NONPRECEDENTIAL DISPOSITION
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United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Argued October 26, 2023
Decided December 27, 2023

Before

JOEL M. FLAUM, *Circuit Judge*

MICHAEL B. BRENNAN, *Circuit Judge*

THOMAS L. KIRSCH, *Circuit Judge*

No. 22-2655

FIONA FENG CHEN,
Plaintiff-Appellant,

v.

JANET YELLEN, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Western Division.

No. 20-cv-50458

Iain D. Johnston,
Judge.

O R D E R

Believing herself the target of a thirteen-year "secretive criminal investigation," former Internal Revenue Service (IRS) agent Fiona Chen sued various Treasury employees, her union, and several union representatives and employees. She alleged that they conspired to violate and violated her constitutional rights. The district court dismissed her complaint for failure to state a claim. We affirm the dismissal, remanding to correct the entry of judgment consistent with this order.

Only a brief recitation of the facts is necessary. Chen, an Asian woman originally from Taiwan, claims that two supervisors and her union representative hatched a plot against her after she filed a complaint against her former IRS supervisor. According to

Chen, the two supervisors and the union representative—who are Jewish—reported her to the Treasury Inspector General for Tax Administration (TIGTA) for making antisemitic comments in recorded voicemails. After gathering information on Chen's alleged misconduct, including by contacting additional union employees, TIGTA referred the matter to the IRS's Employee Conduct and Compliance Office (ECCO). Chen resigned soon after.

As Chen tells it, no one told her about the TIGTA investigation or its result. When she asked for information, a Treasury Department attorney told her that the investigation was "transferred for civil investigation and possibly closed." According to Chen, in 2020, she realized that the Treasury Department lied to her, and the "criminal" investigation continued for years. Chen believes that the investigation prevented her from returning to federal employment. She also submits that the TIGTA and ECCO procedures lacked due process, depriving her "of any chance to know[] and defend herself in the event [of her] indictment." Chen does not allege she was ever indicted and admits that the TIGTA complaint was terminated in her favor.

Chen sued, bringing five claims: Counts 1 and 2 allege Fifth and Sixth Amendment violations related to the TIGTA investigation; Count 3 alleges a conspiracy claim under 42 U.S.C. §§ 1985(3), 1986 against several defendants for participating in and failing to warn Chen about the TIGTA investigation; and Counts 4 and 5 allege malicious prosecution and related conspiracy claims. The district court dismissed Chen's suit with prejudice for failure to state a claim.[1] This appeal followed.

We start with subject matter jurisdiction, which we review de novo. *Yancheng Shanda Yuanfeng Equity Inv. P'ship v. Wan*, 59 F.4th 262, 268 (7th Cir. 2023). "Federal courts at all levels must assure themselves of their … jurisdiction," and "[i]f a court lacks subject-matter jurisdiction, a ruling it issues on the merits is void." *Mathis v. Metro. Life Ins.*, 12 F.4th 658, 663–64 (7th Cir. 2021).

[1] The district court entered judgment "on a motion for summary judgment" rather than for a failure to state a claim as described in its written opinion. Chen conceded at oral argument that this clerical error is harmless. Pursuant to Rule 60(a), the district court can correct the entry of judgment on remand. Fed. R. Civ. P. 60(a); *see Shuffle Tech Int'l, LLC v. Wolff Gaming, Inc.*, 757 F.3d 708, 710 (7th Cir. 2014).

On that front, Chen's suit hits an early stumbling block: Her claims are frivolous, so they do not engage federal jurisdiction.[2] "The Supreme Court has repeatedly held that federal courts are without power to entertain claims otherwise within their jurisdiction if they are so attenuated and unsubstantial as to be absolutely devoid of merit." *Roppo v. Travelers Com. Ins.*, 869 F.3d 568, 586–87 (7th Cir. 2017) (citations and internal quotation marks omitted). While "only the most extreme cases will fail the jurisdictional test of substantiality," *LaSalle Nat'l Tr., N.A. v. ECM Motor Co.*, 76 F.3d 140, 143 (7th Cir. 1996), claims that are "'wholly insubstantial,' … 'obviously frivolous,' 'plainly unsubstantial,' or 'no longer open to discussion,' … merit dismissal under the substantiality doctrine" for lack of subject matter jurisdiction. *Roppo*, 869 F.3d at 587 (citation omitted).

Chen's claims fit into the narrow set of cases that are so frivolous as to not engage federal subject matter jurisdiction. *Hagans v. Lavine*, 415 U.S. 528, 537 (1974). A TIGTA investigation alone—even if it were criminal—cannot support malicious prosecution, Fifth Amendment, or Sixth Amendment claims.

