IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-2532
Summary Calendar

MARGARITO ROCHA

Plaintiff-Appellant,

v.

TEXAS ALCOHOLIC BEVERAGE COMMISSION, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas
(CA-H-92-1562)

(October 14, 1994)

Before KING, JOLLY, and DeMOSS, Circuit Judges.

PER CURIAM:[*]

Appellant Margarito Rocha ("Rocha") appeals from the district court's dismissal of his lawsuit against the Texas Alcoholic Beverage Commission ("TABC"), W.S. McBeath, and C.T. Davis on the grounds of res judicata. We affirm the judgment of the district court.

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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 Pursuant to that Rule, the court has determined that this opinion should not be published.

I. BACKGROUND

Rocha was employed by the TABC as an agent in its Enforcement Division from February 1982 until his termination on May 23, 1990. At the time of his termination, Rocha was on disciplinary probation stemming from a prior violation of TABC rules. On May 4, 1990, District Supervisor C.T. Davis sent Rocha written notification that Rocha was under investigation for five alleged violations of TABC rules. After the investigation, Davis recommended that Rocha be discharged, and the recommendation was approved by TABC Administrator W.S. McBeath. Rocha appealed this decision to the TABC grievance committee, and a hearing was granted on June 28, 1990. Later that same day, by a majority recommendation, the committee upheld Rocha's dismissal.

In August 1991, Rocha filed suit in federal district court pursuant to 42 U.S.C. § 1983, alleging violations of the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment. The defendants (TABC, Davis, and McBeath) filed a Motion to Dismiss, asserting Eleventh Amendment and qualified immunity defenses. Rocha did not respond to the motion. On February 13, 1992, the district court granted the Motion to Dismiss, noting only that "[i]t is hereby ORDERED, ADJUDGED, and DECREED that Defendants' Motion to Dismiss . . . is hereby GRANTED."

Approximately eight days later, Rocha filed a Motion to Reconsider, asserting only his due process claim. After noting that Rocha's motion "refers solely to his claim for deprivation of

due process," the district court denied the Motion to Reconsider, concluding that Rocha "failed to establish the existence of a property interest in his employment,"[1] and that Rocha "failed to allege facts to support a claim for violation of his due process rights."[2] We affirmed this ruling, emphasizing the at-will nature of Rocha's employment, and holding that "[a]bsent such property interest in his continued employment, appellant has no basis for a claim under 42 U.S.C. § 1983 for deprivations of rights,

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[1] The district court made the following observations:

> Plaintiff's federal constitutional claim depends on his having had a property right in continued employment.
> . . . .
> The plaintiff in this case, however, has failed to identify the source of any property interest in his employment. Under Texas law, absent an express contractual provision, employees are employed at will. Plaintiff has alleged no basis upon which the term of his employment could be found to be anything other than at will; therefore, he has failed to establish the existence of a property interest in his employment.

(citations omitted).

[2] As the district court noted:

> In the present case, Plaintiff's complaint and attached exhibits reveal that he was served with written notice of the formal complaints against him and advised that an investigation was being initiated; that Plaintiff submitted a written response to these complaints; that the investigation was completed and a recommendation was made that Plaintiff be terminated; and that Plaintiff was afforded post-termination due process when he pursued his rights under the Texas Alcoholic Beverage Commission's grievance procedures and received a full hearing on the charges against him. Thus, under the standards enunciated by the Supreme Court in Loudermill, Plaintiff was indeed afforded due process even though he lacked a property interest in his employment.

privileges, and immunities under the due process and equal protection clauses of the Fourteenth Amendment."

On May 22, 1992, prior to the district court's denial of Rocha's Motion to Reconsider, Rocha filed another lawsuit in federal district court, again asserting due process and equal protection claims under 42 U.S.C. § 1983, and again naming TABC, Davis, and McBeath as Defendants.[3] In the complaint, Rocha admitted that the lawsuit was "similar" to the prior action and that the lawsuit was only being filed to prevent the expiration of any applicable limitations period. The Defendants responded with a Motion to Dismiss, again asserting the Eleventh Amendment and qualified immunity defenses, along with the additional defense of res judicata. In order to avoid the res judicata defense, Rocha stated that "[t]his proceeding includes a few additional claims that were not pleaded in [the prior] [c]ause," but the district court granted the Defendants' motion on res judicata grounds.[4] Rocha appeals from this ruling.

II. STANDARD OF REVIEW

Federal law determines the res judicata effect of a prior federal court judgment. See Russell v. SunAmerica Sec., Inc., 962 F.2d 1169, 1172 (5th Cir. 1992). As a question of law, we review

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[3] The only noticeable difference in the complaint of the second lawsuit was that Rocha alleged a loss of liberty under 42 U.S.C. § 1983 and the Fourteenth Amendment.

[4] Alternatively, the district court noted that even if the imposition of res judicata was improper, the court would still dismiss the lawsuit "for the same reasons" set forth in the denial of the Motion to Reconsider in the first action.

the district court's res judicata determination on a *de novo* basis. See Sockwell v. Phelps, 20 F.3d 187, 190-91 (5th Cir. 1994).

III. ANALYSIS AND DISCUSSION

Rocha's brief repeats many of the facts and arguments that were presented in his initial complaint. Through various generalized assertions, he appears to contend that the district court erred in its res judicata determination.

