

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

October 24, 2023

FOR THE TENTH CIRCUIT

Christopher M. Wolpert
Clerk of Court

MARK A. CLARK,

Plaintiff - Appellant,

v.

10 ROADS EXPRESS, LLC,

Defendant - Appellee.

No. 23-3067
(D.C. No. 2:22-CV-02365-EFM-ADM)
(D. Kan.)

ORDER AND JUDGMENT*

Before **HOLMES**, Chief Judge, **HARTZ** and **MORITZ**, Circuit Judges.

Mark A. Clark appeals the dismissal of his pro se employment action claiming discrimination and retaliation in violation of Title VII, 42 U.S.C. §§ 2000e to 2000e-17. The district court ruled that Mr. Clark failed to exhaust his administrative remedies because the factual allegations in his complaint differed from those in his underlying charge of discrimination filed with the Equal Employment Opportunity Commission (EEOC). Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

* 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 This order and judgment is not binding precedent, except under the doctrines of law of the case, *res judicata*, and collateral estoppel.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.

I

Mr. Clark, who identifies as African-American, worked for 10 Roads Express, LLC, as a truck driver until he was fired on July 15, 2021. He filed an administrative charge of discrimination with the EEOC, alleging that on the day he was fired, he contacted his manager because his paycheck was incorrect. He further alleged in the charge that his manager told him he was fired because he failed to report his involvement in a recent traffic accident, which Mr. Clark asserted was pretext for retaliation because he had previously filed a complaint with the National Labor Relations Board (NLRB) after noticing his paychecks were short. He also alleged he had a personality conflict with his manager, he was outspoken, and he suffered discrimination based on his race, age, and disability. The EEOC issued a right-to-sue letter, and Mr. Clark filed his complaint in federal district court.

In his complaint, however, Mr. Clark relied on different facts to support his claims. He said nothing about the traffic accident or complaining to the NLRB about his paychecks being short. Instead, he alleged that he was removed from the work schedule and that loads were being pulled away from him and given to white drivers. He also alleged that he was forced to drive unsanitary equipment.

On 10 Roads' motion, the district court dismissed the action under Federal Rule of Civil Procedure 12(b)(6) for failure to exhaust administrative remedies. The district court reasoned that by relying on different factual allegations than those described in the EEOC charge, Mr. Clark failed to exhaust his claims. Mr. Clark now appeals.

II

We review de novo the district court's dismissal for failure to exhaust administrative remedies. *Smith v. Cheyenne Ret. Inv. L.P.*, 904 F.3d 1159, 1164 (10th Cir. 2018). Although the filing of an EEOC charge is not jurisdictional, it is a statutory requirement, and if a plaintiff fails to comply with it, an employer may raise failure to exhaust as an affirmative defense. *See Lincoln v. BNSF Ry. Co.*, 900 F.3d 1166, 1185 (10th Cir. 2018) (discussing 42 U.S.C. § 2000e-5(e)(1)).

“A plaintiff normally may not bring a Title VII action based upon claims that were not part of a timely-filed EEOC charge for which the plaintiff has received a right-to-sue-letter.” *Sanderson v. Wyo. Highway Patrol*, 976 F.3d 1164, 1170 (10th Cir. 2020) (internal quotation marks omitted). This exhaustion requirement serves “two principal purposes: 1) to give notice of the alleged violation to the charged party; and 2) to give the EEOC an opportunity to conciliate the claim, which effectuates Title VII’s goal of securing voluntary compliance.” *Id.* (internal quotation marks omitted). “To advance these purposes[,] a plaintiff’s claim in court is generally limited by the scope of the administrative investigation that can reasonably be expected to follow the charge of discrimination submitted to the EEOC.” *Id.* (brackets, ellipsis, and internal quotation marks omitted). We liberally construe the allegations in the EEOC charge, which “must contain facts concerning the discriminatory and retaliatory actions underlying each claim.” *Smith*, 904 F.3d at 1164 (brackets and internal quotation marks omitted). “[T]his follows from the rule that each discrete incident of alleged discrimination or retaliation constitutes its own

unlawful employment practice for which administrative remedies must be exhausted.” *Jones v. UPS, Inc.*, 502 F.3d 1176, 1186 (10th Cir. 2007) (internal quotation marks omitted), *overruled on other grounds by Lincoln*, 900 F.3d at 1185-86.

Mr. Clark’s district-court claims do not fall within the scope of the administrative investigation that could reasonably be expected to follow from the facts alleged in his EEOC charge. His complaint alleges he was removed from the work schedule, his loads were reassigned to white drivers, and he was required to drive unsanitary equipment. But his EEOC charge alleged he was fired under the pretext of failing to report the traffic accident and because he had previously complained to the NLRB that his paychecks were short. The EEOC investigation that was reasonably expected to follow from the facts in the EEOC charge would look into Mr. Clark’s involvement in the traffic accident and whether he reported it, as well as his concerns lodged with NLRB about his paychecks. Those facts are unrelated to, and would not prompt an investigation of, the allegedly unlawful conduct underlying Mr. Clark’s claims. *See Jones*, 502 F.3d at 1186 (emphasizing that exhaustion is determined by “the scope of the administrative investigation that can reasonably be expected to follow from the discriminatory *acts* alleged in the administrative charge”). Consequently, the claims were subject to dismissal for failure to exhaust.

Mr. Clark offers two arguments on appeal: he first suggests the reason given for his termination—that he failed to report the accident—is untrue and pretext

because he reported the accident five to seven minutes after it occurred and again two hours later. Second, he says he was targeted by his manager for “personel” [sic] reasons and for going to human resources. Aplt. Br. at 3. But whether these things are true or not is irrelevant to the district court’s reason for dismissing his action—he failed to exhaust his claims—and thus we need not consider the arguments. *See Nixon v. City & Cnty. of Denver*, 784 F.3d 1364, 1369 (10th Cir. 2015) (affirming dismissal of claim where appellant’s brief failed to challenge the basis for the district court’s ruling). And absent any further argument from Mr. Clark challenging the district court’s dismissal, he fails to show any reversible error. *See Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840-41 (10th Cir. 2005) (recognizing that pro se materials are entitled to a liberal construction but this court cannot craft arguments for, or advocate on behalf of, pro se litigants).

III

Accordingly, we affirm the district court’s judgment.

Entered for the Court

Jerome A. Holmes
Chief Judge