

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 93-7280
Summary Calendar

HENRY S. CARREON,

Plaintiff-Appellant,

VERSUS

ROBERT L. SIEGLER, ET AL.,

Defendant-Appellees.

Appeal from the United States District Court
for the Southern District of Texas
(CA-B91-090)

(December 17, 1993)

Before DAVIS, JONES AND DUHÉ, Circuit Judges.

PER CURIAM:¹

Henry S. Carreon appeals the district court's order dismissing his Federal Tort Claims Act (FTCA) suit for failure to state a claim upon which relief may be granted. We affirm.

I.

In November 1981, the plaintiff, Henry Carreon, was injured in an automobile accident in Mexico during the course and scope of his employment with the Animal and Plant Health Inspection Service (APHIS) of the United States Department of Agriculture (USDA).

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

After the accident, Carreon worked part-time until November 1982, when he was declared totally disabled and began receiving benefits under the Federal Employees Compensation Act (FECA). Also in November 1982, the USDA denied Carreon's claim under the Military Personnel and Civilian Employees' Claim Act of 1964 (MPCECA) for property damages resulting from the accident. Carreon resubmitted a MPCECA claim in 1990, which was also denied.

In 1986, Carreon requested that his compensation be paid in a lump-sum settlement pursuant to 5 U.S.C. § 8135. The Department of Labor (DOL) denied the request because it determined that such a settlement would not be in Carreon's best interest.

In May 1990, Carreon also filed a FTCA claim with APHIS seeking recovery for damages sustained in the 1981 accident. In a letter dated November 8, 1990, APHIS denied the claim and informed Carreon he had a right to file suit within six months if he was dissatisfied with the agency's determination.

On May 14, 1991, Carreon brought a FTCA suit against various federal employees, seeking punitive damages, reimbursement for moving and rental expenses incurred after the accident, and a lump-sum settlement of his FECA disability compensation. He alleges that APHIS and the USDA wrongly forced him to work in a light-duty status before he was awarded total disability benefits, that the USDA failed to assist Carreon and his family immediately after the accident, that the DOL wrongly delayed its approval of his disability benefits until November 1982, that DOL employees fraudulently misled him concerning his application for a lump-sum

settlement and illegally denied such a settlement, and that federal employees intentionally inflicted emotional distress upon Carreon and his family.

The defendants filed a motion to dismiss, claiming that the FTCA's waiver of sovereign immunity does not extend to any claim arising in a foreign country, that the plaintiff's FTCA claim was time-barred, and that the plaintiff's recovery of benefits under FECA precluded his FTCA claim.

Pursuant to the magistrate judge's report and recommendation, the district court dismissed the suit for failure to state a claim upon which relief could be granted. The magistrate judge found that the plaintiff's claim was time-barred because it was not presented to APHIS within two years after the claim accrued. The magistrate judge also determined that recovery under the FECA was the sole remedy available to Carreon. The district court further noted that it lacked jurisdiction to review the Secretary of Labor's decision concerning Carreon's FECA claim. Carreon appeals.

II.

A dismissal under Rule 12(b)(6) for failure to state a claim will be upheld when it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. **Haines v. Kerner**, 404 U.S. 519, 520-21, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972); **Cooper v. Sheriff, Lubbock County, Tex.**, 929 F.2d 1078, 1082 (5th Cir. 1991). The same standard of review applies to a review of a dismissal for lack of subject

matter jurisdiction. **Benton v. United States**, 960 F.2d 19, 21 (5th Cir. 1992).

To the extent that Carreon seeks to recover damages for his injuries from the accident, his suit is barred by the exclusive remedy provision of the FECA. Carreon requested and received compensation under the FECA for the injury he sustained in the 1981 accident. The FECA provides for the payment of compensation to employees of the United States who, subject to certain exceptions, are disabled in the performance of duty. 28 U.S.C. § 8102. Receiving compensation under FECA limits the employee's right to pursue certain other avenues for obtaining compensation:

The liability of the United States or an instrumentality thereof under this subchapter . . . with respect to the injury or death of an employee is exclusive and instead of all other liability of the United States or the instrumentality to the employee . . . entitled to recover damages from the United States or the instrumentality because of the injury or death in a direct judicial proceeding, in a civil action, or in admiralty, or by administrative or judicial proceeding under a workmen's compensation statute or under a Federal tort liability statute.

5 U.S.C. § 8116(c). Accordingly, Carreon is barred from recovering damages for injuries sustained in the accident because he has already been compensated under the FECA.

Carreon also asserts that he was mistreated prior to approval of his disability benefits in 1982. This claim is time-barred. Under 28 U.S.C. § 2401, "a tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate federal agency within two years after such claim accrues." The alleged acts and omissions of which Carreon

complaints occurred no later than 1982; Carreon filed this claim in 1990. Accordingly, Carreon's claims relating to the mishandling of his disability benefits are time-barred.

Carreon's assertion that the Secretary should not have denied his request for a lump settlement is not reviewable by this court. After an administrative review procedure, the Secretary's decision is final, and "not subject to review by another official of the United States or by a court by mandamus or otherwise." 5 U.S.C. § 8128(b); **see also Concordia v. United States Postal Service**, 581 F.2d 439, 443 (5th Cir. 1978). The district court therefore correctly noted that it was without jurisdiction to review that decision.

Moreover, Carreon's allegations that the defendants misled him and unreasonably delayed a decision on his application for a lump-sum settlement do not fall within the purview of the FTCA. **See** 28 U.S.C. § 2680(h) (barring suits based on allegations of misrepresentation or deceit). Additionally, as Carreon's allegations are based on discretionary acts or omissions of the various defendants in their official capacities, the claims are barred by the doctrine of sovereign immunity. **See Williamson v. U.S. Dept. of Agriculture**, 815 F.2d 368, 373-74, 376-78 (5th Cir. 1987).

Carreon's original brief to this court does not mention his claims of intentional infliction of emotional distress. That issue is addressed for the first time in his appellate reply brief. This court does not review arguments raised for the first time in a

reply brief. **N.L.R.B. v. Cal-Maine Farms, Inc.**, 998 F.2d 1336, 1342 (5th Cir. 1993).

Carreon also argues that the district court should not have entered an order of dismissal because the suit is "a race, age, Discrimination, reprisal, negligence and Civil Rights violations case." Carreon raised only the age discrimination claim in the district court. This court need not consider Carreon's allegations of race and civil rights violations because he did not present them to the district court. **See Russell v. SunAmerica Securities, Inc.**, 962 F.2d 1169, 1176 (5th Cir. 1992).

Carreon's age discrimination claim is actually an attack on the Secretary's refusal to approve a lump-settlement in lieu of monthly disability benefits. As previously discussed, the refusal to approve a lump-sum settlement was a discretionary decision of the Secretary that is not subject to judicial review. **See** 5 U.S.C. §§ 8135(a)(2)-(3), 8128(b).

AFFIRMED.