An essential element of Fourth Amendment and Illinois malicious prosecution claims is the termination of an underlying judicial proceeding. *See Thompson v. Clark*, 596 U.S. 36, 39 (2022) (holding that malicious prosecution claims require "a favorable termination of [an] underlying *criminal prosecution*" (emphasis added)); *Avila v. Pappas*, 591 F.3d 552, 553 (7th Cir. 2010) (dismissing a malicious prosecution claim as frivolous because "malicious prosecution does not violate the Constitution's due process clauses" and "when the suit is directed against the prosecution itself, rather than any attendant custody, there is no constitutional wrong"); *Beaman v. Freesmeyer*, 131 N.E.3d 488, 495 (Ill. 2019) (requiring the "commencement or continuance of an original criminal or civil *judicial proceeding*" (emphasis added)). Similarly, "[u]nless 'life, liberty, or property' is at stake, the [D]ue [P]rocess [C]lause of the [F]ifth [A]mendment does not apply, and officials may act for such reasons (and with such procedures) as they choose." *Alonzo v. Rozanski*, 808 F.2d 637, 638 (7th Cir. 1986); *see also Bianchi v. McQueen*, 818 F.3d 309, 319 (7th Cir. 2016) (requiring a deprivation of "liberty" for a due process claim premised on the fabrication of evidence).[3] And Sixth Amendment protections do not attach until a

[2] The union defendants argue that under the Civil Service Reform Act, the Federal Labor Relations Authority has exclusive jurisdiction over the claims against them. Having determined we lack subject matter jurisdiction over Chen's claims, we need not address this argument.

[3] To the extent Chen argues her Fifth Amendment claim should be construed as an Equal Protection claim, *Brown v. General Services Administration*, 425 U.S. 820 (1976), squarely holds that Title VII "provides the exclusive judicial remedy for claims of discrimination in federal employment." *Id.* at 835; *Mlynczak v. Bodman*, 442 F.3d 1050, 1056–57 (7th Cir. 2006). We recently affirmed summary judgment for the Secretary

criminal prosecution is commenced "whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Rothgery v. Gillespie County*, 554 U.S. 191, 198 (2008).

A TIGTA investigation is not a judicial proceeding, a criminal prosecution, or a deprivation of life, liberty, or property. Moreover, since Chen does not otherwise allege that she was arrested, indicted, charged, or criminally prosecuted, she alleges no constitutional violation. Instead, her claims rely on "indisputably meritless legal theor[ies]" that "lack even an arguable basis in law," such that they must be dismissed for lack of subject matter jurisdiction. *Felton v. City of Chicago*, 827 F.3d 632, 635 (7th Cir. 2016) (citation and internal quotation marks omitted); *Neitzke v. Williams*, 490 U.S. 319, 327 n.6 (1989).

Chen's conspiracy claims under 42 U.S.C §§ 1985(3), 1986 are frivolous for the same reason. To avoid dismissal of her § 1985(3) claim, she must allege a "depriv[ation] of a[] right or privilege of a citizen of the United States." *Milchtein v. Milwaukee County*, 42 F.4th 814, 827 (7th Cir. 2022). Chen alleges none, and absent a viable § 1985(3) claim, her § 1986 claim falls short, too. *Katz-Crank v. Haskett*, 843 F.3d 641, 650 (7th Cir. 2016).[4]

In sum, Chen's untenable legal theories do not engage federal question jurisdiction. *Roppo*, 869 F.3d at 587. Still, "[a] dismissal for want of jurisdiction, even one that finally resolves a lawsuit, is not on the merits and must be without prejudice." *Weinschenk v. Dixon*, Nos. 21-2822, 21-2823, 2022 WL 1285222, at *1 (7th Cir. Apr. 29, 2022) (citing *MAO-MSO Recovery II, LLC v. State Farm Mut. Auto Ins.*, 935 F.3d 573, 581 (7th Cir. 2019)), *reh'g denied*, 2022 WL 1480801 (May 10, 2022). We remand and instruct the district court to modify the judgment to reflect a dismissal without prejudice and to correct the clerical error in entering judgment. "We caution, however, that the modified dismissal[], though without prejudice, [is] final, and th[is] case[] [is] resolved." *Id.* at *2; *see Gleason v. Jansen*, 888 F.3d 847, 851–52 (7th Cir. 2018).

For the foregoing reasons, we AFFIRM the district court's dismissal but REMAND with instruction to modify the entry of judgment consistent with this order.

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of the Treasury in Chen's Title VII suit. *See Chen v. Yellen*, No. 21-3110, 2023 WL 2967428, at *1 (7th Cir. Apr. 17, 2023), *reh'g denied*, 2023 WL 3827944 (June 5, 2023).

[4] Similarly, since claims under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), require an underlying constitutional violation, Chen's purported *Bivens* claim is frivolous too.