

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

September 3, 2026

Lyle W. Cayce
Clerk

No. 23-10179

LEBENE KONAN,

Plaintiff—Appellant,

versus

UNITED STATES POSTAL SERVICE; RAYMOND ROJAS, *also known as*
RAY; JASON DRAKE; UNITED STATES OF AMERICA,

Defendants—Appellees.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:22-CV-139

ON REMAND FROM
THE SUPREME COURT OF THE UNITED STATES

Before WIENER, WILLETT, and DOUGLAS, *Circuit Judges.*

PER CURIAM:*

This appeal returns to us on remand from the Supreme Court, which vacated our prior judgment and held that the Federal Tort Claims Act’s (“FTCA”) postal exception, 28 U.S.C. § 2680(b), “covers suits against the

* This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

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United States for the intentional nondelivery of mail.” *U.S. Postal Serv. v. Konan*, 607 U.S. 391, 146 S. Ct. 736, 746 (2026). The Court remanded for further proceedings but expressly reserved two questions: “whether all of Konan’s claims are barred by the postal exception, or which arguments Konan adequately preserved.” *Id.* We now resolve both and AFFIRM the judgment of the district court as modified to reflect a dismissal without prejudice of Konan’s FTCA claims.

I

The facts, which we accept as true at this stage, are set out in our prior opinion, and in the Supreme Court’s opinion. Briefly, Lebene Konan alleges that United States Postal Service (“USPS”) mail carrier Raymond Rojas and Postmaster Jason Drake intentionally refused to deliver mail to two rental properties she owns in Euless, Texas, motivated by racial animus.

Konan brought state-law tort claims for nuisance, tortious interference with prospective business relations, conversion, and intentional infliction of emotional distress against the United States under the FTCA. She also brought equal protection claims against Rojas and Drake under 42 U.S.C. §§ 1981 and 1985. The district court dismissed every claim “with prejudice.” It ruled that the postal exception barred the FTCA claims because each arose from harms tied to the nondelivery of mail. And because Konan’s “FTCA claims fail for lack of subject-matter jurisdiction,” it found that “amendment would be futile.” The court then dismissed the §§ 1981 and 1985 claims because those statutes do not reach the individual defendants given the nature of their employment.

Our prior opinion reversed the dismissal of Konan’s FTCA claims and affirmed the dismissal of her §§ 1981 and 1985 claims. *Konan v. U.S. Postal Serv.*, 96 F.4th 799, 806 (5th Cir. 2024). We held that the postal exception does not reach intentional nondelivery and found that Konan’s

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damages arose from the USPS's intentional failure to carry mail to her properties. *Id.* at 803. The Supreme Court granted the Government's petition for certiorari, denied Konan's conditional cross-petition on the §§ 1981 and 1985 claims, and held that the postal exception covers the intentional nondelivery of mail. *Konan*, 146 S. Ct. at 741 n.*, 746. The Court vacated our judgment and remanded, reserving for us whether all of Konan's claims are barred and which arguments she preserved. *Id.* at 746.

II

At our direction, the parties filed supplemental letter briefing to address "any remaining issues in the case in light of the Supreme Court's opinion and remand." Konan's supplemental brief concedes that her "state law tort claims against the United States predicated on *respondeat superior* are barred under § 2680(b)," and we agree. *Konan*, 146 S. Ct. at 746. Accordingly, her four FTCA claims were properly dismissed for lack of subject-matter jurisdiction.

Regarding Konan's §§ 1981 and 1985 claims, the Supreme Court's vacatur formally set aside our entire prior judgment, including our affirmance of the dismissal of those claims against Rojas and Drake. *See Lawrence v. Chater*, 516 U.S. 163, 166 (1996). But the Supreme Court noted that it "denied Konan's cross-petition for certiorari regarding those claims, so they [were] not before [the Court]." *Konan*, 146 S. Ct. at 741 n.*. Nothing in the Court's opinion disturbs our prior analysis. We therefore reaffirm the dismissal of Konan's §§ 1981 and 1985 claims against Rojas and Drake. *See Gradsky v. United States*, 376 F.2d 993, 996 (5th Cir. 1967).

Konan's supplemental briefing additionally argues for the first time that the United States is directly liable for the USPS's negligent supervision of Rojas and Drake, and she asks us to remand so she may amend her

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complaint to plead that theory. We decline to consider these arguments and express no view on their merits.

However, Konan identifies one feature of the district court's judgment that we conclude requires correction. The court dismissed Konan's FTCA claims *with* prejudice. But a dismissal under § 2680(b) is a dismissal for lack of subject-matter jurisdiction grounded in the United States's retained sovereign immunity, and such a dismissal "*must be without* prejudice to refiling in a forum of competent jurisdiction." *Spivey v. Chitimacha Tribe of Louisiana*, 79 F.4th 444, 449 (5th Cir. 2023) (emphasis in original) (quoting *Carver v. Atwood*, 18 F.4th 494, 498 (5th Cir. 2021)). The district court erred in dismissing the FTCA claims with prejudice.

We may correct this error on our own motion even though Konan raised it for the first time on remand. *Spivey* identifies a limit on a court's power to enter a particular form of judgment, not a substantive claim. "And it's precisely because the jurisdiction-less court cannot reach the merits that it also cannot issue with-prejudice dismissals that would carry res judicata effect." *Id.* Correcting this defect conforms the district court's judgment to the limits of its jurisdiction.¹

III

The judgment of the district court is AFFIRMED as modified to reflect a dismissal without prejudice of Konan's FTCA claims.

¹ The modification, which reaches only the FTCA claims, has a limited consequence that we state plainly. A dismissal without prejudice does not foreclose Konan from filing a new action raising whatever claim she can support, including a possible negligent-supervision claim. We express no view on whether any such claim would survive the defenses available to the United States. Those questions are for the district court in the first instance on a properly developed record. We hold only that the form of the FTCA dismissal must conform to *Spivey*.