FILED
United States Court of Appeals
Tenth Circuit

October 25, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JANICE BARROW,

Plaintiff - Appellant,

v.

KANSAS STATE UNIVERSITY; JACQUELINE D. SPEARS; CHARLES TABER; RICHARD B. MYERS,

Defendants - Appellees.

No. 22-3266
(D.C. No. 2:21-CV-02569-JWB-GEB)
(D. Kan.)

ORDER AND JUDGMENT*

Before **HARTZ**, **MORITZ**, and **ROSSMAN**, Circuit Judges.

Janice Barrow appeals the dismissal of her federal age-discrimination claims against Kansas State University (KSU), her procedural-due-process claim against several KSU employees in their official and individual capacities, and her state-law claims. We affirm the district court's order in full. Barrow's federal age-discrimination claims against KSU fail because KSU has not waived its sovereign immunity. And Barrow's complaint fails to allege constitutionally inadequate process, dooming her procedural-due-process claim. Last, the district court did not

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. But it may be cited for its persuasive value. *See* Fed. R. App. P. 32.1(a); 10th Cir. R. 32.1(A).

abuse its discretion by refusing to reconsider its ruling dismissing Barrow's state claims without prejudice, rather than remanding such claims to state court.

Background[1]

Barrow was employed as a tenured professor at KSU beginning in 2015. On November 8, 2019, she emailed her supervisor, Janice Spears, stating that she planned to retire before the next academic year:

> As guided by policy, I am letting you know that I plan to retire before the next academic year (2020–2021), which is a year earlier than originally planned. My sister's passing this year gave me pause[,] and I revisited my priorities. A completed copy of the PER-37 NOTIFICATION OF RETIREMENT form for your signature is to be dispatched, also as guided.

App. 12.

Nevertheless, Barrow alleges that she "did not intend the sending of such an email to be an official notification of retirement." *Id.* at 13. Instead, she "understood that . . . KSU's policies required her to submit a PER-37 form and/or an official

[1] We take these facts from Barrow's complaint, accepting them as true and viewing them in a light most favorable to Barrow. *See Waller v. City & Cnty. of Denver*, 932 F.3d 1277, 1282 (10th Cir. 2019). We additionally consider, as the district court did, facts taken from certain undisputedly authentic documents that are mentioned in and central to the complaint and that defendants attached to their dismissal motions. *See Alvarado v. KOB-TV, L.L.C.*, 493 F.3d 1210, 1215–16 (10th Cir. 2007) (explaining that "court may consider documents referred to in the complaint if the documents are central to the plaintiff's claim and the parties do not dispute the documents' authenticity" (quoting *Jacobsen v. Deseret Book Co.*, 287 F.3d 936, 941 (10th Cir. 2002))). Barrow makes a conclusory suggestion that the district court erred by considering facts outside the pleadings. But because her cursory mention of this issue is inadequately briefed, we decline to consider it. *See Verlo v. Martinez*, 820 F.3d 1113, 1127 (10th Cir. 2016) ("A party's offhand reference to an issue . . . , without citation to legal authority or reasoned argument, is insufficient to present the issue for our consideration.").

notification and official date of retirement in order to officially retire." *Id.* Barrow alleges that Spears confirmed this understanding by responding, in part, that she would be "on the lookout for [the] PER-37" form. *Id.* That said, however, KSU's retirement policy indicates that employees seeking to retire must "notify their department/unit head of their impending retirement *either* by letter *or* through the completion of the [PER-37 form]." *Id.* at 150 (emphasis added).

Later in November, Spears asked Barrow about the status of her PER-37 form, and Barrow responded that she was "looking towards retiring sometime in August 2020[] but [was] still working on the details" and might not have the form until January. *Id.* at 13. In early December, Spears replied again to Barrow's November 8 email, writing that she "formally accept[ed] [Barrow's] plan to retire before the 2020–2021 academic year." *Id.* at 154. Spears further acknowledged that Barrow was "still working with . . . advisors in determining the exact date of retirement" and asked Barrow to provide her "exact" retirement date by email. *Id.* Barrow responded that she "was considering August 22, 2020[,] as a possible retirement date." *Id.* at 14.

