FILED
United States Court of Appeals
Tenth Circuit

July 20, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ANA MARIA RAVINES DE SCHUR,

Plaintiff - Appellant,

v.

EASTER SEALS GOODWILL NORTHERN ROCKY MOUNTAIN, INC.,

Defendant - Appellee.

No. 22-4055
(D.C. No. 2:22-CV-00228-DBB)
(D. Utah)

ORDER AND JUDGMENT*

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

Plaintiff Ana Maria Ravines de Schur filed a complaint pro se against Easter Seals Goodwill Northern Rocky Mountain, Inc. ("Easter Seals") in the U.S. District Court for the District of Utah. The district court found that Plaintiff asserts a claim under 8 U.S.C. § 1324b, which prohibits unfair immigration-related employment practices. The district court held that it lacked jurisdiction over her § 1324b claim

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

** After examining the brief 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.

and that her complaint otherwise fails to state a plausible claim for relief. We agree that Plaintiff's § 1324b claim fails, but this does not implicate the district court's jurisdiction. Accordingly, we vacate the district court's dismissal of Plaintiff's complaint and remand with instructions to dismiss Plaintiff's complaint on the merits with prejudice.

I.

Ravines de Schur alleges that she is a refugee who applied for a job with Easter Seals. She claims that she provided Easter Seals with proper documentation that demonstrates employability under federal law—a valid photo ID and a social security card. She alleges that Easter Seals demanded additional documentation to prove her employability—her refugee travel document, her German passport, a copy of her political asylum decision, and statements from third parties such as the Provo City Housing Authority. Plaintiff further alleges that she filed charges that administratively made it to the U.S. Department of Justice's Office of the Chief Administrative Hearing Officer ("OCAHO") on the basis that the demands for these additional documents were illegal. She was dissatisfied with the procedures in that administrative action, so she brought her claim to the district court instead.

Ravines de Schur's complaint did not clearly state a particular statute under which the claim was made. However, the magistrate judge found that "Ravines de Schur appears to assert a claim under 8 U.S.C. § 1324b, which prohibits discrimination in hiring based on national origin or citizenship status" and "bars employers from requesting more or different documents than those required by

federal law to show work authorization." R.O.A. at 15 (citing 8 U.S.C. § 1324b(a)(1), (6)). The magistrate judge concluded that the district court lacked jurisdiction over Ravines de Schur's claim because the statute does not contain any provision allowing a plaintiff to file an action in a federal district court except an action to enforce an administrative order. The magistrate judge ordered Ravines de Schur to file an amended complaint correcting the deficiencies in her original complaint. She failed to amend her complaint, and the magistrate judge recommended that the district judge dismiss the complaint without prejudice pursuant to 28 U.S.C. § 1915(e)(2) because she failed to state a claim for which relief can be granted.

Ravines de Schur timely filed objections pursuant to 28 U.S.C. § 636(b)(1) and Federal Rule of Civil Procedure 72. But the district court concluded that she only restated many of the allegations made in her complaint, including many allegations against parties not named as defendants. The district court overruled Ravines de Schur's objections and held her claims to be frivolous. The district court adopted the magistrate judge's Report and Recommendation and dismissed this action without prejudice.

II.

"Like dismissals under Rule 12(b)(6), we review de novo a district court's sua sponte dismissal pursuant to 28 U.S.C. § 1915(e)(2) in an *in forma pauperis* proceeding." *Vasquez Arroyo v. Starks*, 589 F.3d 1091, 1094 (10th Cir. 2009) (some emphasis omitted) (citing *Perkins v. Kan. Dep't of Corr.*, 165 F.3d 803, 806

(10th Cir. 1999)). In an *in forma pauperis* proceeding, "the court shall dismiss the case [sua sponte] at any time if the court determines that . . . (B) the action or appeal . . . (ii) fails to state a claim on which relief may be granted." 28 U.S.C. § 1915(e)(2)(B)(ii). "Dismissal of a pro se complaint for failure to state a claim is proper only where it is obvious that the plaintiff cannot prevail on the facts [s]he has alleged and [where] it would be futile to give h[er] an opportunity to amend." *Kay v. Bemis*, 500 F.3d 1214, 1217 (10th Cir. 2007) (quoting *Curley v. Perry*, 246 F.3d 1278, 1281 (10th Cir. 2001)).

