FILED
United States Court of Appeals
Tenth Circuit

August 7, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

KENT THOMAS WARREN,

Plaintiff - Appellant,

v.

U.S. DEPARTMENT OF EDUCATION,

Defendant - Appellee.

No. 22-3252
(D.C. No. 5:21-CV-04085-JAR-ADM)
(D. Kan.)

ORDER AND JUDGMENT*

Before **HOLMES**, Chief Judge, **MATHESON**, and **McHUGH**, Circuit Judges.

Plaintiff-Appellant Kent Thomas Warren sought judicial review under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, of decisions by the Department of Education (the "Department") denying his applications for administrative discharge of student loans on which he has defaulted. The district court affirmed the agency's actions, and Mr. Warren appeals, proceeding pro se. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

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* After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

I. Background

The Department holds nine loans issued to Mr. Warren in conjunction with his enrollment at four universities from 2006 to 2014, including the University of Arizona, Northern Arizona University, Southern Illinois University, and Western Governors University ("WGU"). Those loans are now in default, and Mr. Warren applied to the Department seeking discharge under two separate programs.

First, on March 24 and April 24, 2017, he submitted loan discharge applications to the Department under the "false certification" (or "ability to benefit") program. Under this program, a borrower may be eligible for discharge if the school falsely certified the student's eligibility for the loan based on the student's ability to benefit from the training. The Department denied these applications on September 6, 2018.

Second, Mr. Warren applied at least twice for discharge under the "borrower defense" program. Under this program, a borrower may be eligible for discharge if the school engaged in certain misconduct, as set out by regulation. *See generally* 20 U.S.C. § 1087e(h); 34 C.F.R. §§ 685.400–411 (2023). On October 6, 2020, the Department sent Mr. Warren a decision denying his borrower defense application as to WGU. This is the only final agency decision on his borrower defense applications that is in the administrative record now before the court.[1] In its decision, the

[1] The administrative record includes two borrower defense applications submitted by Mr. Warren, dated November 1 and November 6, 2018. Both list all four universities. However, the record shows that the Department advised Mr. Warren it was processing his applications only for loans disbursed at WGU, and

Department concluded that Mr. Warren's claims of misconduct by WGU failed to state a legal claim, and therefore denied his application for discharge.

Mr. Warren sought judicial review under the APA. He alleged the Department's actions were "not in accordance with law," citing 42 U.S.C. § 2000d (Title VI of the Civil Rights Act of 1964), 20 U.S.C. § 1414(b)(3)(A)(iii) (a subpart of the Individuals with Disabilities Education Act), and the Equal Protection Clause of the Fourteenth Amendment. R. vol. I at 27. He asked the court to declare his loans void and for other injunctive relief. The district court affirmed the Department's decision, and Mr. Warren appeals.

II. Discussion

This is at least the fifth case in which Mr. Warren has brought claims alleging he has been discriminated against based on his U.S. citizenship while seeking to obtain a teaching license without first completing a bachelor's degree.[2] His

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that he would need to submit separate applications to seek discharge related to loans for other schools. At some point the Department assigned additional discharge application ID numbers to Mr. Warren, but on December 20, 2018, it told him that "[a]s of right now, the only application that is on file is for Western Governors University. If there are other schools that you would like to apply for the Borrower Defense to Repayment, you will need to submit an application for each school." R. vol. IV at 314.

In any event, the Department takes the position that its October 6, 2020, denial of borrower defense discharge for loans incurred at WGU is the only final agency decision issued on Mr. Warren's borrower defense applications. Aplee. Br. at 4. The district court reached the same conclusion. R. vol. I at 156, 159 & n.13. We agree, and Mr. Warren has not argued otherwise.

[2] *See Warren v. Univ. of Ill.-Champaign/Urbana*, No. 19-4094-SAC-ADM, 2020 WL 1043637, at *1, *3 (D. Kan. Mar. 4, 2020) (dismissing discrimination claims brought against universities Mr. Warren attended in which he alleged, in part,

overarching claim is that he has not been granted either a bachelor's degree or a teaching license on the basis of "work and/or life experience," in lieu of completing university coursework, while non-citizens allegedly may pursue teaching occupations on the basis of such experience. *See generally* R. vol. I at 23–28.[3]

Now before us in this appeal is Mr. Warren's APA claim seeking to set aside the Department's final agency actions, specifically its September 6, 2018, denial of his false certification/ability to benefit applications and its October 6, 2020, denial of his borrower defense application as to WGU. To the extent Mr. Warren seeks relief as to any other loan or decision by the Department, the record does not reflect any other final action subject to review, or that he has administratively exhausted any