Under res judicata, a final judgment on the merits of an action "precludes the parties or their privies from relitigating issues that were or could have been raised in that action." Allen v. McCurry, 449 U.S. 90, 94 (1980) (emphasis added). From a policy perspective, the Supreme Court has noted that res judicata "relieve[s] parties of the cost and vexation of multiple lawsuits, conserve[s] judicial resources, and, by preventing inconsistent decisions, encourage[s] reliance on adjudication." Id. Moreover, the res judicata consequences of a final judgment on the merits are not altered "by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case." Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 398 (1981). An incorrect judgment can be corrected only on direct review -- not by bringing another action upon the same facts. See id.

In this circuit, application of res judicata is proper only if the following four requirements are met:

> (1) the parties must be identical in the two suits; (2) the prior judgment must have been rendered by a court of competent jurisdiction; (3) there must be a final

> judgment on the merits; and (4) the same cause of action must be involved in both cases.

Russell, 962 F.2d at 1172; see In re Howe, 913 F.2d 1138, 1143-44 (5th Cir. 1990).

In the present case, Rocha's lawsuit meets all four of these requirements. First, the parties are identical in the two lawsuits. The TABC, C.T. Davis, and W.S. McBeath were named as Defendants in both the first and the second actions, with no other parties added or deleted. Second, the district court had proper jurisdiction over Rocha's lawsuit; thus, it was a court of "competent jurisdiction."

The third and fourth requirements warrant some additional discussion. Under the third requirement, there is no doubt that there was a "final judgment on the merits" in Rocha's first lawsuit. Despite Rocha's contention that "the original suit was dismissed without prejudice," nothing in the district court's initial dismissal of Rocha's lawsuit indicates that this was the case. See Graves v. Hampton, 1 F.3d 315, 318 (5th Cir. 1993) ("[T]he general rule is that a dismissal is with prejudice unless otherwise specified . . . . ") (emphasis added); Fed. R. Civ. P. 41(b) ("Unless the court in its order for dismissal otherwise specifies, a dismissal . . . operates as an adjudication upon the merits."). Indeed, considering that the Defendants' Motion to Dismiss contained only § 1983, Eleventh Amendment, and qualified immunity defenses, the district court presumably evaluated these

defenses and granted the Motion on one of these grounds.[5] Aside from the initial order of dismissal, however, the final judgment on the merits was also reaffirmed when the district court evaluated and rejected Rocha's due process argument in the Motion to Reconsider. Moreover, the final judgment was again reaffirmed when this court agreed with the district court's order of dismissal, noting that Rocha had no basis for his § 1983 claims of due process and equal protection violations. In short, despite Rocha's contentions, a final judgment on the merits was rendered in his first lawsuit.

In response to the fourth requirement, Rocha asserts that his second lawsuit "includes a few additional claims" that were not pleaded in his first lawsuit. Unfortunately, this argument is also unavailing for Rocha. The Fifth Circuit has adopted the "transactional test" in determining whether two suits involve the same claim for res judicata purposes. See In re Howe, 913 F.2d at 1144. Under this approach, "the critical issue is not the relief requested or the theory asserted, but whether plaintiff bases the two actions on the same nucleus of operative facts." Id. Simply put, "[a] party may not avoid the preclusive effect of res judicata by asserting a new theory or a different remedy. The nucleus of facts defines the claim rather than the legal theory posed or recovery sought." Id. at 1144 n.10 (emphasis added). Finally, as mentioned, res judicata "`bars all claims that were or could have

[5] As mentioned, the district court's order of dismissal did not state any specific grounds for its ruling.

been advanced in support of the cause of action on the occasion of its former adjudication, . . . not merely those that were adjudicated.'" Id. at 1144 (quoting Nilsen v. City of Moss Point, 701 F.2d 556, 560 (5th Cir. 1983) (en banc)).

Given these parameters, Rocha's second lawsuit clearly involves the same actions, as the various claims stem from precisely the same nucleus of facts. In the second lawsuit, Rocha again alleges his due process and equal protection claims, although he adds a claim for a "loss of liberty."[6] Nevertheless, all of these claims stem from the circumstances and events surrounding his termination, including the procedures used during the termination process. With the same nucleus of operative facts, Rocha's loss of liberty claim, as well as any other claim stemming from his termination, could have been advanced in the first lawsuit.[7] Thus,

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[6] Moreover, in his brief, Rocha seems to assert that he alleged a Title VII violation as well.

[7] In his brief, Rocha appears to contend that his Sixth Amendment rights have been violated because his first attorney failed to raise a Title VII claim in his initial complaint. As mentioned, a Title VII claim would have stemmed from the same nucleus of operative facts (the termination process); thus, at this point, it is barred by res judicata. Rocha may have a separate action against his attorney for failure to raise the Title VII claim or for other negligent actions, but his claim cannot be heard in this setting. Moreover, the Sixth Amendment right to effective assistance of counsel does not apply to civil litigation. See Sanchez v. United States Postal Serv., 785 F.2d 1236, 1237 (5th Cir. 1986). As we noted in Sanchez, "[s]ince no right to effective assistance of counsel exists, we need not consider the alleged errors committed by Sanchez' attorney. If Sanchez' attorney did mishandle the case, Sanchez may have a remedy against his attorney in the form of a malpractice suit." Id.

Rocha's assertion that he included a "few additional claims" in the second lawsuit does not avoid the res judicata defense.

IV. CONCLUSION

Because the four requirements for the application of res judicata have been satisfied,[8] the judgment of the district court dismissing Rocha's lawsuit against the TABC, W.S. McBeath, and C.T. Davis is AFFIRMED.

[8] Because we find that Rocha's lawsuit was properly dismissed on res judicata grounds, we do not reach the parties' contentions on due process, equal protection, at-will employment, the Eleventh Amendment, qualified immunity, and section 1983.