"We apply the same standard of review for dismissals under § 1915(e)(2)(B)(ii) that we employ for Federal Rule of Civil Procedure 12(b)(6) motions to dismiss for failure to state a claim." *Id.* (citing *Mitchell v. Farcass*, 112 F.3d 1483, 1490 (11th Cir. 1997)). Therefore, the Supreme Court's standard from *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), applies. "To survive a Rule 12(b)(6) motion to dismiss, a complaint must allege facts that, if true, 'state a claim to relief that is plausible on its face.'" *Clinton v. Sec. Benefit Life Ins. Co.*, 63 F.4th 1264, 1274 (10th Cir. 2023) (quoting *Iqbal*, 556 U.S. at 678 (quoting *Bell Atl. Corp.*, 550 U.S. at 570)).

"Because [Ravines de Schur] is pro se, we liberally construe h[er] filings[;] but we will not act as h[er] advocate." *James v. Wadas*, 724 F.3d 1312, 1315 (10th Cir. 2013) (citing *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005)). While we will "construe [her] complaint broadly, [she] still has 'the burden of alleging sufficient facts on which a recognized legal claim could be based.'"

Jenkins v. Currier, 514 F.3d 1030, 1032 (10th Cir. 2008) (quoting *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991)). We "will not supply additional factual allegations to round out a plaintiff's complaint or construct a legal theory on a plaintiff's behalf." *Whitney v. New Mexico*, 113 F.3d 1170, 1173–74 (10th Cir. 1997) (citing *Hall*, 935 F.2d at 1110). Even construing the complaint liberally, Plaintiff fails to state a claim upon which relief can be granted.

The district court concluded that the only claim against the defendant that Ravines de Schur appeared to assert was under 8 U.S.C. § 1324b, which governs unfair immigration-related employment practices. We agree. Based on the record, Ravines de Schur's only claim is that Easter Seals allegedly demanded immigration-related paperwork beyond that required for employment by federal law. The district court also acknowledged that Ravines de Schur alleges wrongdoing by various other entities who are not parties to this case. But these allegations against nonparties are irrelevant. We agree with the district court that these allegations fail to state a plausible claim for relief against Easter Seals, the only defendant. Therefore, the § 1324b claim appears to be the only legal claim that Ravines de Schur asserts in this case; and she does not dispute on appeal that this is the applicable statute.

8 U.S.C. § 1324b(b)–(g) requires that all unfair immigration-related employment claims be brought through administrative proceedings in the first instance. The statute provides that "any person alleging that the person is adversely affected directly by an unfair immigration-related employment practice . . . may file a

charge respecting such practice or violation with the Special Counsel."[1] *Id.* § 1324b(b)(1). "The Special Counsel shall investigate each charge received and . . . determine whether or not there is reasonable cause to believe that the charge is true and whether or not to bring a complaint with respect to the charge before an administrative law judge." *Id.* § 1324b(d)(1). If the Special Counsel has not filed a complaint before an administrative law judge within 120 days, "the Special Counsel shall notify the person making the charge of the determination not to file such a complaint during such period[;] and the person making the charge may . . . file a complaint directly before such a judge within 90 days after the date of receipt of the notice." *Id.* § 1324b(d)(2).

This is the exclusive method of addressing a violation under this statute. Indeed, except for narrow exceptions not applicable here, for a private party's suit against a private party based on an alleged underlying statutory violation, the Supreme Court's decision in *Alexander v. Sandoval*, 532 U.S. 275 (2001), governs and requires a private right of action in the statute's text to enable such a suit.[2]

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[1] The Special Counsel is defined in the statute as the "Special Counsel for Immigration-Related Unfair Employment Practices." 8 U.S.C. § 1324b(c)(1).

[2] One such exception in suits against private parties exists with certain suits under the Alien Tort Statute because the Supreme Court held the statute's jurisdictional grant to imply a private cause of action under the law of nations. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 714, 724 (2004). Another such exception is private suits under the Securities Exchange Act of 1934 because the Supreme Court has similarly implied a private cause of action in this area. *See Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 171, 173 (1994). In some scenarios involving suits against federal or state officials, *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), *Ex parte Young*, 209 U.S.

In *Sandoval*, the Court made clear that "[l]ike substantive federal law itself, private rights of action to enforce federal law must be created by Congress." *Id.* at 286 (citing *Touche Ross & Co. v. Redington*, 442 U.S. 560, 578 (1979)). "The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right *but also a private remedy*." *Id.* (emphasis added) (citing *Transamerica Mortg. Advisors, Inc. v. Lewis*, 444 U.S. 11, 15 (1979)). "Statutory intent on this latter point is determinative." *Id.* (citing *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1102 (1991); *Merrell Dow Pharms. Inc. v. Thompson*, 478 U.S. 804, 812 & n.9 (1986)). "Without [statutory intent], a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter[] or how compatible with the statute." *Id.* at 286–87 (citing *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 145, 148 (1985); *Transamerica Mortg. Advisors, Inc.*, 444 U.S. at 23; *Touche Ross & Co.*, 442 U.S. 575–76).

