UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 92-3934

AUGUSTIN R. GUITART,

Plaintiff-Appellant,

VERSUS

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana
CA 92 1161 D

August 19, 1993

Before REAVLEY, DUHÉ and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

A former employee of the Federal Deposit Insurance Corporation (FDIC) sued the federal government after he was asked to resign his position. The district court granted the Appellee's motion to dismiss, concluding that it lacked subject matter jurisdiction. We affirm.

I.

In January 1990, Augustin Guitart (Guitart) received a temporary limited appointment with the FDIC as a Minority Contract

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[1] 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Specialist in the agency's Baton Rouge office.[2] After repeatedly voicing his dissatisfaction over the implementation of programs to spur minority involvement in the RTC, Guitart allegedly was asked to resign.[3] Appellant sought no administrative remedy that might have led to his reinstatement.[4] He sued the United States under the Federal Tort Claims Act, 28 U.S.C. § 2671 et seq., alleging that the negligent acts and omissions of FDIC employees, while acting within the scope of their employment with the RTC, caused him various damages.[5]

The district court, relying on McAuliffe v. Rice, 966 F.2d 979 (5th Cir. 1992), granted the Appellee's motion to dismiss for lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). The court concluded that Appellant was unable to pursue his claims using the procedural vehicle of the FTCA; as a temporary employee

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[2] The Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. 101-73, 103 Stat. 364 (codified as amended at 12 U.S.C. § 1441a et seq.), established the Resolution Trust Corporation (RTC) to deal with the nation's savings and loan crisis. 12 U.S.C. § 1441a(b) (1989). The RTC, by statute, has no employees of its own; its staff is comprised of FDIC employees "on loan" to the RTC. Id. at § 1441a(b)(8)(B)(i). We will refer to the Appellant as an employee of the FDIC or the FDIC/RTC.

[3] Because this case was dismissed for lack of subject matter jurisdiction, we accept all factual allegations in the Appellant's complaint as true. Alffada v. Fenn, 935 F.2d 475, 478 (2nd Cir.), cert. denied, 112 S.Ct. 638 (1991); Paterson v. Weinberger, 644 F.2d 521, 523 (5th Cir. 1981).

[4] Guitart did provide notice of his FTCA claim to the FDIC's Board of Directors. R. 64-74. This notice requested monetary damages only.

[5] In his complaint, Appellant alleges that the Appellee's employees violated the federal constitution, federal statutory laws (namely failure to carry out their missions under FIRREA), the Louisiana constitution, and state laws.

of the FDIC, Guitart finds his exclusive remedy for employment-related wrongs in the Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 94-454, 92 Stat. 1119 (codified as amended at 5 U.S.C. § 1101 et seq.).

II.

The question before us is whether Appellant can use the FTCA to seek redress for his employment-related claims, which are founded on both federal and state law. Appellant concedes that he has no remedy under the CSRA. He argues that the two Supreme Court cases on CSRA preemption, United States v. Fausto[6] and Bush v. Lucas,[7] have been modified by subsequent legislative enactments. Consequently, Guitart maintains that he is not restricted to the CSRA as sole remedy for his employment-related dispute. The Government counters that Guitart is restricted to the remedies of the CSRA, but that the CSRA affords him no remedy because of the nature of his FDIC employment.[8] Consequently, the Appellee concludes that Guitart is an employee "at-will" and cannot obtain judicial review of his termination.

III.

The CSRA "'comprehensively overhauled the civil service system,' ... creating an elaborate 'new framework for evaluating

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[6] 484 U.S. 439 (1988).

[7] 462 U.S. 367 (1983).

[8] In the bureaucracy-speak of the civil service, Guitart was a term-limited, nonpreference eligible employee in the excepted service who had not completed any probationary period. See 5 U.S.C. § 7511(a) (Supp. 1993); accord Castro v. United States, 775 F.2d 399, 407 n.8 (1st Cir. 1985).

adverse personnel actions against federal employees.'" United States v. Fausto, 484 U.S. 439, 443 (1988) (quoting Lindahl v. OPM, 470 U.S. 768, 773-74 (1985)). The reach of the CSRA's preemptive framework was discussed in Fausto and Bush v. Lucas, supra. The Court in Fausto held that the CSRA's framework precluded a federal employee from pursuing the statutory remedy of the Back Pay Act, 5 U.S.C. § 5596. Fausto, 484 U.S. at 454. In Bush, the Court concluded that the CSRA foreclosed a federal employee from pursuing a First Amendment claim against his former supervisor. 462 U.S. at 389-90.

This court in Rollins v. Marsh, 937 F.2d 134 (5th Cir. 1991), addressed the ability of a federal employee to pursue state-law claims: "Every circuit facing this issue has concluded that the remedies provided by the CSRA preempt state-law remedies for adverse personnel actions. We follow and find that the Rollinses' state-law claims are preempted by the CSRA." Id. at 140 (citing Saul v. United States, 928 F.2d 829, 840-43 (9th Cir. 1991); Berrios v. Department of the Army, 884 F.2d 28, 31-33 (1st Cir. 1989); Broughton v. Courtney, 861 F.2d 639, 641-44 (11th Cir. 1988)). Following Rollins, we conclude that Appellant's state-law claims were properly dismissed.