But in April 2020, after receiving an email canceling KSU's annual retirement ceremony because of the COVID-19 pandemic, Barrow "stat[ed] that she had not officially confirmed a retirement date" and that, to the contrary, she planned to continue working. *Id.* Spears emailed Barrow on April 21, expressing confusion "and asking [Barrow] to supply her retirement date." *Id.* In response, Barrow repeated "that she had not submitted the final request confirming the retirement date" and "that she wanted to keep working." *Id.*

In May, Spears wrote Barrow an email, telling her "that [her] retirement had been accepted" and asking her "to confirm her retirement date would be August 8, 2020." *Id.* Barrow responded "that her actual notice to retire would be on a PER-37" form and "that she was currently considering August *2021* as a possible retirement date." *Id.* at 15 (emphasis added). In reply, Spears said that she was "not interested in prolonging this exchange" and "emphatically insisted that [Barrow] must retire in August 2020." *Id.* At some point during these May exchanges, Barrow complained that Spears was forcing her to retire because of her age.

In June, Barrow stated in an email that she was "not voluntarily retiring in August 2020" and "was not subject to dismissal under . . . KSU's policies related to tenure." *Id.* at 16. She further noted "that if she were being involuntarily dismissed, she was entitled to written notification, hearing, [and] review, . . . none of which had occurred." *Id.* Spears nevertheless conveyed Barrow's retirement date to various parties as August 22, 2020.

Ten days before that date, Barrow submitted an administrative appeal to Charles Taber, KSU's provost, "in accordance with Appendix G of the University Handbook, regarding, generally, forced retirement." *Id.* at 18. Because Barrow's administrative appeal included allegations of age discrimination, Taber sent it to the Office of Institutional Equality for review under what the parties refer to as the PPM 3010 process. *Id.* Barrow asked to have her complaint heard "under . . . KSU's procedures regarding tenure and termination" in Appendix G, as well. *Id.* But Taber wrote that he had "been advised by [g]eneral [c]ounsel that the PPM 3010 process

takes precedence over Appendix G process." *Id.* Barrow involuntarily retired effective August 22, 2020.

Barrow later filed this action in state court, bringing discrimination and retaliation claims against KSU under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 to 634, and the Kansas Age Discrimination in Employment Act (KADEA), Kan. Stat. Ann. §§ 44-1111 to 44-1121.[2] She also asserted a procedural-due-process claim seeking (1) prospective injunctive relief under *Ex parte Young*, 209 U.S. 123 (1908), against Spears, Taber, and KSU's president in their official capacities; and (2) damages under 42 U.S.C. § 1983 against Spears and Taber in their individual capacities. Taber removed the case to federal court, and the other defendants consented to removal. All defendants then moved to dismiss.

The district court granted those motions, concluding that KSU was entitled to sovereign immunity and that Barrow failed to state a procedural due-process claim because her complaint showed that she received adequate notice and process; it also determined that Spears and Taber were entitled to qualified immunity on the individual-capacity due-process claim due to the absence of clearly established law. The district court then declined to exercise supplemental jurisdiction over Barrow's state age-discrimination claims and dismissed them without prejudice. It later denied

[2] She did so after filing age-discrimination charges against KSU with the Equal Employment Opportunity Commission and the Kansas Human Rights Commission. The former issued Barrow a right-to-sue letter, and the latter found no probable cause.

Barrow's timely motion to alter or amend the judgment, rejecting Barrow's request to remand the state claims rather than dismissing them without prejudice.

Barrow now appeals.

Analysis

Barrow challenges the district court's rulings dismissing her ADEA claims and her procedural-due-process claim, as well as its dismissal without prejudice of her state age-discrimination claims. We take each challenge in turn.

