UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-3200
Summary Calendar

BARBARA A. FENELON,

Plaintiff-Appellant,

versus

HEDY DUPLESSIS, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
For the Eastern District of Louisiana
(CA 91 810 H c/w 91 1011 H,
91-1012 & 91-1159 H)

(June 29, 1993)

Before POLITZ, Chief Judge, DAVIS and JONES, Circuit Judges.

POLITZ, Chief Judge:[*]

Barbara Fenelon appeals dismissal of multiple asserted claims arising out of her former employment with the U.S. Postal Service. Finding no error, we affirm.

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[*]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Background

Fenelon filed four lawsuits complaining of her treatment by the U.S.P.S.[1] One concerned the handling of her administrative complaints of discrimination, another concerned an accident in which she was physically removed from the post office, a third addressed events leading up to her final termination and the fourth alleged retaliation for prior charges of discrimination. The suits asserted various tort and constitutional claims, as well as claims under 5 U.S.C. § 552a(g), 42 U.S.C. § 2000e-16, and 42 U.S.C. § 1983. Fenelon named various USPS officers and employees as defendants but did not name the Postmaster General or the Postal Service itself. All four complaints sought monetary relief; none sought reinstatement. The district court consolidated and then dismissed the four actions. This appeal followed.

Analysis

In dismissing Fenelon's tort claims, the district court held that they could not be prosecuted under the Federal Tort Claims Act. Fenelon complains that she did not want to sue under the FTCA. Prevailing law, however, gives her no choice. As the Supreme Court explained in **United States v. Smith**, Congress amended the FTCA in 1988 to make it "the exclusive remedy for torts committed by Government employees in the scope of their

[1] Two suits were filed in state court and removed by the government.

employment."[2] 28 U.S.C. § 2679(b)(1) provides:

> The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim . . . .

Fenelon next contends that the individual defendants were not acting in the scope of their employment at the time of the conduct of which she complains. That objection is defeated by the Attorney General's certification that they were. As we explained in **Carlson v. Mitchell**, one purpose of the 1988 amendment to the FTCA was "to give the new certification procedure conclusive effect on the issue of whether the employee acted within the scope of employment."[3]

Similarly futile is Fenelon's objection to the district court's substitution of the United States as the sole defendant in the tort claims, for 28 U.S.C. § 2679(d)(1) provides that upon certification, the action "shall be deemed an action against the United States [under the FTCA] and the United States shall be substituted as the party defendant."[4]

Fenelon may not succeed with her intentional tort claims

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[2] 499 U.S. 160, 111 S.Ct. 1180, 113 L.Ed.2d 134, 142-43 (1991).

[3] 896 F.2d 128, 131 (5th Cir. 1990); see also **Smith**.

[4] See also **Smith**.

because they are not actionable under the FTCA.[5] She argues, however, that her claims should not have been dismissed because they are cognizable under state law. Fenelon obviously fails to understand that special rules apply when the alleged culprit is a federal employee. As the Supreme Court recognized in **Smith**, the FTCA sometimes may leave an injured party without a remedy.

The district court dismissed Fenelon's remaining tort claims for lack of subject matter jurisdiction because she did not exhaust administrative remedies under the FTCA.[6] Fenelon contends that she filed an administrative claim on January 28, 1991. Each of her lawsuits, however, was filed less than six months after the filing of the administrative claim[7] and without a final agency disposition. Fenelon has failed to comply with the requirements of 28 U.S.C. § 2675.

The FTCA does not preclude monetary remedies against individual federal employees or officers for claims brought under the federal constitution.[8] Fenelon's constitutional claims are foreclosed, however, by Supreme Court precedent. In **Bush v.**

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[5] 28 U.S.C. § 2680(h).

[6] See **McAfee v. Fifth Circuit Judges**, 884 F.2d 221 (5th Cir. 1989), cert. denied, 493 U.S. 1083 (1990).

[7] The lawsuits were filed on January 22, January 31, February 27, and March 26, 1991, respectively.

[8] 28 U.S.C. § 2679(b)(2).

Lucas,[9] the Supreme Court refused to create a cause of action for federal employees seeking monetary damages from the government for constitutional violations, declining to disturb the balance between employee rights and government efficiency struck by Congress in fashioning a civil service remedy. We likewise refused to create a constitutional cause of action for a terminated Postal Service employee in **Broussard v. U.S. Postal Service**.[10] Dismissal of Fenelon's constitutional claims was proper.

Remaining are those claims arising under federal statutes. Like constitutional claims, they are not precluded by the FTCA.[11] Fenelon's section 1983 claims, nonetheless, were properly dismissed because the actions of which she complains were not undertaken "under color of state law." Further, 42 U.S.C. § 2000e-16 provides the exclusive remedy for discrimination in federal employment.[12] The fatal defect in Fenelon's Title VII claim is that she failed to name the proper defendant: the Postmaster General.[13] Fenelon's Privacy Act claim, 5 U.S.C. § 552a(g), likewise fails because she

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[9] 462 U.S. 367, 103 S.Ct. 2404, 76 L.Ed.2d 648 (1983).

[10] 674 F.2d 1103 (5th Cir. 1982).

[11] 28 U.S.C. 2679(b)(2).

[12] **Brown v. General Services Admin.**, 425 U.S. 820, 96 S.Ct. 1961, 48 L.Ed.2d 402 (1976).

[13] **Lamb v. U.S. Postal Service**, 852 F.2d 845 (5th Cir. 1988).

did not name the appropriate defendant: the U.S. Postal Service itself.[14]

AFFIRMED.

[14] **Connelly v. Comptroller of the Currency**, 876 F.2d 1209 (5th Cir. 1989).