FILED
United States Court of Appeals
Tenth Circuit

October 25, 2021

Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

JOHN TOMPKINS, M.D.,

Plaintiff - Appellant,

v.

UNITED STATES DEPARTMENT OF VETERANS AFFAIRS; DENIS McDONOUGH,[*] in his official capacity; RALPH T. GIGLIOTTI, in his official capacity; KRISTOPHER WADE VLOSICH, in his official capacity,

Defendants - Appellees.

No. 20-6060

Appeal from the United States District Court
for the Western District of Oklahoma
(D.C. No. 5:18-CV-01251-J)

Danny K, Shadid, of Counsel with Riggs Abney Neal Turpen Orbison & Lewis Law Firm, Oklahoma City, Oklahoma, for Plaintiff-Appellant.

Rebecca A. Frazier, Assistant United States Attorney (Timothy J. Downing, United States Attorney, and Tom Majors, Assistant United States Attorney, with her on the brief), Oklahoma City, Oklahoma, for Defendants-Appellees.

Before **PHILLIPS**, **MURPHY**, and **McHUGH**, Circuit Judges.

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[*]In accordance with Rule 43(c)(2) of the Federal Rules of Appellate Procedure Denis McDonough is substituted for Robert Wilkes as Secretary of The Department of Veterans Affairs, Defendant-Appellee in this action.

MURPHY, Circuit Judge.

I. INTRODUCTION

For thirty years, John Tompkins worked as a physician at the United States Department of Veterans Affairs ("VA") in Oklahoma City, Oklahoma. From 2012 through 2016, he served as Chief of Surgery. In 2017, he was terminated from his position as a physician based on administrative deficiencies during his tenure as Chief of Surgery. After exhausting the VA's administrative remedies, Tompkins brought this action in district court. He asserted entitlement to (1) review under the Administrative Procedures Act ("APA") and (2) relief under the Fifth Amendment's Due Process Clause. Tompkins appeals from an order of the district court dismissing his complaint without prejudice based on his failure to identify an applicable waiver of the government's sovereign immunity.

The district court correctly dismissed Tompkins's complaint. This court joins all other circuit courts of appeals in holding that Subchapter 5 of Chapter 74 of the Veterans' Benefits Act ("VBA"), 38 U.S.C. §§ 7461 to 7464, is a comprehensive statutory scheme governing the discipline of VA physicians and is, therefore, the exclusive remedy for review of Tompkins's termination. Accordingly, Tompkins is not entitled to judicial review under the provisions of the APA. Nor did the district court err in dismissing for lack of jurisdiction over

Tompkins's due process claims. This court made clear in *Lombardi v. Small Business Administration*, 889 F.2d 959, 961-62 (10th Cir. 1989), that Supreme Court precedents "virtually prohibit intrusion by the Courts into the statutory [employment] scheme[s] established by Congress. This judicial intervention is disfavored whether it is accomplished by the creation of a damages remedy or injunctive relief." Because Tompkins completely failed to address how his claim for injunctive relief falls outside the ambit of the rule set out in *Lombardi*, the district court correctly concluded Tompkins could not evade the VBA's limitations on judicial review by means of a due-process based claim for injunctive relief. Thus, exercising jurisdiction pursuant to 28 U.S.C. § 1291, this court **affirms** the order of the district court dismissing Tompkins's complaint for lack of jurisdiction.[1]

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[1]In his opening brief, Tompkins sets out a list of ten issues "presented for review." For example, he asserts the existence of a property interest in his position as a VA physician flowing from the length of his tenure in that position and/or from the fact the grievance process's impartial examiner concluded termination was not appropriate. He also raises, inter alia, facial and as-applied attacks on the grievance provisions of the VBA and claims under the Fifth and Fourteenth Amendments' Equal Protection Clauses. No aspect of these ten issues was presented to the district court in either Tompkins's amended complaint or his briefing in response to the motion to dismiss. Nor has Tompkins argued that the district court plainly erred in failing to raise such issues sua sponte. Thus all issues set out in Tompkins's opening brief, with the specific exceptions of his APA and due process claims identified above, are waived. *Richison v. Ernest Group, Inc.*, 634 F.3d 1123, 1130-31 (10th Cir. 2011) ("If a newly raised legal theory is entitled to appellate review at all—if [not] waived before the district court—it may form a basis for *reversal* only if the appellant can satisfy the elements of the plain error standard of review. In civil cases this often proves to (continued...)

