FILED
United States Court of Appeals
Tenth Circuit

October 10, 2018

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

KATHLEEN ARBOGAST,

Plaintiff - Appellant,

v.

STATE OF KANSAS, by and through the Department of Labor,

Defendant - Appellee.

No. 18-3012
(D.C. No. 5:17-CV-04049-JAR-JPO)
(D. Kan.)

ORDER AND JUDGMENT*

Before **HARTZ**, **HOLMES**, and **MATHESON**, Circuit Judges.

Plaintiff Kathleen Arbogast appeals the district court's order dismissing her complaint under Fed. R. Civ. P. 12(b)(6) because the statute of limitations had run on her claims under the Rehabilitation Act of 1973, 29 U.S.C. §794. We have jurisdiction under 28 U.S.C. §1291 and 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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

Plaintiff, who was employed by the Kansas Department of Labor (KDOL), suffered from asthma and complained that her condition was aggravated by perfumes and other fragrances at the office. *See Arbogast v. Kan., Dep't of Labor*, 789 F.3d 1174, 1178 (10th Cir. 2015) (*Arbogast I*). Although she was moved to a workplace in the basement of her building, her problems persisted as workers wearing fragrances would visit her, so she continued to complain. *See id.* Her employment was terminated in August 2011. *See id.*

Plaintiff filed her first suit in the United States District Court for the District of Kansas on January 22, 2013, after unsuccessfully challenging her termination in a proceeding before the Kansas Civil Service Board. The complaint, which named KDOL and the Kansas Secretary of Labor as the only defendants, alleged claims of discrimination and retaliation in violation of the Rehabilitation Act. The district court ruled that KDOL had waived its Eleventh Amendment immunity, and rejected KDOL's argument that it did not have the capacity to be sued, believing this argument to be merely a reiteration of the immunity argument. KDOL filed an interlocutory appeal asserting that "(1) KDOL lacks the capacity to sue and to be sued under Kansas law and (2) even if KDOL [was] a proper defendant, it [was] immune from suit by operation of the Eleventh Amendment to the U.S. Constitution." *Id.* This court held that it lacked appellate jurisdiction over the issue of KDOL's capacity to be sued, and affirmed the district court's ruling that KDOL was not entitled to Eleventh Amendment immunity. *See id.*

On remand the district court re-examined the capacity-to-be-sued issue and granted KDOL's motion to dismiss, explaining: "Where, as here, a governmental subdivision or agency of the State is the only named governmental defendant, that defendant does not have the capacity to sue or be sued under Kansas law in the absence of statutory authority providing otherwise." *Arbogast v. Kan., Dep't of Labor*, 686 F. App'x 556, 557 (10th Cir. 2017) (*Arbogast II*) (internal quotation marks omitted).[1] Plaintiff appealed, and this court affirmed. *Id.*

On June 16, 2017, Plaintiff filed the present lawsuit, naming the State of Kansas, by and through the KDOL, as the defendants. The district court granted KDOL's motion to dismiss, holding that the two-year statute of limitations began to run when Plaintiff's employment was terminated in August 2011, so her 2017 complaint was untimely. On appeal Plaintiff argues that not until *Arbogast I* was issued on June 19, 2015, was she "reasonably able to ascertain" that her injury "was associated with, or caused by, some act of the State of Kansas." Aplt. Br. at 7. Therefore, she contends, her complaint, filed within two years after *Arbogast I*, was timely.

II. Standard of Review

We review de novo the district court's order granting dismissal under Rule 12(b)(6), "accept[ing] the facts alleged in the complaint as true and view[ing] them in

[1] We take judicial notice of the proceedings in the earlier lawsuit filed by Plaintiff. *See Turner v. McGee*, 681 F.3d 1215, 1217 n.2 (10th Cir. 2012) (taking judicial notice of filings in related cases).

the light most favorable to the plaintiff[]." *Lincoln v. Maketa*, 880 F.3d 533, 537 (10th Cir. 2018) (internal quotation marks omitted). To withstand dismissal, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). "If the allegations show that relief is barred by the applicable statute of limitations, the complaint is subject to dismissal for failure to state a claim." *Chance v. Zinke*, 898 F.3d 1025, 1034 (10th Cir. 2018) (ellipsis and internal quotation marks omitted).