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that they "subjected [him] to discrimination by reason of national origin through failure to provide non-discriminatory admissions requirements (work/life experience equitable to degree standing) to an United States citizen . . . comparable to that of a foreign national"); Order at 2, *Warren v. State of Kansas*, No. 18-4030-SAC-KGS, (D. Kan. June 8, 2018), ECF No. 15 ("the essence of [Mr. Warren's] complaint appears to be a contention that . . . Kansas has . . . discrimina[ted] against plaintiff as a United States citizen by refusing to issue [him] a teacher's license . . . ."; ordering Mr. Warren to show cause why his complaint should not be dismissed); *Warren v. United States*, No. 17-1784C, 2017 WL 6032312, at *1, *2 (Fed. Cl. Dec. 6, 2017) (dismissing claims against the United States alleging violation of constitutional rights because "federal regulations allow foreign nationals to qualify for employment through the use [of] specialized experience instead of formal degrees or training," and seeking "discharge of his student loans" and monetary damages); *Warren v. Warren*, No. 15-4878-SAC, 2015 WL 3440483, at *1, *3 (D. Kan. May 28, 2015) (dismissing action filed by Mr. Warren naming himself as defendant and alleging, in part, that Kansas's "state licensing of teachers is discriminatory" against United States citizens).

[3] Because Mr. Warren proceeds pro se, we "liberally construe" his filings, "but we will not act as his advocate." *James v. Wadas*, 724 F.3d 1312, 1315 (10th Cir. 2013).

other requests for relief, and therefore any other claim or request is unripe. *See Ark Initiative v. U.S. Forest Serv.*, 660 F.3d 1256, 1261 (10th Cir. 2011) ("Parties must exhaust available administrative remedies before the [agency] prior to bringing their grievances to federal court." (internal quotation marks omitted)).

For the reasons below, we affirm the district court's decision upholding the Department's denials of Mr. Warren's applications for administrative discharge.

A. APA Review

Our review of agency decisions under the APA is narrow and "very deferential to the agency." *Hays Med. Ctr. v. Azar*, 956 F.3d 1247, 1264 (10th Cir. 2020) (internal quotation marks omitted). We presume agency actions are valid unless the party challenging them proves otherwise. *Id.* Matters of law are reviewed de novo while factual determinations are set aside only if unsupported by substantial evidence. *Trimmer v. U.S. Dep't of Lab.*, 174 F.3d 1098, 1102 (10th Cir. 1999). We sustain agency decisions unless they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. *Hays*, 956 F.3d at 1263.

In his Reply brief, Mr. Warren seems to concede that the Department was correct to deny his applications for loan discharge under both the false certification and borrower defense programs. *See* Aplt. Reply Br. at 3 ("[Mr. Warren] confirms that these [two types of applications] should not have been taken, let alone pursued in the manner they were presented. . . . [Mr. Warren] does not deny the arguments presented to [the] U.S. Department of Education should have been declined."). Although we deem his APA challenge effectively abandoned, we explain below why

we will affirm the district court and uphold the agency's decisions and why Mr. Warren's claims are unavailing (even if not abandoned).

1. False Certification/Ability to Benefit

Pursuant to 20 U.S.C. § 1087(c)(1), if a student borrower's "eligibility to borrow . . . was falsely certified by the eligible [educational] institution . . . then the Secretary [of Education] shall discharge the borrower's liability on the loan (including interest and collection fees) by repaying the amount owed . . . ." The governing regulation in effect when Mr. Warren applied for false certification discharge provided that "a student *has* the ability to benefit from the training offered by the school if the student received a high school diploma or its recognized equivalent prior to enrollment at the school." 34 C.F.R. § 682.402(e)(13)(iv) (2016) (emphasis added).

As Mr. Warren himself alleges, he graduated from high school prior to enrolling at any of the relevant universities, R. vol. I at 12, ¶11, and this is corroborated in the administrative record, R. vol. II at 605. Because he falls within the definition of a person able to benefit from the coursework he pursued, Mr. Warren was ineligible for false certification/ability to benefit discharge. *See* 34 C.F.R. § 682.402(e)(13)(iv) (2016). The Department's denial of his applications therefore was not arbitrary, capricious, or otherwise contrary to law.