I. ADEA Claims Against KSU

Barrow contends that the district court erred in determining that KSU was entitled to sovereign immunity.[3] Our review is de novo. *See Mojsilovic v. Oklahoma ex rel. Bd. of Regents for Univ. of Okla.*, 841 F.3d 1129, 1131 (10th Cir. 2016). States enjoy traditional sovereign immunity from liability that is broader than their Eleventh Amendment immunity from suits brought in federal court. *See Alden v. Maine*, 527 U.S. 706, 713 (1999). Such traditional immunity "is a fundamental aspect of the sovereignty [that] the [s]tates enjoyed before the ratification of the Constitution" and continue to "retain today." *Id.* Thus, as the district court held and as Barrow admits, it is not relevant or determinative here that KSU effectively waived its Eleventh Amendment immunity by consenting to removal to federal court. *See Trant v.*

[3] Barrow concedes that KSU is an arm of the state eligible to assert state sovereign immunity. *See Brennan v. Univ. of Kan.*, 451 F.2d 1287, 1290 (10th Cir. 1971) (explaining that "[t]he Kansas Supreme Court has long considered the state universities . . . as arms of the state" and holding that the University of Kansas could assert sovereign immunity).

Oklahoma, 754 F.3d 1158, 1173 (10th Cir. 2014) ("[W]e recognize that a state may waive its immunity from suit in a federal forum while retaining its immunity from liability.").

State law governs "the nature and scope of a state's immunity." *Id.* at 1172. In Kansas, state immunity may be relinquished in three ways: consent, application of *Ex parte Young*, or Congressional abrogation. *Schall v. Wichita State Univ.*, 7 P.3d 1144, 1154 (Kan. 2000). The parties agree that only consent is at issue here because Barrow does not invoke *Ex parte Young* as to her claims against KSU and the Supreme Court has rejected Congress's attempt to abrogate state sovereign immunity in the ADEA. *See Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 91–92 (2000).

The test for determining whether a state has consented to be sued and thereby waived its immunity "is a stringent one." *Sossamon v. Texas*, 563 U.S. 277, 284 (2011) (quoting *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675 (1999)). "Waiver may not be implied," and any waiver will be strictly construed in the sovereign's favor; for instance, "a [s]tate's consent to suit in its own courts is not a waiver of its immunity from suit in federal court," and a waiver "to other types of relief does not waive immunity to damages." *Id.* at 284–85; *see also Tyler v. U.S. Dep't of Educ. Rehab. Servs. Admin.*, 904 F.3d 1167, 1186 (10th Cir. 2018) (explaining that waiver of sovereign immunity requires "unequivocally expressed" consent (quoting *Sossamon*, 536 U.S. at 284)). As relevant here, "[i]n Kansas, the consent to suit or waiver of sovereign immunity must

be based on [s]tate action, meaning legislative enactments expressing the will of the elected officials." *Purvis v. Williams*, 73 P.3d 740, 749 (Kan. 2003).

Here, Barrow claims that Kansas waived its sovereign immunity for violations of the federal ADEA by passing the KADEA. But the KADEA, by its own terms, waives the state's immunity only for violations of the KADEA itself and does not mention the federal ADEA. *See* Kan. Stat. Ann. § 44-1112(d) (defining "employer" to "include[] the state and all political subdivisions of the state"); *id.* § 44-1113 (making "employer" liable for age discrimination). To overcome this hurdle, Barrow points to *State ex rel. Franklin v. City of Topeka*, 969 P.2d 852 (Kan. 1998). There, an employee of a state agency complained of racial discrimination in violation of a city ordinance. *Id.* at 854. Refusing to cooperate in the city's investigation, the state agency sought a declaratory judgment in state court that the city could not enforce its employment-discrimination ordinance against the state. *Id.* The Kansas Supreme Court sided with the city. *Id.* at 859. In so doing, the Kansas Supreme Court concluded that the state had waived its sovereign immunity because: (1) the Kansas Tort Claims Act (KTCA), §§ 75-6101 to 75-6120, makes the state liable for wrongful acts "under the laws of this state," Kan. Stat. Ann. § 75-6103(a); and (2) the Kansas Act Against Discrimination (KAAD), Kan. Stat. Ann. §§ 44-1001 to 44-1013, is a state law that "makes employment discrimination a wrongful act"; so (3) a state agency's "violation of the legislatively created duty to refrain from discriminatory employment practices is actionable under the KAAD and the [KTCA]." *Franklin*, 969 P.2d at 856–57.

