2/2/2019

18-1398

No._____

In the
Supreme Court of the United States

ANICA ASHBOURNE, Petitioner

v.

DONNA HANSBERRY, Director, Global High Wealth, Respondent,

DONNA PRESTIA, Assistant Director, Global High Wealth, Respondent,

THOMAS COLLINS, Territory Manager, Global High Wealth, Respondent, and,

Timothy Geithner, Secretary, United States Department of the Treasury, Respondent

---

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

PETITION FOR WRIT OF CERTIORARI

Anica Ashbourne, pro se
7422 Drumlea Road
Capitol Heights, MD 20743
(240) 788-7712
taxatty_2000@yahoo.com

QUESTIONS PRESENTED

Upon exhaustion of the administrative proceedings, the Equal Employment Opportunity Act of 1972, 42 U.S.C. §2000e-16(c), section 717(c) provides a federal sector employee with an unconditional right to a trial *de novo* for discrimination claims filed pursuant to Title VII of the Civil Rights Act of 1964. *Chandler v. Roudebush*, 425 U.S. 840, (1976); President v. Vance, 627 F.2d 353, 360 (D.C. Cir. 1980).

1. Upon exhaustion of the administrative proceedings, did 42 U.S.C. §2000e-16(c) provide Anica Ashbourne with an unconditional right to a trial *de novo* on her discrimination claims filed pursuant to Title VII of the Civil Rights Act of 1964?

2. Did the courts abuse their judicial authority when they ignored *Brown v. Gen'l Services Adm.*, 425 U.S. 820 (1976) and *Chandler v. Roudebush*, 425 U.S. 840 (1976), by relying on 42 U.S.C. §2000e-5 to dismiss a complaint that was filed under 42 U.S.C. §2000e-16?

LIST OF PARTIES

Pursuant to Rule 14.1(b), Petitioner states that the parties include:

1. Anica Ashbourne, an African-American female, is the Plaintiff and the Petitioner.

2. Donna Hansberry (white female) is the Defendant and the Respondent.

3. Donna Prestia (white female) is the Defendant and the Respondent.

4. Thomas Collins (white male) is the Defendant and the Respondent.

5. Timothy Geithner, Secretary, U.S. Department of the Treasury, the Defendant and the Respondent.

Other Relevant Parties:

6. Lauren Benedict (white female), Labor Relations Specialist, Global High Wealth.

7. Tom G. Johnson (white male), owner of C.J. Johnson, Inc., an Oakland, CA CPA firm.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other Authorities

Regulations

OPINIONS BELOW

The opinion of the United States District Court was issued on March 29, 2017. Judge Colleen Kollar-Kotelly's opinion is printed at 1a. The United States District Court for the District of Columbia Circuit (D.C. Circuit) affirmed Kollar-Kotelly's opinion on June 29, 2018, which is printed at 15a. An order denying a rehearing en banc is printed at 29a.

JURISDICTION

The United States District Court for the District of Columbia Circuit issued its opinion on June 29, 2018. Rehearing en banc was denied on September 5, 2018. Justice Roberts granted an extension to May 4, 2019. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reprinted below.

42 U.S.C. §2000e-16(c) provides:

CIVIL ACTION BY EMPLOYEE OR APPLICANT FOR EMPLOYMENT FOR REDRESS OF GRIEVANCES; TIME FOR BRINGING OF ACTION; HEAD OF DEPARTMENT, AGENCY, OR UNIT AS DEFENDANT [FEDERAL SECTOR EMPLOYEES]

Within 90 days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a), or by the Equal Employment Opportunity Commission upon an

appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Equal Employment Opportunity Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e–5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

29 C.F.R. §1614.407 provides:

CIVIL ACTION: TITLE VII, AGE DISCRIMINATION IN EMPLOYMENT ACT AND REHABILITATION ACT. [FEDERAL SECTOR EMPLOYEES]

A complainant who has filed an individual complaint, an agent who has filed a class complaint or a claimant who has filed a claim for individual relief pursuant to a class complaint is authorized under title VII, the ADEA and the Rehabilitation Act to file a civil action in an appropriate United States District Court: (a) Within 90 days of receipt of the final action on an individual or class complaint if no

appeal has been filed; (b) After 180 days from the date of filing an individual or class complaint if an appeal has not been filed and final action has not been taken; (c) Within 90 days of receipt of the Commission's final decision on an appeal; or (d) After 180 days from the date of filing an appeal with the Commission if there has been no final decision by the Commission.

INTRODUCTION

This Case requires this Court to determine whether the Equal Employment Opportunity Act of 1972, 42 U.S.C. §2000e-16(c), section 717(c) gave federal employers, like Donna Hansberry, Donna Prestia, and Thomas Collins, and the courts the right to force discrimination victims out of the administrative process. And, if a victim refuses to abandon the process, whether federal employers and the courts then have the right to use *res judicata* to dismiss the complaint, thereby depriving a victim of her statutory right to a trial *de novo* on her claims. Ms. Ashbourne argues that it does not.

