FILED
United States Court of Appeals
Tenth Circuit

November 13, 2023

Christopher M. Wolpert
Clerk of Court

**UNITED STATES COURT OF APPEALS**

**FOR THE TENTH CIRCUIT**

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DAVID PEREZ,

Plaintiff - Appellant,

v.

CITY AND COUNTY OF DENVER,

Defendant - Appellee.

No. 23-1057
(D.C. No. 1:21-CV-01263-RMR-KLM)
(D. Colo.)

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**ORDER AND JUDGMENT***

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

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David Perez, pro se, appeals the district court's order denying his motion to file a third amended complaint and dismissing his case with prejudice. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

## BACKGROUND

Mr. Perez was a firefighter with the Denver Fire Department (DFD) when on March 13, 2019, he sustained a debilitating Line of Duty (LOD) injury to his right

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered 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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

hand (his dominant hand) while fighting a house fire. As a result of the injury, he was placed on work restrictions. According to Mr. Perez, between March 19, 2019, and November 13, 2019, (1) he received various modified duty positions that either did not comply with his work restrictions or exacerbated his injury and (2) he was passed over for other, more appropriate positions within the DFD for which he was qualified. On October 21, 2019, Mr. Perez filed a complaint with the Colorado Civil Rights Division (CCRD), which alleged that he was retaliated against and denied the use of Leave Without Pay (LWOP) to attend a medical appointment because he had exhausted his sick leave to be treated for his LOD injury.

Mr. Perez was placed on LWOP on December 6, 2019. Based on his belief that the DFD had failed to accommodate his LOD injury and forced him to quit, on February 27, 2020, Mr. Perez informed DFD's chain of command that he was taking disability retirement and his employment would end on March 2. On December 28, 2020, he filed a charge of disability discrimination and retaliation with the Equal Employment Opportunity Commission (EEOC) based on events from March 19, 2019, through February 27, 2020, when he tendered his resignation.

The EEOC issued Mr. Perez a right-to-sue letter on May 4, 2021, and three days later—May 7—Mr. Perez, pro se, filed a complaint in the United States District Court for the District of Colorado alleging discrimination and harassment, retaliation, and failure to accommodate, in violation of federal and state law.

Acting under the magistrate judge's order permitting him to cure deficiencies, Mr. Perez filed an amended complaint. But after reviewing the amended complaint,

the magistrate judge still found several deficiencies and ordered Mr. Perez to submit a second amended complaint. This time, counsel entered an appearance on behalf of Mr. Perez, and filed a second amended complaint, which asserted six claims for relief—namely: (1) race and national origin discrimination in violation of Title VII, 42 U.S.C. § 2000e-2(a)(1); (2) race and national origin discrimination in violation of the Colorado Anti-Discrimination Act (CADA), Colo. Rev. Stat. § 24-34-402(1)(a)(l); (3) violation of the Americans With Disabilities Act (ADA), 42 U.S.C. § 12101; (4) retaliation in violation of the ADA, 42 U.S.C. § 12203(a); (5) disability discrimination in violation of CADA, Colo. Rev. Stat. § 24-34-402(1)(a)(l); and (6) disability retaliation in violation of CADA, Colo. Rev. Stat. § 24-34-402(1)(e)(IV).

The City and County of Denver (Denver) moved to dismiss. The district court found that Mr. Perez failed to exhaust his administrative remedies as to the CADA claims because the second amended complaint failed to allege that he received a right-to-sue letter from the CCRD. The court dismissed the CADA claims without prejudice.[1] The court also dismissed the Title VII and ADA claims without prejudice on the grounds that Mr. Perez had failed to exhaust his administrative remedies. In

[1] Mr. Perez later argued that he received a right-to-sue letter from the CCRD on November 20, 2020. Pursuant to Colo. Rev. Stat. § 24-34-306(11)(b), Mr. Perez was required to file a civil action within ninety days after jurisdiction of the commission ends. The commission's jurisdiction ends when "[t]he complainant has requested and received a notice of right to sue." Colo. Rev. Stat. § 24-34-306(11)(a)(II). But Mr. Perez did not file suit until May 7, 2021—long after the ninety-day deadline expired. However, we need not address whether the suit was timely because Mr. Perez ultimately abandoned his claims under the CADA.

doing so, the court specifically declined to consider Mr. Perez's relation-back argument and exhibits "in the context of this [Fed. R. Civ. P.] 12(b)(6) motion" on the grounds that Mr. Perez "cannot amend [his] complaint by adding factual allegations in response to [Denver's] motion to dismiss." R., Vol. II at 38 (ellipsis and internal quotation marks omitted).[2]

Mr. Perez, through counsel, moved to file a third amended complaint. Attached to the motion was the proposed complaint, which dropped the Title VII and CADA claims, and alleged two claims under the ADA—retaliation and discrimination. Denver opposed the motion, arguing that the proposed amendment was futile because Mr. Perez had failed to file a charge of discrimination with the EEOC within 300 days of his constructive discharge, which accrued on February 27, 2020. Mr. Perez filed an untimely reply in which he first raised the issue of whether any amended charges of discrimination relate back to previous charges filed with the CCRD or EEOC and thus should be deemed timely. Denver moved to strike the untimely reply, Mr. Perez responded, and Denver filed a reply.

