [a parallel cause of action], but the consequence that you say resulted from that has already been determined for a different reason. It's an interesting academic question because you've got to get rid, it seems to me, of the justification used by the [POMC] and the opportunity to appeal.
>
> And based upon that, one could even argue that the failure to exercise the right of appeal really precludes this court from dealing with the academic assertion as to a parallel cause of action that was not timely exercised.

Id. at 225-26.

The district court directed UPD "to prepare and submit a suggested form of order in reference to the matter." *Id.* at 225. The order that was eventually signed, however, did not mention Ms. Ponce's failure to exhaust her administrative remedies as the grounds for dismissal. Instead, the court granted the motion "[f]or the reasons set forth at oral argument and in [UPD's] Motion to Dismiss," *id.* at 230, even though the court never addressed or ruled on the arguments raised by UPD in its motion.

II

"We review the district court's order dismissing the case for lack of subject matter jurisdictions de novo." *Dossa v. Wynne*, 529 F.3d 911, 913 (10th Cir. 2008) (internal quotation marks omitted). The district court erred as a matter of law in dismissing the FAC on the grounds that Ms. Ponce was required to exhaust state administrative remedies before filing suit under Title VII. Congress imposes the requirements for exhausting a claim arising under federal law—not the State of Utah. *See, e.g.*, *Gillette v. McNichols*, 517 F.2d 888, 890 (10th Cir. 1975) ("It is well established that exhaustion of state administrative remedies is not required of a party seeking relief under the federal Civil Rights statutes.").

We further hold that Ms. Ponce's Title VII claims are not precluded under these facts. In deciding whether "a common-law rule of preclusion would be consistent with Congress' intent in enacting Title VII," and after examining "the language and legislative history of Title VII," the Supreme Court held that "Congress did not intend *unreviewed* state administrative proceedings to have preclusive effect on Title VII claims." *Elliott*, 478 U.S. at 796 (emphasis added). *See also Est. of Bassatt v. Sch. Dist. No. 1*, 775 F.3d 1233, 1237-38 (10th Cir. 2014) (discussing *Elliott*'s holding that state *court* findings are generally entitled to preclusive effect); *Stone v. Dep't of Aviation*, 290 F. App'x 117, 123 (10th Cir. 2008) (unpublished) (holding that "our review for collateral estoppel purposes in a Title VII . . . case is confined to the judgments of the state courts, and not the underlying agency decision"); *Hernandez v. New Mexico*, No. 94-2287, 1995 WL 490289, at *4 (10th

Cir. Aug. 16, 1995) (unpublished) (unpublished) (recognizing that agency findings that have not been judicially reviewed do not preclude Title VII claims).

III

UPD urges us to affirm the district court's order on the alternate grounds that the FAC fails to state plausible claims for relief. According to UPD, this issue was resolved in its favor when the court dismissed the FAC "[f]or the reasons set forth at oral argument *and* in [UPD's] Motion to Dismiss." Aplt. App. at 230 (emphasis added). For the reasons stated below, we remand the issue to the district court for its consideration.

The district court's order contains no rationale from which we can discern that the court determined that the FAC failed to state plausible claims for relief. This is not to say the lack of any reasoning necessarily precludes our review. For example, "[w]e can affirm a lower court's ruling on any grounds adequately supported by the record, even grounds not relied upon by the district court." *Elwell v. Byers*, 699 F.3d 1208, 1213 (10th Cir. 2012).

But other circumstances counsel against deciding the issue on appeal—namely, Ms. Ponce has not briefed the issue. We have declined review in similar circumstances where there is a lack of adversarial briefing and no reasoned decision from the court. *Cf. Sylvia v. Wisler*, 875 F.3d 1307, 1324-25 (10th Cir. 2017) (declining to review the merits of a court's disposition that had "the effect of tacitly resolving [a] claim . . . [without] the benefit of the district court's rationale for doing so" and in the "absence of meaningful adversarial briefing").

Nonetheless, UPD argues that the issue is waived because Ms. Ponce failed to brief it on appeal. A party may waive appellate review of an issue by not arguing it in her opening brief. *See, e.g., Bishop v. Smith*, 760 F.3d 1070, 1095 (10th Cir. 2014) ("Waiver through appellate-briefing-omission . . . [is an] admittedly distinct failure[] of preservation."). However, "whether issues should be deemed waived is a matter of discretion." *United States v. Walker*, 918 F.3d 1134, 1153 (10th Cir. 2019).

Given the vagaries of the district court's order, we exercise our discretion to overlook the alleged waiver and conclude that "the most prudent and fair course is to allow the district court to address this [issue] in the first instance on remand." *Sylvia*, 875 F.3d at 1326.

IV

The judgment of the district court is reversed. The case is remanded for further proceedings consistent with this order and judgment.

Entered for the Court

Nancy L. Moritz
Circuit Judge