The district court found *Franklin* "easily distinguishable" because it held only that the "'waiver of sovereign immunity from *state law claims* found in the [KTCA] also waived immunity from parallel claims in *municipal* ordinances (i.e., ordinances passed by a subdivision of the *state*).'" App. 242 (quoting *id.* at 228). Challenging this conclusion, Barrow first faults the district court for "ignor[ing] *Franklin*'s clear language finding separate waivers of sovereign immunity in the KAAD as well as the K[TC]A." Aplt. Br. 20. But although the lower court in *Franklin* had "construed the KAAD as waiving the [s]tate's immunity in cases of employment discrimination generally," 969 P.2d at 856, the Kansas Supreme Court never endorsed or affirmed that specific holding. Instead, it affirmed based on the lower court's "alternative or additional reasoning" that the KTCA waived sovereign immunity. *Id.* So *Franklin*'s sovereign-immunity holding turns solely on the KTCA.

Next, Barrow disputes the importance of the municipality aspect of *Franklin*, pointing out that the KTCA's plain language includes "specific definitions" for the terms *state* and *municipality* that "do not overlap." Aplt. Br. 21. Thus, she contends, the KTCA's waiver of sovereign immunity for violations of "the laws of this state" does not incorporate municipal ordinances. § 75-6103(a). But Barrow's reading merely suggests that *Franklin* stretched the KTCA's waiver beyond its plain language to incorporate municipal antidiscrimination ordinances. And even assuming that is true, Barrow's interpretation does not encompass the exceedingly broad holding she proposes: "that by having enacted state non[]discrimination laws that

make itself liable for employment discrimination, Kansas has waived sovereign immunity from other non[]discrimination laws." Aplt. Br. 18.

In sum, Barrow's challenge to KSU's sovereign immunity does not succeed. A waiver of sovereign immunity "must be unequivocally expressed." *Tyler*, 904 F.3d at 1186 (quoting *Sossamon*, 536 U.S. at 284). And the process by which Barrow argues for waiver in this case is anything but unequivocal. The KADEA plainly waives state sovereign immunity only for claims brought under that statute and says nothing about claims brought under federal law. *See* §§ 44-1112(d), 1113. And nothing in *Franklin* supports "Barrow's actual argument: that the KADEA functions as an express waiver of sovereign immunity for claims of age discrimination." Rep. Br. 19; *see also Sossamon*, 563 U.S. at 284–85 (explaining that state's consent to one type of suit does not create consent to different kind of suit). Moreover, there is nothing unusual about being unable to bring federal ADEA claims against a state—the Supreme Court has expressly acknowledged that even though the federal ADEA did not waive state sovereign immunity from claims arising under ADEA, such a conclusion was not "the end of the line for employees who find themselves subject to age discrimination at the hands of their state employers" because "[s]tate employees are protected by state age[-]discrimination statutes." *Kimel*, 528 U.S. at 91. We therefore affirm the district court's sovereign-immunity ruling.[4]

[4] We accordingly do not reach KSU's alternative argument for affirming based on the absence of an adverse employment action.

II. Procedural-Due-Process Claim

Barrow next challenges the district court's ruling that she failed to state a claim for violation of her procedural-due-process rights. Our review is de novo. *See Waller*, 932 F.3d at 1282.

Recall that Barrow's procedural-due-process claim takes two forms: (1) an official-capacity claim under *Ex parte Young* seeking an injunction directing Spears, Taber, and KSU's president to reinstate Barrow's employment; and (2) an individual-capacity claim under § 1983 seeking damages against Spears and Taber. Both theories require Barrow to plausibly allege a violation of her procedural-due-process rights. *See Levy v. Kan. Dep't of Social & Rehab. Servs.*, 789 F.3d 1164, 1169 (10th Cir. 2015) (explaining that to prevail on official-capacity claim seeking prospective relief, plaintiff must allege ongoing constitutional violation); *Cillo v. City of Greenwood Vill.*, 739 F.3d 451, 459–60 (10th Cir. 2013) (explaining that although § 1983 permits "an injured person to seek damages against an individual who has violated his or her federal rights while acting under color of state law," including "violations that occur in the context of public employment," plaintiff faced with qualified-immunity motion to dismiss must plausibly allege constitutional violation).