The issue here is that the D.C. Circuit has failed to recognize 42 U.S.C. §2000e-16(c) and that "may" here does not mean "must". Congress gave victims of discrimination the right to choose how to navigate their discrimination complaints, and the right to choose how long they wanted to remain in the administrative process before filing their Title VII actions. Although it claims otherwise, the D.C. Circuit has not cited any court cases where res judicata applied to 42 U.S.C. §2000e-16(c) actions to bar a federal sector plaintiff. who elected to remain

in the administrative process, from having her discrimination claims. Since Title VII is the exclusive remedy for complaints filed under 42 U.S.C. §2000e-16(c), the D.C. Circuit could not cite any cases where a federal sector employment complaint was barred by res judicata because the complainant raised discrimination claims in a civil action under an anti-discrimination statute, and then later under Title VII. And, contrary to its claims, the D.C. Circuit has not cited any cases where a judge had ordered a federal sector victim of discrimination, like Ms. Ashbourne, with pending non-discrimination suits, out of the administrative process with orders to add her Title VII claims to her non-discrimination complaint. Lastly, contrary to decisions issued by this Court, the D.C. Circuit relied entirely on both private sector and on non-employment discrimination cases to decide this case.

Here, the D.C. Circuit deliberately relied on private sector cases instead of cases filed under 42 U.S.C. §2000e-16. This Court has characterized such conduct as abusive. It has held that a court abuses its discretion when it relies on private sector employment discrimination laws to decide a federal sector employment discrimination case. This Court recognized that courts cannot rely on private sector cases because of the significant administrative and procedural differences between 42 U.S.C. §2000e-5 and 42 U.S.C. §2000e-16. For example, courts have routinely applied res judicata when a private sector plaintiff is pursuing his Title VII claims under 42 U.S.C. §2000e-5 and under other anti-discrimination statutes. However, unlike the private sector, though, Congress deliberately made 42 U.S.C.

§2000e-16 the exclusive remedy for federal sector plaintiffs. Unlike the private sector plaintiff, a federal sector employee cannot pursue employment discrimination remedies under any other anti-discrimination statute.

In exchange for making 42 U.S.C. §2000e-16 the federal employee's exclusive remedy, Congress deliberately gave federal employees an unconditional right to a trial *de novo* on their claims and the right to choose the time for filing the civil action. This Court has held repeatedly that the statutory language of 42 U.S.C. §2000e-16(c) makes it clear that a federal sector employee has an unconditional right to a trial *de novo* provided he has complied with the provision's requirements. Chandler v. Roudebush, 425 U.S. 840, 846 (1976).

Unlike the private sector plaintiff, the provision requires a federal employee to exhaust several administrative remedies.

First, he must contact an Equal Employment Opportunity Counselor within 45 days of the discriminatory event. 29 C.F.R. §1614.105(a)(1). Second, he must make efforts to informally resolve the matter. 29 C.F.R. §1614.105(a)(1). Third, he must timely file an administrative discrimination complaint with the agency. 29 C.F.R. §1614.106(a). Fourth, he must obtain a final agency decision. 29 C.F.R. §1614.110(a). Fifth, he may appeal the agency's decision to the Equal Employment Opportunity Commission within 30 days of his receipt. 29 C.F.R. §1614.402(a). If he does not appeal the agency's decision, he may file a civil action in District Court. 29 C.F.R. §1614.407.

The Case is before this Court because the D.C. Circuit argues that "may" here actually means "must". However, 42 U.S.C. §2000e-16(c) provides that a federal employee "may file a civil action" either: 1) within 90 days after he receives the agency's decision if no appeal with the Equal Employment Opportunity Commission has been filed; 2) 180 days after the date he filed his discrimination complaint, if no appeal has been file and the agency has not taken final action on his complaint; or, 3) within 90 days after he receives the Equal Employment Opportunity Commission's final decision on his appeal. The right to file a "civil action" in 42 U.S.C. §2000e-16(c) is an unconditional statutory right. In Chandler, this Court found that the statutory language of §717(c) made it clear that the victim's right to a trial *de novo* is unconditional, unqualified, and unrestricted. This Court said too that any attempt to qualify or interfere with this right is a violation of §717(c) and an affront to the elementary canon of statutory construction. Chandler, 425 U.S. at 846-848.

This Court again addressed the issue of whether a discrimination victim had an unconditional right to a trial *de novo* in Mohasco Corp. v. Silver. Although this was a private sector case, this Court rejected the lower court's conclusion that the Title VII plaintiff was required to filed her discrimination suit after a certain number of days. 447 U.S. 807 (1980). It held there were no such requirement because Title VII entitled the plaintiff to a trial *de novo*. It reasoned that Title VII's time provisions did not require a victim to file her civil action according to any time periods or other

specifications inconsistent with the time periods Congress set out in Title VII. In so holding, this Court emphasized that a court should not apply any time limitation that Congress had not specifically included in Title VII. Such is the case here.

Like the lower court in Mohasco, the D.C. Circuit erroneously concluded that Ms. Ashbourne was required to withdraw from the administrative process after a certain number of days, or face having her statutory right to a trial *de novo* being barred by res judicata. The D.C. Circuit concluded that Ms. Ashbourne lost her right to a trial *de novo* when she refused to withdraw from the administrative process. Specifically, the D.C. Circuit determined that Ms. Ashbourne lost her right because she refused to withdraw when Judge Beryl Howell ordered her to consolidate her Title VII claims with her non-discrimination claims, and when she elected to appeal their Final Agency Decision in 2013, and to remain in the administrative process until it concluded in 2015.

The D.C. Circuit concluded that, since she had refused to withdraw from the administrative process, Judge Kollar-Kotelly properly dismissed her Title VII complaint under res judicata.