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[2] Specifically, the district court noted that

> [t]he Second Amended Complaint only refers to a Charge of Discrimination that resulted in a Notice of Right to Sue letter from the EEOC on 04 May 2021. Therefore, the Second Amended Complaint does not refer to or mention the initial charge of discrimination to which [Mr. Perez] argues his December 2020 charge should relate back, such that the Court could consider this initial charge on a 12(b)(6) motion to dismiss.

R., Vol. II at 38-39 (citation, brackets, and internal quotation marks omitted).

The district court determined that Mr. Perez's relation-back argument, raised for the first time in his reply, was waived.[3] The court further found that Mr. Perez's constructive discharge accrued on February 27, 2020, when he gave notice to the DFD chain of command, and therefore, that his December 28, 2020, EEOC complaint was untimely as to any acts pre-dating the constructive discharge and the discharge itself because it was filed more than 300 days after his constructive discharge. *See* 42 U.S.C. § 2000e-5(e)(1) ("[A] charge shall be filed . . . within three hundred days after the alleged unlawful employment practice occurred"); *see also* 42 U.S.C. § 12117(a) (applying the same "powers, remedies, and procedures set forth in section[] . . . 2000e-5" to suits under the ADA). As a result, the court denied Mr. Perez's motion to file the third amended complaint as futile because it could not

[3] The district court declined to consider the relation-back argument raised for the first time in Mr. Perez's reply brief. *See United States v. Leffler*, 942 F.3d 1192, 1197-98 (10th Cir. 2019) (holding that "we generally do not consider arguments made for the first time . . . in an appellant's reply brief [because it] would be manifestly unfair to the appellee who . . . has no opportunity for a written response" and "the rule protects [the court] from issuing an improvident or ill-advised opinion because [it] did not have the benefit of the adversarial process" (internal quotation marks omitted)). To be sure, *Leffler* addressed appellate briefing, but we see no reason why the arguments raised by a party for the first time in a reply brief in the district court should be evaluated differently. In either forum, waiting to raise an argument for the first time in a reply brief robs the other party of a chance to respond and denies the court the benefit of the adversarial process.

survive summary judgment and dismissed the case with prejudice.[4] Mr. Perez filed a pro se appeal.

## STANDARD OF REVIEW

"Generally, we review a denial of leave to amend for abuse of discretion." *Chilcoat v. San Juan Cnty.*, 41 F.4th 1196, 1217 (10th Cir. 2022), *cert. denied*, 143 S. Ct. 1748 (2023). "An abuse of discretion occurs where the district court clearly erred or ventured beyond the limits of permissible choice under the circumstances. A district court also abuses its discretion when it issues an arbitrary, capricious, whimsical, or manifestly unreasonable judgment." *Birch v. Polaris Indus., Inc.*, 812 F.3d 1238, 1247 (10th Cir. 2015) (citation and internal quotation marks omitted).

"Although [Fed. R. Civ. P.] 15(a)[(2)] provides that leave to amend shall be given freely, the district court may deny leave to amend where the amendment would be futile." *Jefferson Cnty. Sch. Dist. No. R-1 v. Moody's Inv.'s Servs., Inc.*, 175 F.3d

[4] The district court also denied the motion as a matter of discretion on the alternate ground that Mr. Perez knew or should have known all the facts upon which the amendment was based but inexplicably failed to include them in any of the prior versions of his complaint. *See, e.g.*, *Las Vegas Ice & Cold Storage Co. v. Far W. Bank*, 893 F.2d 1182, 1185 (10th Cir. 1990) ("Where the party seeking amendment knows or should have known of the facts upon which the proposed amendment is based but fails to include them in the original complaint, the motion to amend is subject to denial." (internal quotation marks omitted)). Mr. Perez, however, does not address this alternate determination, which means that we could affirm even without addressing futility. *See, e.g.*, *Rivero v. Bd. of Regents of Univ. of N.M.*, 950 F.3d 754, 763 (10th Cir. 2020) ("If the district court states multiple grounds for its ruling and the appellant does not challenge all those grounds in the opening brief, then we may affirm the ruling.")