Moreover, as the Supreme Court has recently made clear, "Congress expresses its intentions through statutory text passed by both Houses and signed by the President (or passed over a Presidential veto)." *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2496 (2022). As the Supreme "Court has repeatedly stated, the text of a law controls over purported legislative intentions unmoored from any statutory

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123 (1908), or 42 U.S.C. § 1983 could provide a cause of action. However, again this case law is inapposite to the present suit.

text." *Id.* We "may not 'replace the actual text with speculation as to Congress'[s] intent.'" *Id.* (quoting *Magwood v. Patterson*, 561 U.S. 320, 334 (2010)).

Therefore, the statute's text must clearly create a private cause of action for an individual to bring such a suit. Because 8 U.S.C. § 1324b lacks a private right of action within the statutory text, a private suit against a private party cannot be brought in a federal district court even though the district court has been granted general federal question jurisdiction under 28 U.S.C. § 1331. Thus, in every § 1324b case, the process requires adjudication in the agency.

The party can seek review of a final order of the agency in the appropriate federal circuit court with jurisdiction over the area in which the violation is alleged to have occurred. *See* 8 U.S.C. § 1324b(i). Additionally, a federal district court has jurisdiction under 8 U.S.C. § 1324b(j) to enforce an administrative law judge's order under this statute. But the statute does not allow a party to file an original, non-enforcement action in a district court. Thus, the district court was correct to dismiss Ravines de Schur's § 1324b claim because her complaint cannot plausibly state a claim upon which relief can be granted without a valid private right of action.

However, the district court wrongly concluded that this implicated its jurisdiction. "The question whether a cause of action exists is not a question of jurisdiction." *Burks v. Lasker*, 441 U.S. 471, 476 n.5 (1979) (citing *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429, U.S. 274, 279 (1977); *Bell v. Hood*, 327 U.S. 678, 682 (1946)). This is statutory interpretation, which is a merits concern.

Moreover, the district court wrongly found this claim to be frivolous. "A claim is frivolous if it has no arguable basis in law or fact." *Frey v. Town of Jackson*, 41 F.4th 1223, 1242 (10th Cir. 2022) (citing *Neitzke v. Williams*, 490 U.S. 319, 325 (1989)). Neither the Supreme Court nor any circuit court has previously directly addressed this issue. Therefore, although the claim clearly fails after analyzing whether a private right of action exists, we do not find it to be frivolous. As a result, the court's subject matter jurisdiction is not implicated based on frivolousness either. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998) ("Dismissal for lack of subject-matter jurisdiction because of the inadequacy of the federal claim is proper only when the claim is 'so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy.'" (quoting *Oneida Indian Nation of N.Y. v. Cnty. of Oneida*, 414 U.S. 661, 666 (1974)) (citing *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 359 (1959))).

Furthermore, it would be futile to give Plaintiff an opportunity to amend her complaint. She cannot state a claim with a private right of action in a district court under any set of circumstances. Further, she was given an opportunity below to amend to state a private cause of action and failed to do so. Thus, a dismissal under 28 U.S.C. § 1915(e)(2)(B)(ii) is appropriate. *See Kay*, 500 F.3d at 1217. Consequently, because Plaintiff loses on the merits—not jurisdictional grounds—and amendment would be futile, the complaint should be dismissed *with* prejudice. *See Brereton v. Bountiful City Corp.*, 434 F.3d 1213, 1219 (10th Cir. 2006) (citing

Curley, 246 F.3d at 1281–82) (noting that "[w]here a complaint fails to state a claim, and no amendment could cure the defect, a dismissal sua sponte may be appropriate," and that "[i]f such a dismissal operates on the merits of the complaint, it will also ordinarily be entered with prejudice" (citing *Curley*, 246 F.3d at 1281–82)).

Ravines de Schur could have continued through the entirety of the administrative action; and if she were dissatisfied with the agency's final order on her § 1324b claim, she could have appealed the agency's final order to this Court. But she did not do so, instead filing suit in the district court. Accordingly, the district court correctly dismissed Ravines de Schur's complaint containing her 8 U.S.C. § 1324b claim—her only claim with a defendant before the court. But as discussed above, the district court should not have deemed this to be a jurisdictional defect. Rather, Plaintiff fails on the merits.

III.

For the foregoing reasons, we VACATE the district court's frivolousness finding and jurisdiction-based dismissal and REMAND the case with instructions to the district court to enter a dismissal with prejudice.

Entered for the Court

Allison H. Eid
Circuit Judge