But, this is contrary to this Court's decisions involving 42 U.S.C. §2000e-16(c). As this Court determined more than 30 years ago, victims of discrimination have an unconditional, unqualified, and unrestricted right to a trial *de novo*. Nothing in 42 U.S.C. §2000e-16 required Ms. Ashbourne to withdraw from the administrative process after a certain number of days or permitted Howell to order

her to consolidate her discrimination complaints with her non-discrimination civil actions. Howell, Kollar-Kotelly, and D.C. Circuit completely ignored 42 U.S.C. §2000e-16(c). In fact, they never mention it. But, in McRae v. Librarian and Howard v. Pritzker, the D.C. Circuit made it clear that federal sector plaintiffs have an unconditional right to a trial *de novo* and an unconditional right to choose the time to file their suits.

Although it refused to mention 42 U.S.C. §2000e-16 in the instant case, this Circuit, in McRae v Librarian, held that 42 U.S.C. §2000e-16 granted McRae the right to a trial *de novo*, even if she chose to remain in the administrative process .843 F.2d 1494, 1496 (D.C. Cir. 1988). Significantly, the court found that 42 U.S.C. §2000e-16 did not give either the courts or the agencies the statutory right to choose when the victim had to file her suit. It emphasized that 42 U.S.C. §2000e-16 clearly accorded these rights to the victims of discrimination. McRae, 843 F.2d at 1494, 1496. And, as this Court stated more than 30 years ago, any attempts by the courts to "[o]bliquely qualify [] the federal employee's right to a trial *de novo* [violate] § 717 (c). . .[and] this elementary canon of construction." Chandler, 425 U.S. at 848, 862.

In 2015, this Circuit addressed the issue again in Howard v. Pritzker. It rejected the district court's conclusion that Howard's suit was barred by 28 U.S.C. §2401(c) (6-year statute of limitations for filing suit against the federal government) because Howard had elected to remain in the administrative process, rather than file her civil action. Citing

Chandler and Brown, this Circuit held that Congress intended for 42 U.S.C. §2000e-16(c) to contain the only time requirements for federal sector employment discrimination complaints. 775 F.3d 430, 436 (D.C. Cir. 2015). Unlike the instant case, Howard is consistent with decisions issued by all of the other circuits.

Citing Howard, the Third Circuit, in Kannikal v. Atty Gen'l U.S.., explained that "the legislative history of Title VII demonstrates that Congress did not intend to foreclose the administrative process but to encourage victims to use it, while also providing them with an escape from it "... after a certain number of days have elapsed." Kannikal, 776 F.3d 146, 151 (3rd Cir. 2015).

The Court should grant this petition because the D.C. Circuit's decision is in direct conflict with 42 U.S.C. §2000e-16 and with decisions issued by this Court and by every other circuit. Moreover, this Court's intervention is required because it is a matter of national importance when a federal district court judge refuses to enforce Title VII of the Civil Rights Act of 1964, issues a decision finding that(white) employers are "entitled" to use their "judgment" (and not evidence) about African-American applicants, or alters court records so that a victim of racial discrimination is deprived of her right to a trial *de novo* on her discrimination claims.

FACTUAL BACKGROUND

The Case arose because Donna Hansberry, Donna Prestia, and Thomas Collins, all federal

employers, inter alia, falsified Ms. Ashbourne's personnel records by creating a Notice of Proposed Termination with trumped-up charges, and then using their notice to terminate her amidst stigmatizing charges of dishonesty.

Ms. Ashbourne had filed a discrimination complaint with the Equal Employment Opportunity Commission, and sued Donna Hansberry, Donna Prestia, and Thomas Collins in court for violating her rights under the Privacy Act and under the U.S. constitution. Although Ms. Ashbourne had filed a motion to stay her civil actions, Howell did not stay the proceedings. Instead, Howell granted Donna Hansberry, Donna Prestia, and Thomas Collins's motion for summary judgment. Howell rejected Ms. Ashbourne's argument that both the Federal Rule of Civil Procedure 56 and the Privacy Act required them to substantiate their Notice of Proposed Termination with the factual records of independent and objective third parties (i.e. documentary evidence. Instead, she concluded that they were entitled to use their "judgment" about Ms. Ashbourne. On appeal, the D.C. Circuit agreed with Howell. It rejected Ms. Ashbourne's argument and held that the Privacy Act required Ms. Ashbourne to disprove their unproven charges. Ms. Ashbourne then filed a petition with this Court, which it denied.

In 2015, Ms. Ashbourne filed her Title VII complaint, which was assigned to Judge Kollar-Kotelly. Ms. Ashbourne's Title VII complaint included the same claims she raised in her administrative complaint. Judge Kollar-Kotelly dismissed her complaint. Ms. Ashbourne argued

that she ignored 42 U.S.C. §2000e-16 and evidence that Ms. Ashbourne, in February 2013, had filed a motion to stay her non-discrimination claims while she exhausted her administrative remedies.

Petitioner Anica Ashbourne is a Tax Attorney/CPA and former government Chief Audit Executive. DDC 16-00908, Document 12, p. 4. In 2009, the U.S. Department of the Treasury selected her for several positions and then requested that she submit the Electronic Questions for Investigative Purposes (e-QIP). DDC 16-00908, Document 12, p. 4. Based on the results of its background investigation, the agency hired Ms. Ashbourne for a Secret Security Clearance position and, because of her diverse work experience, designated her a candidate with "Superior Qualifications". 20a.

According to her résumé, under Ashbourne & Company, she "Consulted with clients in a range of industries". DDC 12-1153, Document 66-2, p. 91. She also wrote that she worked as a consultant for several years at CPA firms and in private industry and, for tax reporting purposes, she worked as both an employee and as an independent contractor. DDC 12-1153, Document 66-2, p. 98. This is consistent with how she reported her verifiers in e-QIP. DDC 16-00908, Document 12, p. 4.