II. BACKGROUND

A. Legal Background—The VBA

The VA is empowered to employ physicians as "necessary for the health care of veterans." 38 U.S.C. § 7401(a)(1). Those physicians are appointed "without regard to civil-service requirements." *Id.* § 7403(a)(1). They are not, therefore, covered by the provisions of the Civil Service Reform Act. 5 U.S.C. § 7511(b)(10); *see also id.* §§ 2102(a)(1)(A), 2103. Instead, the VBA sets out its own grievance process for § 7401(a)(1) physicians. *See* 38 U.S.C. §§ 7461 to 7464. That grievance process is split into two different tracks.

If a physician is the subject of a "major adverse action" arising out of a question of "professional conduct or competence," *see id.* § 7461(c)(2), (3), an enhanced grievance procedure is set out in § 7462. These physicians are entitled to detailed, advance written notice of a potential charge; an opportunity to

[1](...continued)
be an extraordinary, nearly insurmountable burden. Before us, however, [the appellant has not] even attempted to show how his new legal theory satisfies the plain error standard. And the failure to do so—the failure to argue for plain error and its application on appeal—surely marks the end of the road for an argument for reversal not first presented to the district court." (quotation and citation omitted)). This rule holds true even as to arguments in favor of subject matter jurisdiction a plaintiff-appellant failed to raise below. That is, "[o]ur duty to consider unargued *obstacles* to subject matter jurisdiction does not affect our discretion to decline to consider waived arguments that might have *supported* such jurisdiction." *United States ex rel. Ramseyer v. Century Healthcare Corp.*, 90 F.3d 1514, 1515 n.2 (10th Cir. 1996), *superseded by statute on other grounds as recognized in*, *United States ex rel. Reed v. KeyPoint Gov't Sols.*, 923 F.3d 729, 764-65 (10th Cir. 2019).

respond, both orally and in writing, with affidavits and other evidence; and a decision by a "deciding official," an individual "who shall be an official higher in rank than the charging official." *Id.* § 7462(b). A physician aggrieved by the resolution reached by the "deciding official" can appeal to the Disciplinary Appeals Board ("DAB"). *Id.* §§ 7462(c), 7464. The DAB is entitled to affirm, reverse, or modify the resolution reached by the "deciding official." *Id.* § 7462(c)(2). The VA Secretary is tasked with "execut[ing]" the DAB's decision. *Id.* § 7462(d)(1). The Secretary can reverse the decision of the DAB, or remand the matter to the DAB for further proceedings, only upon a finding that the DAB decision is "clearly contrary to the evidence or unlawful." *Id.* § 7462(d)(2). The Secretary does, however, have discretion to "mitigate the adverse action imposed," upon a determination that the DAB's decision is not "justified by the nature of the charges." *Id.* § 7462(d)(3). The Secretary's decision counts as "the final administrative action in the case." *Id.* § 7462(d)(4). The DAB's decision, as modified by the Secretary, is subject to judicial review. *Id.* § 7462(f)(1). A court conducting review under § 7462(f)

> shall review the record and hold unlawful and set aside any agency action, finding, or conclusion found to be—
>
> > (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
> >
> > (B) obtained without procedures required by law, rule, or regulation having been followed; or

(C) unsupported by substantial evidence.

Id. § 7462(f)(2).

