FILED
United States Court of Appeals
Tenth Circuit

September 27, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JULIAN ASH,

Plaintiff - Appellant,

v.

PETE BUTTIGIEG, Secretary of U.S. Department of Transportation; DOCR-EEOC, Associate Director, Equal Employment Opportunity; EMPLOYMENT AND LABOR LAW DIVISION AGC-100; OFFICE OF PERSONNEL MANAGEMENT, Appeals Officer-Retirement Services-Appeals; FEDERAL AVIATION ADMINISTRATION,

Defendants - Appellees.

No. 22-6195
(D.C. No. 5:22-CV-00371-R)
(W.D. Okla.)

ORDER AND JUDGMENT*

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

---

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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

Julian Ash appeals from the dismissal of his pro se employment action. The district court determined the action should be dismissed for lack of jurisdiction and failure to state a claim. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.[1]

I

Ash worked at the Federal Aviation Administration (FAA) until he resigned in 2018. He later filed this action, asserting claims for conspiracy under 42 U.S.C. § 1985; racketeering under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961 to 1968; conspiracy to defraud the United States under 18 U.S.C. § 371; and violations of the Notification and Federal Employee Antidiscrimination and Retaliation Act (No FEAR Act), Pub. L. No. 107-174, 116 Stat. 556 (2002); the Federal Employees' Compensation Act (FECA), 5 U.S.C. §§ 8101 to 8152; the Veterans Employment Opportunities Act (VEOA), 5 U.S.C. § 2108; Title VII, 42 U.S.C. §§ 2000e to 2000e-17; the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12112 to 12117, which the district court construed as a claim under the Rehabilitation Act, 29 U.S.C. § 794;[2] and the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 to 634.

[1] Ash filed this case in the United States District Court for the District of Columbia, which transferred it to the United States District Court for the Western District of Oklahoma.

[2] The district court explained that federal employees are excluded from the ADA and are covered instead by the Rehabilitation Act, which provides the same "substantive standards." Aplt. App. at 347 (quoting *Sanchez v. Vilsack*, 695 F.3d 1174, 1178 n.2 (10th Cir. 2012)).

The district court determined Ash asserted official-capacity claims against the agencies based on two sets of factual allegations. First, the complaint described the facts as follows:

> A Final Agency Decision for DOT Complaint No. 2019-28552-FAA-05 was secreted on 7/20/21 by the FAA's DOCR. The agency absolved itself of all reported and verified allegations of Discrimination, Retaliation, Waste, Fraud, and Abuse. The Office of Accountability took extreme measures to Avoid Acknowledgment of Whistleblower Violations that were exposed in the agency's own Report of Investigation. For ex. ROI Pg 422 of 663 HR Director states, none of my allegations were supported. However, ROI Pg 642 of 663 states: No Investigation was conducted? All allegations were dismissed based on TIMELINESS? However, ROI Pg 72 of 663 states TIMELINESS: N/A. Finally, Pg 2 of the Final Agency Decision, U.S. Supreme Court states: Reprisal Cases shall not be time barred, Conspiracy?

Aplt. App. at 13. Second, Ash attached to his complaint a final agency decision issued by the Department of Transportation (DOT), which listed nine instances of allegedly discriminatory or harassing conduct, none of which the DOT determined supported a finding of discrimination.

Given Ash's claims and allegations, the district court concluded his RICO and § 1985 claims were barred by sovereign immunity; there was no private cause of action to support his claims under § 371 and the No FEAR Act; the district court lacked jurisdiction to consider any claims covered by FECA, which Congress designated the Secretary of Labor to determine; and he failed to administratively exhaust his claims under the VEOA, Title VII, the Rehabilitation Act, and the ADEA. The district court therefore dismissed the action, and Ash appealed.[3]

[3] Appellees elected not to file a response brief.

II

We review de novo the district court's various grounds for dismissal. *See Serna v. Denver Police Dep't*, 58 F.4th 1167, 1169-70 (10th Cir. 2023) (lack of private cause of action); *Hennessey v. Univ. of Kan. Hosp. Auth.*, 53 F.4th 516, 527 (10th Cir. 2022) (sovereign immunity); *Smith v. Cheyenne Ret. Invs. L.P.*, 904 F.3d 1159, 1164 (10th Cir. 2018) (failure to exhaust); *Tippetts v. United States*, 308 F.3d 1091, 1093-94 (10th Cir. 2002) (lack of jurisdiction over claim covered by FECA). Although we afford Ash's pro se materials a solicitous construction, *see Van Deelen v. Johnson*, 497 F.3d 1151, 1153 n.1 (10th Cir. 2007), we "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). Indeed, we have "repeatedly insisted that pro se parties follow the same rules of procedure that govern other litigants." *Id.* (internal quotation marks omitted).