In May 2010, Donna Hansberry, Donna Prestia, and Thomas Collins offered Ms. Ashbourne a $115,742 position as an Auditor-in-Charge in Global High Wealth, division within the Internal Revenue Service (IRS), R. 49, p. 3 [Case No. 12-1153], a position she started on June 21, 2010.

Although Ms. Ashbourne had undergone a Secret Security Clearance investigation a few months before, Donna Hansberry, Donna Prestia, and Thomas Collins instructed her to resubmit e-QIP so they could reinvestigate her. Document 69-3, p. 12 [Judge Beryl Howell (Case No. 12-1153) (Case No. 12-1153]. Then without any explanation, they reduced her salary to $89,030 (a $26,712 decrease), Document 49, p. 3 [Judge Beryl Howell (Case No. 12-1153) (Case No. 12-1153]. Despite Ms. Ashbourne's "Superior Qualifications", Donna Hansberry, Donna Prestia, and Thomas Collins reduced her salary to an amount they paid their entry-level auditors (all of whom were white). Id. After reducing her salary, which essentially demoted her to an entry-level position, Thomas Collins threatened to terminate her employment if Ms. Ashbourne did not give him the names of personal references (i.e. friends) who could verify her work experience. Id. at 3-4. However, she found his conduct was questionable because the federal government uses an applicant's supervisors to verify work experience, not an applicant's personal friends. Case No. 12-1153, Document 89-3, p. 6 [Judge Beryl Howell (Case No. 12-1153)]; Document 69-3, p. 64 [Judge Beryl Howell (Case No. 12-1153)],

A few days later, Donna Hansberry, Donna Prestia, and Thomas Collins contacted Tom G. Johnson of C.J. Johnson, Inc., an Oakland, CA CPA firm and asked him to submit an affidavit about her 2001 employment with his firm. Document 69-3, p. 125 [Judge Beryl Howell (Case No. 12-1153)]. In 2009, however, Ms. Ashbourne had told the U.S. Department of the Treasury that she had resigned

from C.J. Johnson, Inc. because she suspected that Tom G. Johnson was engaged in the unauthorized practice of law and in questionable accounting practices. Document 49, p. 5 [Judge Beryl Howell (Case No. 12-1153)]. And, in e-QIP, Ms. Ashbourne wrote that she had resigned, but that Tom G. Johnson would claim otherwise. Appendix, p. 34, 45 [Civil Case No. 15-5351.

Mr. Johnson claimed in his affidavit that he terminated Ms. Ashbourne for being AWOL in Ohio for 3 days. Document 69-3, p. 124-125 [Judge Beryl Howell (Case No. 12-1153)]. When Allison & Taylor LLC, an independent pre-employment firm, interviewed him, Mr. Johnson claimed that he terminated her on December 17, 2001.Document 57, p. 35 [Judge Beryl Howell (Case No. 12-1153)]. However, Ms. Ashbourne said that she resigned on December 17, 2001. In fact, her 2001 debit card transactions and ATM withdrawals show that she did not travel to Ohio until December 18, 2001 and that Tom G. Johnson had paid her bonus pay in January 2002. Document 49, p. 6 [Judge Beryl Howell (Case No. 12-1153)].

After they received Tom G. Johnson's affidavit, Donna Hansberry, Donna Prestia, and Thomas Collins created a false background investigative report. In it, they claimed that Ashbourne & Company (Ms. Ashbourne's sole proprietorship) did not exist because the business did not have an Employer Identification Number, an Individual Taxpayer Identification Number, and an Albany business license. Document 49, p. 4 [Judge Beryl Howell (Case No. 12-1153)]. However, they

lied. First, Ms. Ashbourne's business did not have an Employer Identification Number because it was not an employer. Actually, it is a fact and the law that a sole proprietorship cannot be its owner's employer. According to Webster's Dictionary, it is factually impossible for a sole proprietor to be an employee of her own sole proprietorship. Document 64, p. 3 [Judge Beryl Howell (Case No. 12-1153)]. Second, the business did not have an Individual Taxpayer Identification Number because it is not an individual. And, third, the business did not have an Albany business license because it did not do business in Albany. Id at 4.

On May 9, 2011, Donna Hansberry, Donna Prestia, and Thomas Collins called Ms. Ashbourne into an unscheduled meeting. Document 49, p. 6 [Judge Beryl Howell (Case No. 12-1153)]. Lauren Benedict, their labor relations specialist, laughed when Ms. Ashbourne walked in the room. Ms. Benedict told her that they intended to fire her because Ms. Ashbourne wrote in e-QIP that she had resigned from C.J. Johnson, Inc. Donna Hansberry, Donna Prestia, and Thomas Collins wanted Ms. Ashbourne to "confess" that she had been terminated. Document 12, p. 9[United States District Court (Colleen Kollar-Kotelly) (Judge Colleen Kollar-Kotelly (Case No. 16-908))]. Ms. Benedict said that Ms. Ashbourne would be terminated the next day, if she did not resign and handed her their "Resign or Be Terminated Letter". Case No. 12-1153, Document 49, p. 6.