All other types of adverse employment actions are controlled by the grievance provisions set out in § 7463. Section 7463 provides a significantly limited number of grievance procedures compared to those set out in § 7462. Section 7463(a) obligates the Secretary to "prescribe by regulation procedures for the consideration of grievances of section 7401(1) employees arising from adverse personnel actions in which each action taken either . . . is not a major adverse action[] or . . . does not arise out of a question of professional conduct or competence." *Id.* § 7463(a). Notably, with an exception not relevant here, the DAB "shall not have jurisdiction to review such matters." *Id.*[2] "[A]n employee who is a member of a collective bargaining unit" is entitled to "seek review of an adverse action described in [§ 7463(a)] either under the grievance procedures provided through regulations prescribed under [§ 7463(a)] or through grievance procedures determined through collective bargaining, but not under both." *Id.* § 7463(b). Physicians subject to charges that may potentially result in a major adverse action, even if the charges do not involve professional conduct or competence, are entitled to elevated rights to notice and an opportunity to be

[2]Exclusive DAB jurisdiction exists over "mixed case[s]." 38 U.S.C. §§ 7462(a)(3), 7463(a). "[A] mixed case is a case that includes both a major adverse action arising out of a question of professional conduct or competence and an adverse action which is not a major adverse action or which does not arise out of a question of professional conduct or competence." *Id.* § 7462(a)(3).

heard. *Id.* § 7463(c)(1). Such physicians are "entitled to notice and an opportunity to answer with respect to those charges in accordance with subparagraphs (A) and(B) of section 7462(b)(1)." *Id.* That is, physicians subject to a potential major adverse action not involving a question of professional conduct or competence are entitled to the same notice and opportunity-to-respond rights as those physicians subject to a major adverse action for a charge relating to professional conduct or competence. "In any other case," diminished notice and opportunity-to-respond rights are provided. *Id.* § 7463(c)(2). Finally, § 7463(d) sets the following minimum requirements for grievance procedures prescribed by the Secretary:

> (1) A right to formal review by an impartial examiner within the Department of Veterans Affairs, who, in the case of an adverse action arising from a question of professional conduct or competence, shall be selected from the [DAB].
>
> (2) A right to a prompt report of the findings and recommendations by the impartial examiner.
>
> (3) A right to a prompt review of the examiner's findings and recommendations by an official of a higher level than the official who decided upon the action. That official may accept, modify, or reject the examiner's recommendations.

Id. § 7463(d). "[T]he employee is entitled to be represented by an attorney or other representative . . . at all stages of the case." *Id.* § 7463(e).

B. Factual Background

Tompkins worked as an orthopedic surgeon at the VA in Oklahoma City for thirty years.[3] He served as Interim Chief of Surgery starting September 2010, and as Chief of Surgery from January 2012, through mid-October 2016. Tompkins voluntarily resigned as Chief of Surgery,[4] but remained at the VA as a full-time orthopedic surgeon.

Kristopher Vlosich was named the System Director of the Oklahoma City VA facility in May 2016. Vlosich, relying on the recommendation of Chief of Staff Susan Bray-Hall, tried to fire Tompkins for medical deficiencies in July of 2017. That effort failed when an outside review by three separate VA orthopedic surgeons concluded Tompkins's medical practice was "extremely good and well within the accepted standard of care."

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[3]The government raised a facial attack as to the district court's jurisdiction over Tompkins's complaint. As was true before the district court, the government's facial attack on federal court jurisdiction requires this court to accept as true the well-pleaded factual allegations in the complaint. *Paper, Allied-Indus., Chem. & Energy Workers Int'l Union v. Cont'l Carbon Co.*, 428 F.3d 1285, 1292 (10th Cir. 2005). Thus, this factual background is drawn from Tompkins's amended complaint.

[4]Although not fully explained in Tompkins's complaint, it is clear that during this time frame the VA's Office of Inspector General ("OIG") was conducting an investigation of the VA hospital in Oklahoma City. Furthermore, it is clear Tompkins's actions as Chief of Surgery were somehow implicated in that OIG investigation. Indeed, as set out more fully below, that OIG investigation underpins Tompkins's claims that certain grievance decision-makers were biased against him.