2. Borrower Defense

The borrower defense provisions for discharge arise from the Higher Education Act, in which Congress provided that the Department of Education "shall

specify in regulations which acts or omissions of an institution of higher education a borrower may assert as a defense to repayment of a loan . . . ." 20 U.S.C. § 1087e(h).[4] The relevant implementing regulation provides that for loans first disbursed prior to July 1, 2017, a borrower defense includes "any act or omission of the school attended . . . that relates to the making of the loan . . . or the provision of educational services . . . *that would give rise to a cause of action against the school under applicable State law*." 34 C.F.R. § 685.206(c)(1) (2020) (emphasis added).

Mr. Warren, who bears the burden of showing the Department acted contrary to law, *Hays*, 956 F.3d at 1264, has not identified any state-law cause of action to support his borrower defense application. In fact, he emphasizes that his claims are based only on federal law. *See* Aplt. Reply Br. at 5. Because he does not identify any state law violation arising from WGU's actions to support his borrower defense application under the governing regulation, he has not shown the Department's action was arbitrary, capricious, or contrary to law.

Moreover, even if we were to construe Mr. Warren's allegations of discrimination as potentially supporting his borrower defense application, his argument fails. Mr. Warren's main premise is that non-citizens are treated more favorably than himself and other citizens who are seeking a degree and/or a teaching license. But neither his own allegations nor anything in the record support his theory. Mr. Warren cites and relies on scattered federal immigration statutes,

[4] It is undisputed that Mr. Warren's WGU loan was a direct loan to which the borrower defense program could apply.

regulations, and a related Federal Register entry. *See* Aplt. Br. at 6–7 (citing 8 U.S.C. § 1182(a), 8 C.F.R. § 214.2(h)(4)(iii)(C)(4), and Labor Certification for the Permanent Employment of Aliens in the United States, 69 Fed. Reg. 77377 (Dec. 27, 2004)). But these provisions relate to providing visas for non-citizens (particularly those seeking to work in the United States). These authorities do not control either how Kansas (or any other state) licenses its teachers, or how WGU (or any other school) evaluates "work and/or life experience." Neither Mr. Warren's factual allegations nor any evidence in the record show that WGU treated non-citizens more favorably than citizens or engaged in any other unlawful discrimination.[5] The Department's denial of Mr. Warren's borrower defense application for failure to state a legal claim was therefore not arbitrary, capricious, or contrary to law.

B. Constitutional and Other Arguments

As noted above, we read Mr. Warren's Reply brief as abandoning his APA arguments. He instead focuses on arguing that his student loans "should never have been disbursed," and requesting that the loans "be declared void." Aplt. Reply Br. at 3, 4. To the extent this argument differs from his APA claim, it is unavailing. The only claim resolved in the district court and now pending in this appeal is Mr. Warren's APA challenge to the Department's decisions denying administrative

[5] Furthermore, as the Department points out, administrative regulations in Kansas, where Mr. Warren sought a teaching license, require all applicants to verify they have obtained a bachelor's degree, without distinction based on citizenship or national origin. *See* Kan. Admin. Regs. § 91-1-203(a)(1)(A). Indeed, "foreign applicants" must take additional steps to support evaluation of credentials obtained outside the United States and to show English proficiency. *See id.* § 91-1-204(e).

discharge. The relief available on that claim, even if Mr. Warren had prevailed, would extend no further than for the court to set aside the agency actions. *See* 5 U.S.C. § 706(2). Mr. Warren has not identified any authority allowing the court to now declare the underlying loans (disbursed between 2007 and 2014) to be "void." Moreover, his request for such relief is based on his claim of illegal discrimination, but as explained in Part II.A.2, above, his allegations are unfounded.

As to Mr. Warren's constitutional equal protection claim, he expressly withdrew that claim before the district court, and we will not revive it here. *See* R. vol. I at. 67–68; *Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1127 (10th Cir. 2011) ("If [a legal] theory was intentionally relinquished or abandoned in the district court, we usually deem it waived and refuse to consider it.").[6]

III. Conclusion

Because Mr. Warren has not shown the Department's final actions to be arbitrary, capricious, or contrary to law, we affirm the district court's decision upholding the Department's September 6, 2018, and October 6, 2020, denials of his requests for discharge.

[6] Mr. Warren's passing references to "due process" are insufficient to raise a separate constitutional claim. *See United States v. Hardman,* 297 F.3d 1116, 1131 (10th Cir. 2002) ("Arguments raised in a perfunctory manner . . . are waived.").

Mr. Warren's two "Motions for Entry of Final Judgment," filed July 10, 2023, and July 17, 2023, are denied as moot.

Entered for the Court

Jerome A. Holmes
Chief Judge