On May 10, 2011, they handed Ms. Ashbourne their Notice of Proposed Termination and escorted

her out of the facility. Case No. 16-00908, Document 12, p. 9. In their notice, they accused Ms. Ashbourne of lying about Ashbourne & Company on her résumé and about her resignation from C.J. Johnson, Inc. USCA 15-5351, Document 1610657 p. 37. Now, in it, they claimed that Ashbourne & Company did not exist because Ms. Ashbourne was self-employed. However, they still lied about Ashbourne & Company. First, by definition, Ashbourne & Company had to exist because a person who is self-employed is the owner of a sole proprietorship. USCA Case 15-5351, p. 85. A person cannot be self-employed without a business. Second, they had no evidence Tom G. Johnson told the truth; instead, they simply opined that they believed Tom G. Johnson. USCA Case 15-5351, p. 85. In response, Ms. Ashbourne produced C.J. Johnson, Inc.'s 2001 tax records, Id. at 88, which showed that Tom G. Johnson paid Ms. Ashbourne in full throughout her employment as well as bonus pay in January 2002. Id. at 88.

Ms. Ashbourne sued Donna Hansberry, Donna Prestia, and Thomas Collins in district court for falsifying her personnel records with their Notice of Proposed Termination, and for violating her Privacy Act and constitutional rights. Ms. Ashbourne also filed an administrative discrimination complaint with the Equal Employment Opportunity Commission.

PROCEDURAL BACKGROUND

A. Administrative Complaint Filed with EEO Counselor

On November 9, 2011, Ms. Ashbourne filed an administrative complaint raising the following claims:

1. Discriminatory Compensation – They reduced her negotiated salary from $115,742 to $89,000. This was the same salary they paid uncredentialed and inexperienced (all white) auditors. 16a-18a. Their salary reduction demoted Ms. Ashbourne from an Auditor-in-Charge, 16a, to an entry-level auditor. 17a.

2. Performance Evaluations –Donna Hansberry, Donna Prestia, and Thomas Collins ignored her manager's narratives that her performance exceeded expectations and numerically rated her as average. These were the same numerical scores they gave uncredentialed and inexperienced (all white) employees. 19a-20a.

3. Promotional Opportunities-Their average ratings deprived Ms. Ashbourne of performance (monetary) awards and other promotional opportunities. 19a.

4. Work Assignments – They assigned her a disproportionate amount of work. 19a. When her manager and other IRS officials tried to assign her more challenging work, 18a, Donna Hansberry, Donna Prestia, and Thomas Collins assigned her the entry-level work that its inexperienced (all white) employees were incapable and unqualified to complete.

5. Time-keeping Records/Computer-monitoring-They scrutinized Md. Ashbourne's time records and computer use, but allowed (white) employees

to improperly access taxpayer records, falsify timesheets, and record time for work that was performed by Ms. Ashbourne. 19a; DDC 16-00908, Document 12, p. 4.

6. Adjudicatory process-Ms. Ashbourne had a Secret Security Clearance but they reinvestigated her. In their investigation report, they created "interview notes" for interviews that never took place. And, although she and Thomas Haskins (white male) were both sole proprietors, they determined that her business did not exist because she was self-employed, but that his business did because he was also self-employed.

7. Termination- They admitted they had no evidence when they deliberately terminated her amidst stigmatizing charges of dishonesty.

In December 2012, Donna Hansberry, Donna Prestia, and Thomas Collins issued their Final Agency Decision without interviewing Ms. Ashbourne, without providing her with the Notice of Election Rights, and without sending her a copy their Investigative File. DDC 16-00 908, Document 7-2 p. 3.

B. Appeal of Final Agency Decision to the Equal Employment Opportunity Commission

In January 2013, Ms. Ashbourne appealed their Final Agency Decision. On February 11, 2013, she filed a Motion to Stay Proceedings/Memorandum in Support in Case No. 1:12-cv-01153 (Beryl Howell).

In 2015, the Equal Employment Opportunity Commission dismissed her complaint. It cited 29

C.F.R. §1614.409 to conclude that it could not hear her appeal because she had filed civil actions under 29 C.F.R. §§1614.407 (ADEA) and 1614.408 (Equal Pay Act). But the Commission erred because she had filed not filed her civil actions under §1614. Instead, she had filed her ADEA civil action under 29 U.S.C. §633(a), Stevens v. Dep't of Treas., 500 U.S. 1, 5-6 (1991) and her Equal Pay Act under 29 U.S.C. §206(d). These provisions allows a plaintiff to bypass the administrative process and file suit directly in United States District court.

C. United States District Court (Judge Beryl Howell (Case No. 12-1153))

Although Ms. Ashbourne filed a motion to stay, Howell, in November 2015, did not stay the proceedings; instead, she granted their motion for summary judgement. DDC 12-1153, Document 93. Ignoring evidence, Howell concluded that "... the plaintiff's use of Ashbourne & Company on her résumé gave a misleading impression of steady and continuous work.". DDC 12-1153, Document 93, p. 14. Howell, however, ignored the fact that, by definition, a person who is self-employed will not have steady and continuous work. Document 1676765, p. 85-88 [USCA Case #15-5351].

Howell also deliberately ignored evidence to conclude that "plaintiff indicated on her résumé that she worked . . . at a firm called Ashbourne & Company". DDC 12-1153, Document 93, p. 4. She failed to show though where Ms. Ashbourne had indicated on her résumé that she "worked at" or "worked for" Ashbourne & Company. Howell also rejected evidence from the OPM that the federal

résumé only reports an applicant's "Work Experience". OPM makes it clear that the résumé does not indicate an applicant's "work history", "work locations", "jobs", or "employment history". DDC 12-1153, Document 66-2, p. 91. Howell also rejected evidence that Ms. Ashbourne wrote on her résumé, under Ashbourne & Company, that she had worked for, and was employed by, clients. DDC 12-1153, Document 66-2, pp. 91, 98.