III. Discussion

There is no dispute that Plaintiff's "Rehabilitation Act claims are subject to the two-year statute of limitations under Kan. Stat. Ann. §60-513." *Levy v. Kan. Dep't of Soc. & Rehab. Servs.*, 789 F.3d 1164, 1174 (10th Cir. 2015). Section 60-513 includes a tolling clause, which is also relevant to claims brought under the Rehabilitation Act. *See Heimeshoff v. Hartford Life & Acc. Ins. Co.*, 571 U.S. 99, 116 (2013) ("when a federal statute is deemed to borrow a State's limitations period, the State's tolling rules are ordinarily borrowed as well"). The tolling clause provides that a cause of action governed by the statute

> shall not be deemed to have accrued until the act giving rise to the cause of action first causes substantial injury, or, if the fact of injury is not reasonably ascertainable until some time after the initial act, then the period of limitation shall not commence until the fact of injury becomes reasonably ascertainable to the injured party . . . .

Kan. Stat. Ann. § 60-513(b).

Thus, the limitations period begins to run when "both the act and the resulting injury are reasonably ascertainable by the injured person." *Roe v. Diefendorf*, 689 P.2d 855, 859 (Kan. 1984). For an injury to be "reasonably ascertainable" the plaintiff need not have "actual knowledge." *Davidson v. Denning*, 914 P.2d 936, 948 (Kan. 1996) (applying §60-513(b)). "The phrase 'reasonably ascertainable' means that a plaintiff has the obligation to reasonably investigate available sources that contain the facts of the [injury] and its wrongful causation." *Id.*

It is apparent that all the facts alleged by Plaintiff in support of her claim were reasonably ascertainable to her by the time she filed her first suit in federal court. Nevertheless, she asserts that her claim did not accrue until June 2015, when this court stated its holding in *Arbogast I* that KDOL's lack of capacity to be sued was a separate issue from its sovereign immunity.[2] She relies on two cases: *Wille v. Davis*, 650 F. App'x 627 (10th Cir. 2016), and *Gilger v. Lee Constr., Inc.*, 820 P.2d 390 (1991). But neither helps her.

Wille did not, as Plaintiff suggests, determine that a cause of action for attorney malpractice did not accrue until the Kansas Supreme Court issued an opinion that the attorney had violated ethical rules. Rather, we said only that even if the cause of action did not accrue until then, the claim was still untimely. *See Wille*, 650 F. Appx. at 630.

[2] Plaintiff has not pursued on appeal her argument based on Kan. Stat. Ann. §60-518, which provides for a grace period to reinstate a case, so this argument is waived. *See COPE v. Kan. State Bd. of Educ.*, 821 F.3d 1215, 1223 (10th Cir. 2016) ("Appellants do not raise this argument in their opening brief, and so it is waived.").

As for *Gilger*, the plaintiffs in that case did not rely on a ruling in another case as determining the date of accrual of their cause of action. They had suffered health problems for years before it was determined that the problems were the result of carbon monoxide from improper venting of their furnace, which was allegedly caused by the defendants. The court held that summary judgment on the limitations issue was improper because it was a jury question when the plaintiffs "reasonably ascertained they suffered substantial injuries caused by [the defendants'] negligence." *Gilger*, 820 P.2d at 401.

The short of the matter is that our opinion in *Arbogast I* did not provide Plaintiff with evidence of any facts needed to establish her cause of action. Indeed, since she was a party to that appeal, it would have been remarkable if the opinion disclosed anything factually new. All she learned from our opinion was a little law. And "ignorance of the law does not toll a statute of limitations." *Cooper v. NCS Pearson, Inc.*, 733 F.3d 1013, 1016 (10th Cir. 2013); *accord Chelf v. State*, 263 P.3d 852, 863 (Kan. Ct. App. 2011) (litigant who was unaware of deadline for filing a claim was not excused by his ignorance of the law).

We conclude that the district court properly applied the statute of limitations and dismissed the complaint.

IV. Conclusion

The judgment of the district court is affirmed.

Entered for the Court

Harris L Hartz
Circuit Judge