Shortly thereafter, Vlosich and Bray-Hall formulated a different reason to terminate Tompkins. On October 30, 2017, Bray-Hall issued to Tompkins a letter of "Proposed Separation & Revocation of Clinical Privileges" based on alleged administrative deficiencies occurring in 2015-2016 while Tompkins was Chief of Surgery.[5] Tompkins, represented by counsel, submitted to Vlosich both formal and personal responses to his proposed termination. Separate from his substantive responses, Tompkins requested that Vlosich recuse himself as a decision-maker. Tompkins asserted Vlosich demonstrated a predisposition to find he should be terminated due to a prior statement that Vlosich had reviewed the draft OIG report and agreed with the findings of that report. Vlosich refused to recuse himself.

On November 21, 2017, Vlosich issued to Tompkins a formal discharge letter. The letter advised Tompkins he could appeal the action under the VA's grievance procedure by submitting a grievance to Ralph Gigliotti. Tompkins, through counsel, submitted a formal grievance and demand for an evidentiary hearing. As part of that formal grievance, Tompkins requested that neither Gigliotti nor his subordinates participate in any aspect of the grievance process. In so requesting, Tompkins noted that, just like Vlosich, Gigliotti had previously

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[5]Tompkins's complaint alleges Vlosich and/or his subordinates had identified and engaged a replacement for Tompkins several weeks before Bray-Hall issued this letter. Furthermore, sometime in August 2017, Vlosich told another Oklahoma City VA doctor that he intended to fire Tompkins.

reviewed and approved the OIG report. Gigliotti did not respond to the request for recusal.

The matter was set for an evidentiary hearing after Gigliotti designated Roger Tatum to serve as grievance examiner. Tatum heard extensive evidence over a three-day period, including from Vlosich, who served as a witness on behalf of the VA. Thereafter, Tatum issued a detailed Report of Findings and Recommendations (the "Report"). The Report walked through each of the three allegations of misconduct offered by the VA in support of Tompkins's termination and evaluated the aggravating factors alleged by the VA. After concluding it was not possible to substantiate the alleged aggravating factors, the Report found as follows:

> Based upon the extensive review detailed above, it is concluded there were indeed several areas in which Dr. Tompkins should have provided closer oversight over administration of the Surgery Service Line during his time as Chief of Surgery at the Oklahoma City VA Health Care System. Such concerns could be used to justify requiring a Chief of Service to relinquish that position, although without giving the individual the opportunity to improve based upon feedback, it is unlikely that this would be applied in similar circumstances within every VA facility. However, as noted above, Dr. Tompkins voluntarily stepped down as the Chief of Surgery in October of 2016, and had not served in that role for a full year at the time of his proposed removal from federal service. Terminating his employment as a staff physician for the causes specified in the removal letter is not appropriate and is highly inconsistent with any connection to his duties at the time of his termination.

In accord with these findings, the Report recommended that Tompkins be restored to his position as a VA physician and that all time between his removal and

reinstatement be considered as time in-service for purposes of benefits and retirement.

Shortly thereafter, on August 17, 2018, Gigliotti issued a decision denying Tompkins's grievance. In so doing, Gigliotti decided as follows:

> The Network Director [i.e., Gigliotti] reviewed the Grievance Examiner [Tatum's] Report, along with the evidence file supporting the discharge. He found the offense was serious enough in nature, to rise to the level of discharge given Dr. Tompkins' assignment as Chief of Surgery. In this role, all administrative and clinical functions of the service were ultimately Dr. Tompkins' responsibility. The findings from the investigation conducted by OIG, indicated the severe impact Dr. Tompkins' lack of oversight had on Surgery Service as well as the facility. It is noted that the leadership at the facility took administrative action, once they received the required clearance from OIG officials.

Gigliotti's denial of Tompkins's grievance marked the end of the administrative remedies available to Tompkins.