To determine whether Barrow has plausibly pleaded a violation of her procedural-due-process rights, we engage in a "familiar 'two-step inquiry.'" *M.A.K. Invest. Grp., LLC v. City of Glendale*, 897 F.3d 1303, 1308 (10th Cir. 2018) (quoting *Pater v. City of Casper*, 646 F.3d 1290, 1293 (10th Cir. 2011)). The first step asks whether Barrow has a constitutionally protected property interest. *Id.* We will

assume, like the district court did, that Barrow had a protected property interest in her tenured faculty position. *See Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 576–77 (1972) (noting that public college professor with tenure had property interest in continued employment safeguarded by due process).

At the second step, we consider whether Barrow was "afforded the appropriate level of process." *M.A.K. Invst. Grp.*, 897 F.3d at 1308 (quoting *Pater*, 646 F.3d at 1293). Tenured public employees like Barrow are "entitled to oral or written notice of the charges against [them], an explanation of the employer's evidence, and an opportunity to present [their] side of the story" prior to termination. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985). This pretermination process is "'something less' than a full evidentiary hearing," which is appropriate so long as state law provides an opportunity for a full post-termination hearing. *Id.* at 545 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 343 (1976)); *see also id.* at 546 (explaining that constitutionality of limited pretermination process "rests in part on the provisions in [state] law for a full post-termination hearing").

Here, there is no dispute about notice. The district court determined that, based on the allegations in the complaint, Barrow "received notice that her planned retirement was being effectuated as early as April 2020," and Barrow does not challenge that conclusion on appeal. App. 245. But she does challenge whether she received adequate process; her complaint alleges deprivation of process, without distinguishing between pre- or post-termination. The district court concluded that her complaint showed she received pretermination process through the PPM 3010

procedure and that full post-termination process was available through the Kansas Judicial Review Act (KJRA), Kan. Stat. Ann. §§ 77-601 to 77-631.

As to pretermination process, Barrow contends that being pushed into the PPM 3010 process for discrimination complaints rather than proceeding through the Appendix G process for general tenure grievances both (1) "precluded her from making other arguments" related to retirement and tenure protections and (2) held her "to a higher standard, in that [KSU] was required to not only find a violation of its policies, but also to find discrimination." Aplt. Br. 27–28. Barrow's complaint, however, does not allege any such inadequacies in the PPM 3010 process—in fact, it says nothing about the PPM 3010 process at all. Instead, her complaint suggests only that she was denied Appendix G process. But the constitution does not guarantee a tenured public employee a particular type of pretermination process or the right to choose between various forms of process. *See Loudermill*, 470 U.S. at 545 (explaining "that '[t]he formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings'" (quoting *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971))). Instead, it guarantees "notice and an opportunity to respond," *id.* at 546, which can be satisfied by various kinds of informal pretermination process, *see, e.g.*, *Hulen v. Yates*, 322 F.3d 1229, 1247–48 (10th Cir. 2003) (finding sufficient pretermination process where professor "was able to meet with the decisionmaker twice, lodged repeated written complaints, and engaged the services of an attorney in an attempt to avoid [an unwanted lateral] transfer"). So here, although Barrow's

complaint alleges a denial of Appendix G process, it does *not* allege that the PPM 3010 process was inadequate or that she was prevented from presenting her version of events. We therefore agree with the district court that Barrow fails to allege constitutionally inadequate pretermination process.

As to post-termination process, the KJRA creates a procedural right "to judicial review of final agency action." Kan. Stat. Ann. § 77-607(a); *see also Gaskill v. Fort Hays State Univ.*, 70 P.3d 693, 694 (Kan. Ct. App. 2003) (noting that KJRA provides remedy for tenured professors asserting wrongful termination). But Barrow contends that the KJRA provides insufficient post-termination process because she would not have been able to appeal a final order from the Appendix G process she never received; instead, she could have only appealed the final order from the PPM 3010 process. As an initial matter, KSU correctly points out that Barrow forfeited this argument by failing to make it below and waived it on appeal by failing to argue for plain error. *See Richison v. Ernest Grp. Inc.*, 634 F.3d 1123, 1128, 1130–31 (10th Cir. 2011). And even if we were to overlook Barrow's waiver and exercise our discretion to consider her argument, it fails on its merits. Plaintiffs proceeding under the KJRA are "entitled to judicial review of final agency action, *whether or not the person has sought judicial review of any related nonfinal agency action*." § 77-607(a) (emphasis added). So the KJRA provided Barrow with the opportunity to seek judicial review in state court of both the outcome of the PPM 3010 process *and* the "related nonfinal agency action" of being forced into the PPM 3010 process and denied the Appendix G process. *Id.* Additionally, the KJRA empowers state courts to

