UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-10269
Summary Calendar

GREGORY D. ROWE,

Plaintiff-Appellant,

versus

TEXAS REHABILITATION COMMISSION,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Texas

(4:94-CV-130-K)

(September 29, 1994)

Before KING, JOLLY, and DeMOSS, Circuit Judges.

PER CURIAM:*

Gregory Rowe filed suit against the Texas Rehabilitation Commission ("TRC") in Texas state court alleging discrimination on the basis of a disability in violation of Section 504 of the Rehabilitation Act of 1973 and Title II of the American with

---

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

Disabilities Act of 1990. Thereafter, TRC removed the action to federal district court, invoking federal question jurisdiction.

The district court, sua sponte, issued an order dismissing the suit on res judicata grounds. Rowe, pro se and in forma pauperis, appeals from that order.

The earlier law suit was dismissed with prejudice following the district court's grant of summary judgment for TRC on Eleventh Amendment grounds.

Rowe concedes that he has previously filed the same cause of action against TRC, stating that this "case has been looked at by three judges and has been given three different cause numbers." This court reviews de novo a dismissal under the doctrine of res judicata. Schmueser v. Burkburnett Bank, 937 F.2d 1025, 1031 (5th Cir. 1991). The doctrine is applicable if: (1) the prior judgment was rendered by a court of competent jurisdiction; (2) there was a final judgment on the merits; (3) the parties, or those in privity with them, are identical in both suits; and (4) the same cause of action is involved in both suits. Nagle v. Lee, 807 F.2d 435, 439 (5th Cir. 1987). If these elements are established, the decree in the first case serves as an absolute bar to the subsequent action with respect to every theory of recovery presented and also as to every ground of recovery that might have been presented.

Here, it is undisputed that the prior judgment was rendered by a court of competent jurisdiction, the parties are identical in both suits, and the same cause of action is involved in both suits.

On appeal, Rowe contends that the evidence was never properly reviewed by a court and that the federal district court never ruled on his claims. As Rowe is pro se, this court must afford his brief a liberal construction. See Haines v. Kerner,404 U.S. 519, 520, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972). Liberally construed, Rowe argues that the court did not dismiss his claims on the merits for purposes of res judicata. TRC, on the other hand, contends that the earlier suit was dismissed on the merits.

The dismissal in the earlier case was designated "with prejudice," and "[a] dismissal which is designated 'with prejudice' is `normally an adjudication on the merits for the purposes of res judicata.'" Fernandez-Montes v. Allied Pilots Ass'n, 987 F.2d 278, 284 n.8 (5th Cir. 1993) (emphasis added). However, a dismissal with prejudice based on the Eleventh Amendment is not "on the merits" for res judicata purposes. Darlak v. Bobear, 814 F.2d 1055, 1064 (5th Cir. 1987). Nonetheless, the dismissal on Eleventh Amendment grounds "is res judicata . . . of the lack of a federal court's power to act." Id. (emphasis added). Thus, the district court did not err in dismissing the suit on res judicata grounds.

We affirm the district court's dismissal on res judicata grounds but modify the dismissal to a dismissal without prejudice to Rowe's refiling of his claims against a proper defendant in an appropriate forum.

AFFIRMED, as modified.[1]

[1]Rowe's motions to supplement the appellate record are denied as moot.