FILED
United States Court of Appeals
Tenth Circuit

June 15, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

PATRICIA HERNANDEZ,

Plaintiff - Appellant,

v.

PUEBLO COUNTY, DHS,

Defendant - Appellee.

No. 22-1354
(D.C. No. 1:19-CV-01533-MDB)
(D. Colo.)

ORDER AND JUDGMENT*

Before **MORITZ**, **EID**, and **CARSON**, Circuit Judges.

Patricia Hernandez, proceeding pro se, appeals from the district court's denial of her Federal Rule of Civil Procedure 60(b) motion challenging the grant of summary judgment to Pueblo County Department of Human Services (PCDHS) in her employment discrimination suit. 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 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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

BACKGROUND

PCDHS employed Ms. Hernandez as a Technician beginning in 2015. In November 2018, Ms. Hernandez applied for an internal transfer to a Legal Technician position in the Child Support Service division. PCDHS denied the transfer. After resigning her employment in January 2019, Ms. Hernandez filed suit against PCDHS under the Americans with Disabilities Act.

PCDHS moved for summary judgment, stating that Ms. Hernandez was not qualified for the Legal Technician position because she failed to satisfy a job requirement. On September 21, 2021, the district court granted the motion for summary judgment. Ms. Hernandez filed a notice of appeal (No. 21-1326), but then she voluntarily dismissed that appeal and pursued relief in the district court under Rule 60(b). After the district court denied her Rule 60(b) motion on September 26, 2022, she filed two more notices of appeal, one from the decision granting summary judgment to PCDHS (No. 22-1353) and one from the denial of the Rule 60(b) motion (this appeal, No. 22-1354). This court summarily dismissed No. 22-1353 as untimely, leaving only this appeal to proceed to briefing and decision.

DISCUSSION

"The district court's ruling on a Rule 60(b) motion is separately appealable from the district court's underlying judgment. But an appeal from denial of Rule 60(b) relief raises for review only the district court's order of denial and not the underlying judgment itself." *Lebahn v. Owens*, 813 F.3d 1300, 1305 (10th Cir. 2016) (citation and internal quotation marks omitted).

Although this appeal is from the denial of the Rule 60(b) motion, Ms. Hernandez's opening brief scarcely mentions that motion. Instead, it challenges the district court's grant of summary judgment to PCDHS—a decision that is not before us for review in this appeal. By failing to make any argument regarding the Rule 60(b) motion in her opening brief, Ms. Hernandez waived her opportunity to bring any such challenges. *See In re Syngenta AG MIR 162 Corn Litig.*, 61 F.4th 1126, 1181 (10th Cir. 2023) (collecting cases); *see also Nixon v. City & Cnty. of Denver*, 784 F.3d 1364, 1369 (10th Cir. 2015) (affirming district court's dismissal of a claim where the "opening brief contain[ed] nary a word to challenge the basis of the dismissal"). Although we liberally construe the filings of a pro se party, we "cannot take on the responsibility of serving as the litigant's attorney in constructing arguments and searching the record." *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005).

In her reply brief, Ms. Hernandez recognizes her error in focusing on the summary judgment order and repeats the Rule 60(b) arguments she raised in the district court. But "[t]he general rule in this circuit is that a party waives issues and arguments raised for the first time in a reply brief." *Reedy v. Werholtz*, 660 F.3d 1270, 1274 (10th Cir. 2011) (internal quotation marks omitted). And even if we were to ignore that general rule, in large part Ms. Hernandez repeats her arguments to the district court, without addressing the reasons the court rejected them. She thus fails to fulfill "[t]he first task of an appellant," which "is to explain to us why the district court's decision was wrong." *Nixon*, 784 F.3d at 1366. When an appellant fails to

argue how the district court erred, we must affirm. *See Harris v. Remington Arms Co.*, 997 F.3d 1107, 1114 (10th Cir. 2021) ("With no explanation for why the district court erred . . . , we lack any basis to disturb the district court's [decision].").

Finally, also in her reply brief, Ms. Hernandez requests leave to amend her opening brief to focus on the Rule 60(b) decision. We deny this request. Although Ms. Hernandez proceeds pro se, she must "follow the same rules of procedure that govern other litigants." *Garrett*, 425 F.3d at 840 (internal quotation marks omitted). The rules require litigants to raise their arguments in their opening brief, *see* Fed. R. App. P. 28(a)(8), and they do not provide an opportunity to re-brief an appeal because a litigant mis-framed their brief.

CONCLUSION

We deny Ms. Hernandez's motion to proceed without prepayment of fees and costs because she fails to present a non-frivolous argument challenging the decision on appeal. *See DeBardeleben v. Quinlan*, 937 F.2d 502, 505 (10th Cir. 1991). We affirm the district court's judgment.

Entered for the Court

Allison H. Eid
Circuit Judge