Under Federal Rule of Appellate Procedure 28(a)(6), an appellant's opening brief must contain "a concise statement of the case setting out the facts relevant to the issues submitted for review, describing the relevant procedural history, and identifying the rulings presented for review, with appropriate references to the record." Rule 28(a)(8)(A) further requires that an opening brief contain "appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies." "Consistent with this requirement, we routinely have declined to consider arguments that are not raised, or are inadequately presented, in an appellant's opening brief." *Bronson v. Swensen*, 500 F.3d 1099, 1104 (10th Cir. 2007). "Issues will be

deemed waived if they are not adequately briefed." *Garrett*, 425 F.3d at 841 (brackets and internal quotation marks omitted). A generalized assertion of error without citation to supporting authority is not enough to preserve an argument for appeal. *Id.* Likewise, failing to address the district court's reasons for dismissal waives any challenge to the district court's ruling. *See Nixon v. City & Cnty. of Denver*, 784 F.3d 1364, 1369 (10th Cir. 2015).

Here, even under a solicitous construction, Ash's opening brief fails to comply with our appellate rules. The first five pages of his brief appear to argue the merits of some of his claims. For example, on page 3 he writes:

> Claim 2: Failure To Investigate and Failure to take Appropriate Action
> Element 3: HR Director's email to EEOC dated 12/11/19 states:
> HR Director wasn't willing to discuss Plaintiff's concerns on 11/16/18.
> Claims: Allegations were investigated immediately and determined all allegations were Plaintiff's own feelings and not shared by staff.

Aplt. Br. at 3 (bold font and underlining omitted). We do not know what to make of these statements. We cannot tell what "Claim 2" refers to because the complaint did not delineate the claims by number. The complaint merely set forth the statutes Ash alleged were violated, *see* Aplt. App. at 11, and the district court identified his claims by reference to those statutory provisions. Moreover, Ash's appellate brief offers no factual background or legal authority from which we might discern which claim or issue his statements are intended to address.[4] At bottom, these and similar statements in Ash's

[4] Ash attempts to incorporate what he says is the factual background for his claims by reference to a district court pleading. But this is not an acceptable appellate practice because it circumvents the page limitations for appellate briefs and

brief are undeveloped and untethered to the district court's reasons for dismissal, and we decline to consider them further. *See Nixon*, 784 F.3d at 1369; *Garrett*, 425 F.3d at 841.

Turning to page 5 of Ash's brief, he quotes a footnote from the district court's discussion of his § 1985 claims. *See* Aplt. Br. at 5 (quoting Aplt. App. at 342 n.3). This might signal he intended to challenge the district court's dismissal of those claims, but again, he provides no argument or authority explaining whether the district court erred in dismissing those claims based on sovereign immunity. Instead, without explanation, he questions FAA policies and practices regarding discrimination and the "solicitation of extremist activity," Aplt. Br. at 5, and then quotes the Fourteenth Amendment. Again, these undeveloped statements do not address the district court's rationale for dismissing his § 1985 claims, and they are inadequate to invoke our appellate review. *See Nixon*, 784 F.3d at 1369; *Garrett*, 425 F.3d at 841.

Next, on pages 6 and 7 of his appellate brief, Ash references the FECA and argues that the Department of Justice "has jurisdiction over a FECA Felony." Aplt. Br. at 6. But the district court did not address whether the Department of Justice has jurisdiction over FECA claims. The district court determined it lacked jurisdiction to consider a claim covered by FECA. To the extent Ash intended to challenge that ruling, his argument is unavailing. *See* 5 U.S.C. § 8145 ("The Secretary of Labor shall administer, and decide all questions arising under, [FECA]."); *Tippetts*, 308 F.3d at 1094 ("If a claim is covered by the FECA, the court is without jurisdiction to consider its merits.").

---

complicates our judicial responsibilities. *See Gaines-Tabb v. ICI Explosives, USA, Inc.*, 160 F.3d 613, 623-24 (10th Cir. 1998).

Finally, pages 9 and 10 of Ash's brief cite several regulatory provisions that ostensibly set forth the exhaustion requirements for bringing Title VII, Rehabilitation Act, and ADEA claims. Once again, however, Ash fails to develop any argument explaining how these regulatory provisions indicate the district court erred in concluding that he did not exhaust his administrative remedies. Ash does not even mention the district court's decision, let alone tell us how the district court's reasoning was flawed. And it is not our role to craft arguments on his behalf. *See Garrett*, 425 F.3d at 841. By failing to put forth any developed argument challenging the district court's exhaustion analysis, Ash has waived appellate review of that analysis. *See Nixon*, 784 F.3d at 1369; *Garrett*, 425 F.3d at 841.[5]

III

Accordingly, the district court's judgment is affirmed.

Entered for the Court

Timothy M. Tymkovich
Circuit Judge

[5] Ash references additional regulatory and statutory provisions in his brief, as well as other legal authorities, but none are accompanied by adequately developed legal arguments relevant to the district court's disposition. We have not expressly discussed each and every issue and statement contained in Ash's brief, but we have considered them and conclude they are insufficiently developed for purposes of invoking appellate review. *See Nixon*, 784 F.3d at 1369; *Garrett*, 425 F.3d at 841.