"grant necessary ancillary relief to redress the effects of official action wrongfully taken or withheld," such as ordering KSU to provide Barrow with Appendix G process. Kan. Stat. Ann. § 77-622(c). The KJRA thus provides the required full post-termination hearing, and nothing in Barrow's complaint alleges otherwise.[5]

In sum, because Barrow fails to allege constitutionally inadequate process, she fails to state either an official-capacity or individual-capacity procedural-due-process claim.[6] We accordingly affirm the district court's dismissal of those claims.

[5] The district court held that the post-termination KJRA process could satisfy constitutional due-process on its own, even if no pretermination process was provided. KSU argues the same on appeal. But both the district court and KSU rely on inapposite cases. *See Hudson v. Palmer*, 468 U.S. 517, 533 (1984) (discussing negligent and intentional property deprivations occurring in prisons); *Myers v. Koopman*, 738 F.3d 1190, 1193 (10th Cir. 2013) (noting that post-deprivation process is sufficient "[i]f a state actor's harmful conduct is unauthorized and thus could not be anticipated pre[]deprivation"). These cases represent "special" applications of procedural-due-process principles to "unusual" situations in which a state is not in a position to provide pretermination process. *Zinermon v. Burch*, 494 U.S. 113, 128–30 (1990). In the employment context, by contrast, we have expressly held that "[p]ost-termination remedies, no matter how elaborate, do not relieve the employer of providing the minimal pre[]termination procedural protections noted in *Loudermill*." *Montgomery v. City of Ardmore*, 365 F.3d 926, 937 (10th Cir. 2004). So we do not endorse the district court's post-termination holding, and we reject KSU's argument that post-termination process alone would be sufficient to satisfy due process in this context.

[6] Given this conclusion, we need not reach the district court's determination, echoed by KSU on appeal, that Barrow's individual-capacity claim fails for lack of clearly established law. Nor do we consider KSU's alternative appellate arguments that Barrow lacked a protected property interest and, as to the individual-capacity claim, failed to allege that Spears and Taber "had responsibility for providing the process to which Barrow claims she was entitled." Aplee. Br. 50.

III. State Age-Discrimination Claims

Barrow argues that the district court erred in dismissing her state age-discrimination claims without prejudice rather than remanding them to state court—a ruling that appears in the district court's order denying Barrow's motion to alter or amend. Our review is for abuse of discretion. *See Pueblo of Jemez v. United States*, 63 F.4th 881, 889 (10th Cir. 2023) (noting abuse-of-discretion review for orders on motions to alter or amend); *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 357 (1988) (noting district court's discretion to decide between remand and dismissal).

"When all federal claims have been dismissed, the court may, and usually should, decline to exercise jurisdiction over any remaining state claims." *Koch v. City of Del City*, 660 F.3d 1228, 1248 (10th Cir. 2011) (quoting *Smith v. City of Enid ex rel. Enid City Comm'n*, 149 F.3d 1151, 1156 (10th Cir. 1998)); *see also* 28 U.S.C. § 1367(c)(3) (noting that "district courts may decline to exercise supplemental jurisdiction over a claim . . . if . . . the district court has dismissed all claims over which it has original jurisdiction"). Upon declining supplemental jurisdiction over state-law claims in a case that was removed to federal court, a district court can either dismiss the state-law claims without prejudice or remand them to state court. *See Carnegie-Mellon*, 484 U.S. at 357; *Barnett v. Hall, Estill, Hardwick, Gable, Golden & Nelson, P.C.*, 956 F.3d 1228, 1238 (10th Cir. 2020). The most typical "response to a pretrial disposition of federal claims has been to dismiss the state[-]law claim or claims without prejudice," *Roe v. Cheyenne Mountain Conf. Resort, Inc.*, 124 F.3d 1221, 1237 (10th Cir. 1997) (quoting *Ball v. Renner*, 54 F.3d 664, 669 (10th Cir.