C. Procedural Background

After Gigliotti refused to reinstate him as a VA physician, Tompkins filed the instant action in district court. As defendants, Tompkins named the VA, VA Secretary Denis McDonough,[6] Gigliotti, and Vlosich. McDonough, Gigliotti, and Vlosich were named exclusively in their official capacities. Tompkins's complaint sought relief on two bases. First it asserted an entitlement to judicial review of Gigliotti's denial of Tompkins's request for reinstatement. Second, it

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[6]As noted above, Denis McDonough is the current VA Secretary. *See supra*, n.*. He has been substituted as a party for Robert Wilkie, the VA Secretary when Tompkins filed this action.

asserted Tompkins's termination did not comply with either the procedural or substantive provisions of the Due Process Clause.[7] In support of these propositions, the complaint alleged (1) Vlosich and Gigliotti were biased decision-makers; and (2) Gigliotti's terse rejection of the Report was inconsistent

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[7]As to his due process claims, Tompkins's complaint asserts as follows: "At all pertinent times, Dr. Tompkins possessed and had a reasonable expectation of continued employment as an Orthopedic surgeon working for the VA." As noted above, *see supra* n.3, at this stage of the proceedings we must accept as true all well-pleaded factual allegations in Tompkins's complaint. The existence of a property interest is, however, a question of law, not one of fact. *Tarabishi v. McAlester Reg'l Hosp.*, 827 F.2d 648, 652 (10th Cir. 1987). Even in the face of the government's motion to dismiss asserting Tompkins's complaint did not state a colorable constitutional claim, Tompkins's district court filings—or, for that matter, his appellate filings—never identified a basis for the existence of a property interest in his job as a VA physician. *Cf. Arbaugh v. Y & H Corp.*, 546 U.S. 500, 513 & n.10 (2006) (holding that to properly invoke federal question jurisdiction, a complaint must allege a colorable claim arising under the Constitution or laws of the United States). In particular, Tompkins has not cited any precedent indicating that § 7401(a)(1) physicians, especially given their exclusion from civil service protections, have a property interest in continued employment. And, "[p]roperty interests are not created by the constitution but rather are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Tarabishi*, 827 F.2d at 653 (quotation omitted). Furthermore, although Tompkins's complaint references VA Handbook 5021/21 and its procedures relating to the grievance process, he never explains how or whether those handbook provisions create a property interest in continued employment. Tompkins's failure to plausibly allege the existence of a property interest impacts the colorability of both his procedural and substantive due process claims. *See Hennigh v. City of Shawnee*, 155 F.3d 1249, 1253 (10th Cir. 1998); *Brenna v. S. Colo. State Coll.*, 589 F.2d 475, 476 (10th Cir. 1978). All of these failures leave serious doubt as to whether the due-process claim set out in Tompkins's complaint is sufficiently colorable to invoke federal question jurisdiction. Ultimately, it is unnecessary to resolve this question because, as set out below, Tompkins failed to identify an applicable waiver of the government's sovereign immunity.

with VA Handbook 5021/21, Part IV, Chapter 3, Paragraph 13.[8] In support of the existence of jurisdiction, Tompkins's complaint cited federal question jurisdiction, 28 U.S.C. § 1331, and the judicial review provisions of the APA, 5 U.S.C. §§ 702-06.

In response to Tompkins's complaint, the government filed a motion to dismiss. The government began by noting that a valid waiver of the United States' sovereign immunity is a necessary aspect of federal court subject matter jurisdiction. *See United States v. Mitchell*, 445 U.S. 535, 538 (1980); *Dahl v. United States*, 319 F.3d 1226, 1228 (10th Cir. 2003). The government recognized that the APA, the only source for a potential waiver identified in Tompkins's

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[8]The relevant portions of Paragraph 13 provide as follows:

> Upon receipt of the grievance examiner's report of findings and recommendations, the decision official will accept, modify, or reject the examiner's recommendation(s) and issue a written decision to the employee . . . .
>
> > (1) if the decision official modifies or rejects the examiner's recommendation(s), the written decision will include a specific statement of the reason(s) for the modification or rejection. Modification or rejection of recommendations of the grievance examiner will be limited to the following grounds:
> >
> > > (a) The recommendation(s) are contrary to law, regulation, or published Department policy; and /or
> > >
> > > (2) The recommendation(s) are not supported by the preponderance of the evidence.

complaint, does contain a waiver of the United States' sovereign immunity. *See* 5 U.S.C. § 702 ("An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party."). That waiver, however, does not apply when "any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." *Id.* § 702(2); *see also Neighbors for Rational Dev., Inc. v. Norton*, 379 F.3d 956, 961 (10th Cir. 2004). Relying on the Supreme Court's decision in *United States v. Fausto*, 484 U.S. 439, 443-45 (1988), the government argued that the VBA's detailed grievance scheme precludes APA review. In addition, the government asserted Tompkins failed to plead plausible due process claims. *See generally supra* n.7.

The district court granted the government's motion to dismiss. In so doing, the district court began by acknowledging the VBA sets out a comprehensive scheme for dealing with the appointment and employment of VA physicians. Furthermore, the district court recognized the VBA's comprehensive scheme, while specifically providing for judicial review of certain employment actions, provided no such review for terminations unrelated to questions of professional competence. Applying the Supreme Court's analysis in *Fausto*, the district court ruled that allowing Tompkins to obtain judicial review under the APA, when such

review is specifically excluded from the VBA's grievance scheme, would amount to a circumvention of congressional intent. Accordingly, the district court determined that "the APA's sovereign immunity waiver does not apply and it therefore lacks subject matter jurisdiction over [Tompkins's] constitutional and policy-related due process claims."[9]

III. ANALYSIS

A. Standard of Review

This court reviews de novo a district court's grant of a motion to dismiss for lack of subject matter jurisdiction. *Devon Energy Prod. Co. v. Mosaic Potash Carlsbad, Inc.*, 693 F.3d 1195, 1201 (10th Cir. 2012). For the most part, the resolution of this appeal turns on matters of statutory construction. That question is also subject to de novo review. *United States v. Fillman*, 162 F.3d 1055, 1056 (10th Cir. 1998).

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[9]In his brief on appeal, Tompkins asserts the district court "did not even address [his] constitutional claims." As the above quoted passage makes clear, however, Tompkins's assertion is not accurate. The district court specifically ruled that the exception to the waiver of sovereign immunity set out in § 702(2) applied, leaving it without a jurisdictional basis to reach any of Tompkins's claims. As set out more fully below, given both this court's decision in *Lombardi v. Small Business Administration*, 889 F.2d 959, 961-62 (10th Cir. 1989), and Tompkins's complete failure, either before the district court or on appeal, to argue his due process claims fall outside the rule set out in *Lombardi*, the district court's decision in this regard is undoubtedly correct.

B. Discussion

The district court ruled it did not have jurisdiction over the claims set out in Tompkins's complaint because, under the required *Fausto* analysis, the VBA's comprehensive grievance scheme precludes judicial review. We agree that *Fausto* controls the resolution of this appeal. Thus, the proper starting point is *Fausto*.

In *Fausto*, an excepted service employee of the United States Fish and Wildlife Service (the "Service") was suspended from his job. 484 U.S. at 440. The employee sought back pay in federal court alleging his suspension violated the Service's regulations. *Id*. The Supreme Court held that the CSRA, which did not afford the employee the right to judicial review of the Service's decision, precluded such a suit. *Id*. at 455. *Fausto* explained that the comprehensive statutory scheme of the CSRA, and Congress's deliberate exclusion of individuals in the employee's category from the provisions establishing administrative and judicial review, prevented the employee from seeking review in federal court. *Id*. Thus, *Fausto* rejected the notion that an exclusion of a federal employee from the CSRA meant the employee was "free to pursue whatever judicial remedies he would have had before enactment of the CSRA." *Id*. at 447. Rather, such an exclusion "displays a clear congressional intent to deny the excluded employees . . . judicial review . . . ." *Id*.; *see also id*. at 449 (holding that excepted federal employees are not "free to pursue other avenues of review").