Howell did not comply with Rule 56 or the Privacy Act when she concluded that Donna Hansberry, Donna Prestia, and Thomas Collins were entitled to use their "judgment" rather than documentary evidence to substantiate their Notice of Proposed Termination. DDC 12-1153, Document 93, p. 20.

Howell also deliberately concluded that "plaintiff supports her assertion that she was terminated" when Howell knew that Ms. Ashbourne supported her assertion that she had instead resigned by submitting interview notes of [Tom G. Johnson] prepared by [Allison & Taylor] a third-party investigator."

Rather than accept Allison & Taylor's affidavit, Howell, without any evidence, accused this independent and objective background investigator of influencing Tom G. Johnson's responses. DDC 12-1153, Document 93, p. 18, note 10. But Howell failed to explain how Allison & Taylor had allegedly influenced Tom G. Johnson, how she determined Tom G. Johnson and Ms. Ashbourne continued working together for two weeks after her Ohio trip, or why Tom G. Johnson would pay Ms. Ashbourne

for days he claimed she was allegedly AWOL in Ohio., and for days when the office was closed. Howell failed to explain too why she held that Donna Hansberry, Donna Prestia, and Thomas Collins were "entitled" to use their own "judgment" when the Privacy Act specifically forbids them from doing so. Howell also failed to explain the support for her findings about Bank of America, because her findings conflict with the record, why she ignored admissions made by Tom G. Johnson, Donna Hansberry, Donna Prestia, and Thomas Collins, and why she created a bizarre set of facts that are in conflict with the agency's own records.

Howell also failed to explain how she concluded that Donna Hansberry, Donna Prestia, and Thomas Collins had "interviewed the plaintiff and a number of former employers," DDC 12-1153, Document 93, p. 3, and based their termination of her "on their background investigation", DDC 12-1153, Document 93, p.9, when they had not investigated Tom G. Johnson or verified the accuracy of his affidavit, DDC 12-1153, Document 52, p. 30, that it was not important to them whether Tom G. Johnson had been truthful, DDC 12-1153, Document 76, p. 6, and that they terminated Ms. Ashbourne solely because she said she had resigned, while Tom G. Johnson said otherwise. DDC 12-1153, Document 63-1 p. 2. Howell failed to explain the support for her conclusion that they had "fulfilled [their] duty to verify the accuracy of the signed affidavit." DDC 12-1153, Document 93, p. 18.

In addition to ignoring evidence and the law, Howell unfairly accused Ms. Ashbourne of

"bickering" about her constitutional right to a "meaningful opportunity to be heard". DDC 12-1153, Document 93, p. 10, and then unfairly concluded that Donna Hansberry, Donna Prestia, and Thomas Collins provided her with adequate due process simply because Thomas Collins said they had done so. DDC 12-1153, Document 93, p. 10.

Howell also rejected evidence that Donna Hansberry, Donna Prestia, and Thomas Collins had improperly and publicly disclosed Ms. Ashbourne's personnel records. Ms. Ashbourne argued that they were not entitled to claim the Privacy Act's routine use disclosure exemption because the Privacy Act required them to conduct an objective investigation, which they admitted they had not done, and to verify the accuracy of their Notice of Proposed Termination with documentary evidence. Ignoring well-settled laws, Howell concluded that they could claim the routine use disclosure exemption because they were entitled to use their own "judgment" to verify the accuracy of their records.

Judge Howell rejected evidence that Donna Hansberry, Donna Prestia, and Thomas Collins had created the "Comparison Listings and instead concluded that it was the U.S. Department of the Treasury that had "... generated a "Comparisons Listing" for purposes of evaluating comparative consequences". DDC 12-1153, Document 93, p. 13. The U.S. Department of the Treasury, however, denied this and said it did not use or generate such documents. DDC 12-1153, Document 76, p. 3. Howell failed to explain the basis for her conclusions or why her conclusions are in direct conflict with

statements made by the U.S. Department of the Treasury.

D. United States Court of Appeals for the District of Columbia Circuit (Case No. 15-5351)

The D.C. Circuit affirmed Howell's grant of summary judgment. Document 1709626, p. 1. 1a. It rejected Ms. Ashbourne's argument that the Privacy Act and Doe v. U.S., 821 F.2d 694 (D.C. Cir. 1986) required Donna Hansberry, Donna Prestia, and Thomas Collins to verify the accuracy of their records against the factual records of independent and objective third parties. And, the panel rejected her argument that Arnett v. Kennedy, Doe v. U.S. Department of Justice, and Naekel v. Department of Transportation required them to substantiate their Notice of Proposed Termination with preponderant evidence. Instead, it concluded that it was Ms. Ashbourne's responsibility to disprove their unproven charges.

On October 1, 2018, Ms. Ashbourne filed a petition for writ of certiorari, which this Court denied on December 3, 2018. No. 18426.

E. United States District Court (Judge Colleen Kollar-Kotelly (Case No. 16-908))

In 2015, Ms. Ashbourne filed her Title VII complaint raising the same issues that she raised before the E E O C, including the fact that Donna Hansberry, Donna Prestia, and Thomas Collins had failed to comply with the notice requirements of 29 C.F.R. §1614.