848, 859 (10th Cir. 1999). "A court may properly deny a motion for leave to amend as futile when the proposed amended complaint would be subject to dismissal for any reason, including that the amendment would not survive a motion for summary judgment." *Bauchman ex rel. Bauchman v. W. High Sch.*, 132 F.3d 542, 562 (10th Cir. 1997). "When a district court denies amendment based on futility, our review for abuse of discretion includes de novo review of the legal basis for the finding of futility." *Chilcoat*, 41 F.4th at 1218 (internal quotation marks omitted).

This court "review[s] a district court's grant of summary judgment de novo, using the same standard applied by the district court pursuant to Fed. R. Civ. P. 56(a)." *Cillo v. City of Greenwood Vill.*, 739 F.3d 451, 461 (10th Cir. 2013). "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

On a motion for summary judgment, "the nonmovant that would bear the burden of persuasion at trial may not simply rest upon its pleadings." *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 671 (10th Cir. 1998). If the movant carries "the initial burden of making a prima facie demonstration of the absence of a genuine issue of material fact and entitlement to judgment as a matter of law," then "the burden shifts to the nonmovant to go beyond the pleadings and set forth specific facts that would be admissible in evidence in the event of a trial from which a rational trier of fact could find for the nonmovant." *Id*. at 670-71 (internal quotation marks omitted). "Unsubstantiated allegations carry no probative weight in summary

judgment proceedings." *Bones v. Honeywell Int'l, Inc.*, 366 F.3d 869, 875 (10th Cir. 2004).

"If a party that would bear the burden of persuasion at trial does not come forward with sufficient evidence on an essential element of its prima facie case, all issues concerning all other elements of the claim and any defenses become immaterial. If there is no genuine issue of material fact, we next determine whether the district court correctly applied the substantive law." *Adler*, 144 F.3d at 670 (citation omitted).

**LEGAL FRAMEWORK/DISCUSSION**

"An employee wishing to challenge an employment practice under Title VII must first file a charge of discrimination with the EEOC." *Montes v. Vail Clinic, Inc.*, 497 F.3d 1160, 1163 (10th Cir. 2007) (internal quotation marks omitted) (citing 42 U.S.C. § 2000e-5(e)(1)). The same charging requirements, including the 300-day window of actionable work-related incidents, apply to employment practices under the ADA. *See* 42 U.S.C. § 12117(a).

A constructive discharge claim under Title VII accrues "when the employee gives notice of his resignation, not on the effective date of that resignation." *Green v. Brennan*, 578 U.S. 547, 564 (2016). The same rule applies to a claim for constructive discharge under the ADA. *See Haynes v. Level 3 Commc'ns, LLC*, 456 F.3d 1215, 1222 (10th Cir. 2006) (applying the same standard to the accrual of a cause of action under Title VII, the Age Discrimination in Employment Act, and the ADA). Therefore, Mr. Perez's ADA claims accrued on February 27, 2020, when he

gave notice of his intent to retire, which means that his charge of discrimination filed with the EEOC on December 28, 2020, was untimely as to his constructive discharge claim or any claims involving acts that pre-dated the constructive discharge.

In response to Mr. Perez's motion to amend, Denver came forward with evidence that Mr. Perez gave notice on February 27, 2020, that he intended to retire, but did not file his charge with the EEOC until December 28, 2020—more than 300 days later. Thus, Denver met its initial burden of making a prima facie demonstration of the absence of a genuine issue of material fact and its entitlement to judgment as a matter of law. In response, Mr. Perez provided no materials, exhibits, facts, or argument to contradict Denver's prima face case. Based on our de novo review, the proposed third amended complaint was futile because it could not survive a motion for summary judgment.

Mr. Perez's additional arguments are unavailing. First, any arguments concerning the district court's non-dispositive order dismissing the second amended complaint without prejudice have nothing to do with the ruling that is on appeal. To the contrary, Mr. Perez clearly states in his opening brief that the ruling presented for review is the district court's order denying his motion to file a third amended complaint and dismissing the case with prejudice. *See* Aplt. Opening Br. at 11.

Second, we reject Mr. Perez's argument—made for the first time on appeal—that he was entitled to equitable tolling of the 300-day deadline to file his charge of ADA discrimination and retaliation with the EEOC. "When an appellant fails to preserve an issue and also fails to make a plain-error argument on appeal, we

ordinarily deem the issue waived . . . and decline to review the issue at all—for plain error or otherwise." *United States v. Leffler*, 942 F.3d 1192, 1196 (10th Cir. 2019). "Under such circumstances, the failure to argue for plain error and its application on appeal . . . marks the end of the road for an argument not first presented to the district court." *Id*. (ellipses and internal quotation marks omitted). Because Mr. Perez fails to argue for plain error review on appeal, we decline to consider the argument.

## CONCLUSION

The judgment of the district court is affirmed.

Entered for the Court

Gregory A. Phillips
Circuit Judge