The principles recognized in *Fausto* have been extended to include virtually every type of suit by a federal employee seeking to challenge administrative discipline, including suits under the APA. *Steele v. United States*, 19 F.3d 531, 532-33 (10th Cir. 1994) (holding that CSRA's comprehensive scheme foreclosed jurisdiction over claims under the Federal Tort Claims Act ("FTCA")); *Petrini v. Howard*, 918 F.2d 1482, 1483-85 (10th Cir. 1990) (per curiam) (same as to *Bivens* and state law claims); *Lombardi*, 889 F.2d at 961-62 (same as to *Bivens*-based constitutional claims, without regard to whether the claims were for money damages or injunctive relief); *see also Franken v. Bernhardt*, 763 F. App'x 678, 680-81 (10th Cir. 2019) (unpublished disposition cited exclusively for its persuasive value) (same as to First Amendment and equal protection claims); *Arron v. United States*, Nos. 96-2086, -2288, 1997 WL 265103 at *6 (10th Cir. May 20, 1997) (unpublished disposition cited exclusively for its persuasive value) (holding, based on *Fausto*, that the plaintiff's "FTCA, APA, and constitutional claims are preempted by the CSRA").[10] *Fausto* makes clear that if the purpose,

[10]Other circuits have also read *Fausto* in a similarly broad fashion. *See, e.g.*, *Carter v. Gibbs*, 909 F.2d 1452 (Fed. Cir. 1990) (en banc) (holding the CSRA preempts suit for overtime pay brought under the Fair Labor Standards Act); *Gergick v. Austin*, 997 F.2d 1237 (8th Cir. 1993) (holding the CSRA barred an FTCA claim for intentional infliction of emotional distress caused by workplace harassment); *Saul v. United States*, 928 F.2d 829, 843 (9th Cir. 1991) (holding the CSRA barred an employee's *Bivens* claims and preempted his state law tort claims); *United States Dept. of Health & Human Servs. v. Fed. Labor Rels. Auth.*, 858 F.2d 1278 (7th Cir. 1988) (holding nonpreference excepted service employees were not entitled to challenge adverse employment action
(continued...)

text, and structure of a comprehensive federal employment scheme indicates an intent to cabin judicial review to the particular procedures of that scheme, an employee cannot avoid those limited procedures by bringing suit under other provisions of state or federal law.

In analyzing whether the VBA's disciplinary scheme set out in §§ 7461 to 7464 forecloses judicial review of a disciplinary decision made pursuant to § 7463, this court does not write on a clean slate. Three other circuits have resolved this exact question; all three have concluded the VBA is a comprehensive scheme that intentionally precludes judicial review of disciplinary decisions made pursuant to § 7463. *Hakki v. Sec'y, Dep't of Veterans Affs.*, 7 F.4th 1012, 1027 (11th Cir. 2021) ("[A] district court does not have subject-matter jurisdiction over an APA claim to review a § 7463 decision."); *Fligiel v. Samson*, 440 F.3d 747, 752 (6th Cir. 2006) (holding physician was "precluded from invoking the protections of the APA to obtain the judicial review of her adverse employment action" because, "[l]ike the CSRA, Title 38 provides a comprehensive regulatory scheme for employees of the VA," and "§ 7463 outlines the procedures Congress intended to provide for review of adverse actions of the type [the physician] encountered"); *Pathak v. Dep't of Veterans Affs.*, 274 F.3d

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[10](...continued)
before an arbitrator when there was no right to appeal to the Merits Systems Protection Board).

28, 32 (1st Cir. 2001) ("Congress's express provision of judicial review in § 7462, coupled with a complete omission of judicial review in § 7463—the provision governing [the physician]—is persuasive evidence that Congress deliberately intended to foreclose further review of such claims." (quotation omitted)). We conclude the analyses set out in these decisions are persuasive and hereby adopt them as our own.