On March 29, 2017, Judge Kollar-Kotelly granted their motion to dismiss. Judge Kollar-Kotelly relied entirely on private sector laws to determined that res judicata barred her suit, even though this was federal sector employment discrimination case. Although Ms. Ashbourne had filed a motion to stay, which Kollar-Kotelly had a copy of it, Kollar-Kotelly found that Ms. Ashbourne had not filed the motion and dismissed her case.

F. United States Court of Appeals for the District of Columbia Circuit (17-5136)

On appeal, the D.C. Circuit affirmed. It held that res judicata applied because Ms. Ashbourne had failed to withdraw from the administrative process when Howell ordered her to and because she had failed to file a motion to stay. 25a.

REASONS FOR GRANTING PETITION

I. The D.C. Circuit erroneously relied entirely on private sector laws to decide this federal sector employment discrimination case.

The D.C. Circuit's decision to apply res judicata to this 42 U.S.C. §2000e-16 complaint conflicts with decisions issued by this Court and with decisions issued by every other circuit. In fact, the D.C. Circuit falsely stated that its decision is consistent with the other circuits, 16a, fully aware that it is not and fully aware that it relied entirely on private sector laws. Moreover, the D.C. Circuit also knew that reliance on private sector employment discrimination cases is inapposite in deciding federal sector employment discrimination complaints. Brown v. GSA, 425 U.S. 820, 833-834

(1976). In Brown, this Court reasoned that, unlike 42 U.S.C. §2000e-16, Congress deliberately designed 42 U.S.C. §2000e-5 so that a private sector individual could independently pursue his rights under Title VII and under other anti-discrimination statutes. Brown, 425 U.S. 820, 833-834 (1976). In the private sector employment discrimination cases cited by the D.C. Circuit, the courts applied res judicata because the private sector employee had filed a discrimination complaint under both Title VII and under another anti-discrimination statute.

This Court held in Brown that courts should not conflate 42 U.S.C. §2000e-5 and 42 U.S.C. §2000e-16. Brown, a federal employee, filed a Title VII racial discrimination suit under 42 U.S.C. §2000e-16(c), which the court dismissed as untimely. On appeal, Brown argued that 42 U.S.C. §2000e-5 and Johnson v. U.S. REA, a private sector employment case, allowed him to file suit under other anti-discrimination statutes. Johnson, 421 U.S. 454 (1975). This Court disagreed. It held that Brown's reliance on 42 U.S.C. §2000e-5 and on Johnson was inapposite. This Court explained that, based on the legislative history of 42 U.S.C. §2000e-16 and Congress' concerns about sovereign immunity, Congress intended for § 717 (c) of the Civil Rights Act of 1964, 42 U.S.C. §2000e-16 (c) to be the exclusive statute for federal employees seeking antidiscrimination remedies.

In Zugay v. Prog. Care, 180 F.3d 901, 903 (7th Cir. 1999), the Seventh Circuit held that the lower court erroneously relied on federal sector employment discrimination laws. Zugay, a private

sector employee, filed a pregnancy discrimination complaint under 42 U.S.C. §2000e-5. The lower court, relying on 42 U.S.C. §2000e-16, dismissed it as untimely. The Seventh Circuit reversed explaining that 42 U.S.C. §2000e-16(c) did not apply because it is the governing statute for federal sector employment discrimination complaints. Zugay v. Prog. Care, 180 F.3d 901, 903 (7th Cir. 1999). The Seventh Circuit explained that Congress established different mechanisms for resolving federal sector employment complaints by emphasizing that Congress had included administrative and procedural requirements in 42 U.S.C. §2000e-16 that were not included in 42 U.S.C. §2000e-5. Zugay v. Prog. Care, 180 F.3d 901, 903 (7th Cir. 1999).

Unlike 42 U.S.C. §2000e-5, the governing statute for private sector employment discrimination complaints, when Congress enacted 42 U.S.C. §2000e-16, Congress waived its sovereign immunity. Irwin v. Dep't of Vet. Aff., 498 U.S. 89,94 (1990). In exchange for waiving sovereign immunity, Congress designed a comprehensive remedial scheme to ensure that Title VII suits against the sovereign were brought only according to the express terms set out in 42 U.S.C. §2000e-16. Brown v. GSA, 425 U.S. 820, 832-833 (1976). Congress' remedial scheme is a dispute resolution system that encourages quicker, less formal, and less expensive resolution of disputes "within the federal government and outside of court." West v. Gibson, 527 U.S. 212, 218-219 (1999).

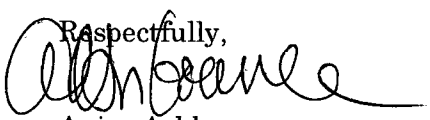
Although 42 U.S.C. §2000e-16(c) provides that a victim of discrimination "may file a civil action"

after a certain number of days, the Panel has interpreted "may" to mean "must".

CONCLUSION

This Court should grant this petition to ensure victims of discrimination retain their unconditional right to a trial *de novo* as Congress intended when it enacted Title VII of the Civil Rights Act of 1964. This Court should also grant this petition so it can investigate why the court altered Ms. Ashbourne's motion to stay and why it ignored Title VII of the 1964 Civil Rights Act to conclude that Donna Hansberry, Donna Prestia, and Thomas Collins were "entitled" to make unsubstantiated "judgments" about Ms. Ashbourne.

Respectfully,



Anica Ashbourne
7422 Drumlea Road
Capitol Heights, MD 20743
240.788.7712
Taxatty_2000@yahoo.com

May 4, 2019

LIST OF APPENDICES

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ANICA ASHBOURNE,
Plaintiff,

v.