1995)), but remand can be appropriate in certain circumstances, such as "when the state claims raise novel issues of state law," *Barnett*, 956 F.3d at 1238.

Here, Barrow accepts the district court's decision to decline supplemental jurisdiction but challenges its choice to dismiss without prejudice rather than remand. Yet her opening brief ignores the procedural context in which she raised this issue: she did not urge remand until her motion to alter or amend. Among the grounds warranting such a motion are an intervening change in law, new evidence previously unavailable, or a "need to correct clear error or prevent manifest injustice."[7] *Servants of the Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000). Relying on this high standard, the district court reasoned that because "[a] survey of Tenth Circuit case[]law demonstrates that a district court may decide whether it is appropriate to remand or dismiss state law claims," Barrow had not identified any mistake or provided a reason justifying remand. App. 286.

Barrow does not argue that the district court abused its discretion in concluding that she failed to meet the alter-or-amend standards. Instead, she argues

[7] To the extent that Barrow's motion also invoked relief from judgment under Federal Rule of Civil Procedure 60(b)(6), that standard is similarly high. *See Kile v. United States*, 915 F.3d 682, 687 (10th Cir. 2019) ("[A] district court may grant a Rule 60(b)(6) motion 'only in extraordinary circumstances and only when necessary to accomplish justice.'" (quoting *Cashner v. Freedom Stores, Inc.*, 98 F.3d 572, 579 (10th Cir. 1996))). And to the extent that she invoked Rule 60(a)—permitting correction of clerical errors, oversights, or omissions—that provision does not apply to Barrow's argument that the district court legally erred or abused its discretion. *See McNickle v. Bankers Life & Cas. Co.*, 888 F.2d 678, 682 (10th Cir. 1989) ("A Rule 60(a) motion may not be used to . . . call into question the substantive correctness of the judgment rather than remedy a clerical error or omission.")).

for the first time in her reply brief that dismissal rather than remand will "impose additional burdens on [her] in the form of filing fees, reissu[ing] service of process, and the need to draft a new state[-]court petition." Rep. Br. 26. From a preservation perspective, this argument comes far too late—Barrow did not raise it below, either in her response to the motions to dismiss or in her motion to alter or amend the judgment, and she did not make it in her opening brief. *See Reedy v. Werholtz*, 660 F.3d 1270, 1274 (10th Cir. 2011) (explaining "that a party waives issues and arguments raised for the first time in a reply brief" (quoting *M.D. Mark, Inc. v. Kerr-McGee Corp.*, 565 F.3d 753, 768 n.7 (10th Cir. 2009))); *Richison*, 634 F.3d at 1128, 1130–31.

Even if we were to overlook Barrow's waiver, her prejudice argument fails to establish an abuse of discretion. To be sure, the Supreme Court has noted that the concern about the time and money required to refile in state court, "taken alone, provides good reason to grant federal courts wide discretion to remand cases involving pendent claims when the exercise of pendent jurisdiction over such cases would be inappropriate." *Carnegie-Mellon*, 484 U.S. at 353. But importantly, *Carnegie-Mellon* did not say that this cost concern was a reason that courts *must* or even *should* remand—it merely said that the cost concern was a reason to give district courts discretion to decide. *Id.* So Barrow's belated time-and-money argument does not establish that the district court abused its discretion, particularly given that she never made this argument to the district court. And Barrow does not argue any other kind of significant prejudice; for instance, she does not assert that the

statute of limitations to refile in state court has run. *Cf. id.* at 351–52 ("[R]emand generally will be preferable to a dismissal when the statute of limitations on the plaintiff's state-law claims has expired before the federal court has determined that it should relinquish jurisdiction over the case."). We accordingly affirm the district court's refusal to reconsider its nonprejudicial dismissal of Barrow's state-law claims.

Conclusion

We affirm the dismissal of Barrow's claims. KSU is entitled to sovereign immunity from federal age-discrimination claims, and nothing in Kansas law waives that immunity. Next, because Barrow's complaint does not allege constitutionally inadequate process, she fails to state a procedural-due-process claim. Last, the district court did not abuse its discretion in refusing to alter or amend its ruling dismissing Barrow's remaining state-law claims without prejudice.

Entered for the Court

Nancy L. Moritz
Circuit Judge