Of note, the failure of the VBA to provide for judicial review in § 7463 does not stand in isolation. Instead, it is coupled with a detailed judicial-review scheme for employment decisions made under § 7462. The difference in the treatment of these two classes of employment decisions makes absolutely clear Congress did not intend to allow judicial review of employment decisions not relating to professional conduct or competence. *Hakki*, 7 F.4th at 1027-28; *see also Kansas ex rel. Schmidt v. Zinke*, 861 F.3d 1024, 1034 (10th Cir. 2017) (holding the strong presumption of judicial review of administrative decisions can be overcome by specific congressional intent to preclude such review); *Fligiel*, 440 F.3d at 751, 751-54 (recognizing courts should interpret the APA to preclude judicial review only upon a clear and convincing showing that Congress intended such a result, but concluding the structure and text of the VBA satisfied that exacting standard). Furthermore, the grounds upon which a competence-based employment decision can be set aside under § 7602 are similar to the bases upon which administrative action can be set aside under the APA. *Compare* 38 U.S.C.

§ 7462(f)(2) *with* 5 U.S.C. § 706(2). "It does not make any common sense that an employee disciplined pursuant to § 7463—who cannot seek the judicial review granted pursuant to § 7462 and thus cannot have his discipline set aside for the reasons outlined in § 7462(f)(2)—can proceed using the APA instead. The bases for APA review overlap with § 7462. Allowing for APA review for § 7463 discipline would 'turn' the VBA's disciplinary structure of review 'upside down.'" *Hakki*, 7 F.4th at 1028 (quoting *Fausto*, 484 U.S. at 449).

For those reasons set out above, this court concludes Tompkins cannot utilize the APA to obtain the very review he is denied by the comprehensive scheme set out in the VBA. Thus, the district court did not err in dismissing Tompkins's APA claim without prejudice for lack of subject matter jurisdiction. We reach the same conclusion as to Tompkins's due process claims. In *Lombardi*, this court concluded that *Fausto*, among other Supreme Court decisions, precluded judicial review of agency employment decisions even if the employee's complaint raised constitutional claims and merely sought injunctive relief. 889 F.2d at 961-62.[11] Tompkins has made no meaningful effort on appeal

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[11]This court recognizes that the various circuit courts of appeals have reached divergent decisions on this particular question. *See, e.g.*, *Am. Fed'n of Gov't Emps. Local 1 v. Stone*, 502 F.3d 1027, 1037-39 (9th Cir. 2007). In particular, some courts of appeals have concluded jurisdiction exists for federal courts to fashion equitable remedies for constitutional violations, even if those constitutional violations occurred only as a result of the federal employment relationship. *Id.* at 1038-39. Of course, this court is bound by the rule set out in *Lombardi* absent en banc review or superseding Supreme Court authority. *In re*
(continued...)

to show that his claim for injunctive relief falls outside of the ambit of the rule set out in *Lombardi*. Instead, he merely asserts the case is irrelevant because it involved the CSRA, not the VBA. For those reasons set out above, however, we have already concluded that the VBA, like the CSRA, is a comprehensive federal employment scheme intended to displace judicial remedies. Given that, it is not enough for Tompkins to simply claim *Lombardi* is irrelevant because it only involves the CSRA. Even under de novo review, Tompkins's scanty appellate arguments are not enough to demonstrate the district court erred in dismissing his due process claims for lack of jurisdiction. *See, e.g.*, *Marcus v. Kan. Dep't of Revenue*, 170 F.3d 1305, 1309 (10th Cir. 1999) (noting there exists a presumption against federal court jurisdiction and the proponent of such jurisdiction bears the burden of demonstrating its existence).

IV. CONCLUSION

The order of the district court dismissing Tompkins's complaint for lack of subject matter jurisdiction is hereby **AFFIRMED**.

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[11](...continued)
Smith, 10 F.3d 723, 724 (10th Cir. 1993) (per curiam).