UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-30388
Summary Calendar

BARBARA FENELON,

Plaintiff-Appellant,

VERSUS

UNITED STATES POSTAL SERVICE, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
For the Eastern District of Louisiana

(CA-93-3969-L-D-1)

(December 14, 1994)

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

Per Curiam*:

Barbara A. Fenelon ("Fenelon") filed a "Complaint for Reprisal and Handicap Discrimination" under Title VII against the Postmaster, alleging discrimination by the New Orleans Postal Agency due to her mental handicap and reprisals due to her attempts

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

to seek relief for the alleged discrimination with the Equal Employment Opportunity Commission (EEOC). The district court dismissed on the basis of *res judicata*. We affirm.

PROCEEDINGS BELOW

The district court issued an order for Fenelon to show cause why her complaint should not be dismissed as duplicative of Civil Action 92-1741 "K"(2) and barred by *res judicata*, claim preclusion, and prescription. Fenelon responded that this suit was not duplicative but was filed for dissimilar acts of handicap discrimination and reprisal. She alleged that she filed this suit to obtain relief for discrimination charges which occurred on February 4, 1991, and February 27, 1991. She asserted that the "first material issue and basis of this suit deals with the fact of handicap discrimination" arising out of her EEOC complaint that Jenkins was "retaliative in his February 27, 1991 act of discharging plaintiff by falsely citing defying orders he never gave her, but also proof is his refusal to give consideration to plaintiff's handicap condition when he acted on February 27, 1991." She asserted that the second basis for this lawsuit, and the reason it is not duplicative of other causes of action, is that in addition to discrimination on the basis of handicap, "a reprisal took place on February 27, 1991." She asserted that she has incurred different types and dates of discrimination by different methods and management personnel, which makes this a different issue.

The magistrate judge recommended that Fenelon's complaint

should be dismissed with prejudice because it was barred by *res judicata*. The magistrate judge found that she raised the same claims of discrimination and reprisals in Civil Action 92-1741 "K"(2) and other suits. In her objections, Fenelon stated that she also sought to prove that reprisal acts were committed on March 15, 1991. She alleged that when she won her EEOC grievance on February 21, 1991, the agency retaliated against her by threatening the arbitrator. She also alleged that Bonnie Wallace's refusal to report correct information for her back pay was an act of reprisal which occurred on March 15. She argued that the act of discrimination on February 27, 1991, was not the only instance of discrimination which she intended to inform the court of, but that ongoing discriminations and reprisals occurred, climaxing in her dismissal on that date. She requested permission to amend her suit in order to "define" the "facts of reprisal" she intended to prove. She argued that this action is not duplicative of Civil Action 92-1741 "K"(2) because she did not raise the charges that the agency threatened the arbitrator or that Bonnie Wallace refused her back pay in that suit. She argued that she could not bring these claims before because she did not file her EEOC claim and did not receive a final agency decision until September 3, 1993. She also alleged that she did not have the legal training to know what could and should be brought together in one suit.

The district court adopted the magistrate judge's recommendation and dismissed her complaint with prejudice. The court held that this action was barred by *res judicata*, finding

that there was identity of the parties and causes of action. The court found that Fenelon's complaint alleged an act of discrimination on February 27, 1991, and that even if her complaint was read broadly to include an act on March 15, 1991, to deny back pay, the court found that her claim in Civil Action 92-1741"K"(2) for discrimination for failure to restore "all lost wages" was the same cause of action.

RES JUDICATA

On appeal, Fenelon argues that the district court erred in dismissing her complaint on the basis of *res judicata* because her reprisal action is based on issues that were never tried on the merits; it could not have been brought in an earlier suit; her evidence was not considered; and factual findings were not made.

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. *Id*.

Fenelon argues that the causes of action are not the same and

that there was not a final judgment on the merits. Civil Action 92-1741 "K"(2) was a final judgment on the merits. It was dismissed based on *res judicata*, claim preclusion, and prescription. Dismissal of an action based on limitations is a final decision on the merits. *Nilsen v. Moss Point, Miss.*, 701 F.2d 556, 562 (5th Cir. 1983) (en banc). Additionally, a dismissal on the basis of *res judicata* is also a final decision on the merits which has *res judicata* effect. 18 Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* § 4435 (Supp. 1994).

Fenelon also argues that the causes of action are not the same because she is suing for different instances of discrimination and reprisals. The principal test for comparing causes of action is whether the primary right and duty or wrong are the same in each action. *Nilsen*, 701 F.2d at 559. Here the primary wrong alleged is the same as that alleged in Civil Action 92-1741 "K"(2). Fenelon's complaint in that action contained allegations of discrimination based on handicap and reprisals. She alleged that the agency threatened the arbitrator and that all lost pay was not re-paid her (contrary to her assertions in her objections to the magistrate judge's report that the previous lawsuit did not contain such allegations).

While it is true that claims based on different alleged instances of discrimination may not have *res judicata* effect, see *Munoz v. Aldridge*, 894 F.2d 1489, 1495 (5th Cir. 1990), this does help Fenelon's case. *Res judicata* applies to bar "all claims that were or could have been advanced in support of the cause of action

on the occasion of its former adjudication." *Nilsen*, 701 F.2d at 560. All of the alleged instances of discrimination are "claims" in support of Fenelon's "cause of action" of handicap discrimination and reprisals. Fenelon was discharged on February 27, 1991. The latest date of an alleged act of discrimination was March 15, 1991, when her back pay was denied. All of the other alleged instances occurred in the time period leading up to and resulting in her dismissal on February 27, 1991. Fenelon could and should have raised all those claims in a single proceeding. Fenelon argues that she could not bring some of her claims because they were part of a later EEOC claim for which she did not receive a right to sue letter until September 3, 1993. She contends that she could not bring those claims before the EEOC until the investigation of her earlier claims was completed and she received her EEOC file, when she discovered that the defendants had concealed the scheme of retaliation. Whether her contention is true is irrelevant, because the substance of the allegations she made in this complaint are identical to the allegations in her complaint in Civil Action 92-1741 "K" (2). Although Fenelon requested permission to amend her suit in her objections to the magistrate judge's report in order to "define" the "facts of reprisal" that she intended to prove, she did not state what those facts were, and her request came too late. She does not "define" those "facts" in her appellate brief, and in fact, states that she "is not required to reveal" them.

Fenelon also complains that the district court did not hold a

hearing or make factual findings. Because the application of *res judicata* could be determined on the face of her complaint, a hearing and findings were not required.

Therefore, the district court's dismissal based on *res judicata* is AFFIRMED.

APPOINTED COUNSEL

Fenelon further complains that the district court should have appointed counsel, and she requests counsel on appeal. Title VII allows district courts to appoint counsel for Title VII plaintiffs upon request "in such circumstances as the court may deem just." 42 U.S.C. § 2000e-5(f)(1). There is no automatic right to appointed counsel. *Gonzales v. Carlin*, 907 F.2d 573, 579 (5th Cir. 1990). The decision whether to appoint counsel is within the discretion of the district court. *Id*. Factors to consider in deciding whether to appoint counsel include the merits of the plaintiff's claims of discrimination, the efforts of the plaintiff to obtain counsel, and the plaintiff's financial ability to retain counsel. *Id*. at 580. Because Fenelon's complaint was dismissed based on *res judicata*, counsel was not required in the district court, and is not required on appeal. Fenelon's request for appointment of counsel is therefore DENIED.

Fenelon's motions to "disallow" defendant's correspondence, for sanctions, to disqualify defendant's attorney, and to "disallow" defendant to file a brief or appear are DENIED.