In McAuliffe v. Rice, 966 F.2d 979 (5th Cir. 1992), we held that a former civilian employee of the Air Force could not obtain judicial review of the decision to terminate her employment. Id. at 981. Reasoning that "it was never the intent of Congress that NAFI employees be entitled to the same level of employment

protection as other federal employees," id. at 980, the McAuliffe court rejected the petitioner's argument that Fausto does not bar judicial review for employees "specifically excluded from the panoply of procedures under CSRA[.]" Id. at 981.

McAuliffe is determinative in this case. Here, the Appellant was a federal employee who was asked to resign from his job. All of his claims stem from his employment relationship with the FDIC/RTC, and were animated in large measure over his disapproval of the implementation of minority and women's outreach programs. The policy decision to exclude FDIC/RTC employees, such as Guitart, from the reach of the CSRA has been made by Congress, and it would be inconsistent with our place in the constitutional scheme to engraft a nonstatutory remedy onto the comprehensive framework of the CSRA. Fausto, 484 U.S. at 449-50; McAuliffe, 966 F.2d at 980.

Guitart is unable to use the procedural vehicle of the FTCA because of the exclusivity of the CSRA's provisions.[9] This is the case regardless of whether the Appellant loads the FTCA vehicle with constitutional claims,[10] claims premised on violations of federal statutes,[11] or state law claims.[12]

IV.

In an effort to overcome the preclusive effects of the CSRA,

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[9] See Rollins, 937 F.2d at 139; Rivera v. United States, 924 F.2d 948, 951 (9th Cir. 1991); Premachadra v. United States, 739 F.2d 392, 394 (8th Cir. 1984).

[10] Bush v. Lucas, 462 U.S. 367, 389-90 (1983).

[11] United States v. Fausto, 484 U.S. 439, 454 (1988).

[12] Rollins v. Marsh, 937 F.2d 134, 139 (5th Cir. 1991).

Guitart argues that judicial review of an employment-related dispute is proper under certain circumstances. First, Appellant contends that the Federal Employees Liability and Tort Reform Compensation Act (FELTRA)[13] evinces Congressional intent to provide a remedy for constitutional violations by federal employees, citing 28 U.S.C. § 2679(b). This may be true when a federal employee is being sued by someone other than a fellow federal employee, albeit a former federal employee. To read the act as the Appellant suggests would ignore the CSRA's established monopoly as the remedy for federal employment-related disputes, and would be at odds with Fausto, Bush, and McAuliffe.

Appellant next urges that Webster v. Doe, 486 U.S. 592 (1988), enables a federal employee who has no administrative remedy to obtain judicial review of his constitutional claims. Webster involved a former CIA employee who was challenging the authority of the CIA Director to terminate employment of "any officer or employee of the Agency whenever he shall deem such termination necessary" for national security. 50 U.S.C. § 403(c), quoted in Webster, 486 U.S. at 594. The Court stated that judicial review of constitutional claims is the norm, and "where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear." Webster, 486 U.S. at 603.

The Court's decision in Bush v. Lucas, supra, spoke to the question of Congressional intent regarding the CSRA's impact on

[13] Pub. L. No. 100-694, 102 Stat. 4564 (1988) (codified as amended 28 U.S.C. § 2679 (Supp. 1993)).

judicial review of constitutional claims stemming from employment-related disputes. The Bush Court "assume[d] for the purposes of decision that petitioner's First Amendment rights were violated by the adverse personnel action." Bush, 462 U.S. at 372. Nevertheless, the Court concluded that the CSRA's elaborate and comprehensive framework, "constructed step by step, with careful attention to conflicting policy considerations," should not be "augmented by the creation of a new judicial remedy for the constitutional violation at issue." Id. at 388.[14]

V.

The courts have given wide-berth to the preclusive effects of the CSRA on the availability of judicial review. Hence, we arrive at this seemingly anomalous result: Because he is a federal employee, the Appellant's sole remedy for his employment-related claims is the CSRA. Due to his employment status, however, Appellant is excluded from pursuing his claims under the CSRA. Due to the exclusivity of the CSRA, judicial review is ousted, even when no other remedy is available.[15]

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[14] In Bush, unlike the case at bar, the federal employee did have a remedy under the CSRA's predecessor which he attempted to augment with a nonstatutory claim. Bush, 462 U.S. at 388-90. This is a distinction without a difference in the present case, however. Our decision in McAuliffe makes it clear "that the CSRA furnishes the exclusive set of remedies available to federal employees of all types." McAuliffe, 966 F.2d at 981. This is the case even where, as here, the CSRA provides the employee no remedy. Id.

[15] We note that Appellant is not without any recourse to the courts. FIRREA contains a "whistleblower" protection provision, 12 U.S.C. § 1441a(q). Appellant has apparently asserted a claim under this statute in a separate proceeding.

For the foregoing reasons, the judgment of the district court is AFFIRMED.