DONNA HANSBERRY, *et al., Defendants.*

Civil Action No. 16-908 (CKK)

MEMORANDUM OPINION
(March 29, 2017)

Plaintiff Anica Ashbourne, a tax attorney proceeding *pro se,* brings this action against the Treasury Department and certain employees thereof under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.,* alleging employment discrimination on the basis of her race and gender. Before the Court is Defendants' [6] Motion to Dismiss and/or for Summary Judgment. Defendants have moved to dismiss for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6), and for summary judgment pursuant to Rule 56(a), in the alternative. Defendants present a number of bases for

dismissing Plaintiff's lawsuit at this procedural juncture, including that Plaintiff abandoned her Title VII claims when she failed to include them in a prior lawsuit, that she is precluded from bringing this action by the legal doctrine of res judicata, and that, in any event, Defendants are entitled to summary judgment on Plaintiff's claims.

Upon consideration of the pleadings[1], the relevant legal authorities, and the record for purposes of the pending motion, the Court **GRANTS** Defendant's [6] Motion pursuant to Rule 12(b)(6). As explained further below, the Court concludes that, on a Rule 12(b)(6) analysis of the Complaint and certain other materials of which the Court may take judicial notice for purposes of a Rule 12(b)(6) motion to dismiss, this action is barred by res judicata in its entirety, and therefore must be dismissed for failure to state a claim upon which relief can be granted. Accordingly, there is no need to reach Defendants' other grounds for seeking dismissal of this lawsuit.

---

[1] The Court's consideration has focused on the following documents:

- Defs.' Mot. to Dismiss and/or for Summ. J., ECF No. 6 ("Defs.' Mot.").
- Department of the Treasury Final Agency Decision, ECF No. 6-2 ("FAD").
- Equal Employment Opportunity Commission Dismissal of Appeal, ECF No. 6-3 ("EEOC Decision").
- Pl.'s Opp'n Mot. to Defs.' Mot. for Summ. J./Dismiss, ECF No. 12 ("Opp'n Mem.").
- Defs.' Reply in Mot. to Dismiss and/or for Summ. J., ECF No. 15 ("Reply Mem.").

I. BACKGROUND

The Court presents only those factual and procedural points that are relevant to its resolution of the pending motion on the basis of res judicata. As this matter is resolved on the basis of a motion to dismiss for failure to state a claim, the Court assumes the truth of the allegations in the Complaint.

Plaintiff was employed in the Department of the Treasury's Global High Wealth division from June 21, 2010 until she was terminated on May 10, 2011. Compl. 118. Prior to her termination, Plaintiff received a "Notice of Proposed Termination," which informed her that her termination was predicated on Defendants' view that she had misrepresented certain aspects of her employment history. *Id.* ¶ 9. In particular, Defendants concluded that Plaintiff had misrepresented the nature of her employment with Ashbourne & Company, her sole proprietorship, and her resignation from another employer. *Id.* Plaintiff alleges that these reasons were pretextual and that her termination and other adverse employment actions were the product of race and gender discrimination. *Id.* ¶ 24.

At the end of 2011, Plaintiff file three lawsuits in the United States District Court for the District of Maryland against the Treasury Department and her former supervisors, alleging violations of 42 U.S.C. § 1983; the Age Discrimination in Employment Act, 29 U.S.C. § 621; the Equal Pay Act, 29 U.S.C. § 206(d)(1); and the Privacy Act of 1974, 5 U.S.C. §552A[2]. All three cases were consolidated into the

---

[2] *Ashbourne v. Geithner, et al.,* 8:11-cv-02818-RWT (D. Md. Sept. 30, 2011); *Ashbourne v. Geithner, et al.,* 8:11-cv-03199-

first filed case, and the consolidated cases were transferred to the United States District Court for the District of Columbia. Order, ECF No. *22, Ashbourne v. Geithner, et al.,* 8:11-cv-02818-RWT (D. Md. July 12, 2012).

Subsequently, United States District Chief Judge Beryl A. Howell ordered Plaintiff to file a single amended complaint "containing all claims remaining in this consolidated case." Order Denying Mot. to Dismiss Without Prejudice, ECF No. 44, *Ashbourne v. Geithner, et al., 1:12-cv-01153-BAH* (D.D.C. Aug. 9, 2013) *("Ashbourne I").* As ordered, Plaintiff filed the amended complaint on October 29, 2013. ECF No. *49, Ashbourne I.* The amended complaint was brought against the same parties as the complaint in this action, and alleged violations of 42 U.S.C. § 1983 and the Privacy Act. *Id.* Chief Judge Howell dismissed Plaintiff's section 1983 claim on the basis of Defendants' motion to dismiss for failure to state a claim, ECF No. *58, Ashbourne I,* and subsequently granted summary judgment in favor of Defendants on Plaintiff's sole remaining claim under the Privacy Act, ECF No. *92, Ashbourne I.* That decision is now on appeal before the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit"), No. 15-5351.

Prior to filing her complaints in the District of Maryland, Plaintiff initiated administrative proceedings regarding her termination with the Department of the Treasury, and alleged "harassment and/or disparate treatment due to her race (African American) and/or sex (female)" under

---

RWT (D. Md. Nov. 9, 2011); *Ashbourne v. US Department of the Treasury,* 8:11-cv-03456-RWT (D. Md. Nov. 30, 2011).

Title VII. FAD at 2-3 (noting June 8, 2011 as the date of initial counselor contact). Ultimately, the Department of the Treasury issued a Final Agency Decision ("FAD") on December 12, 2012 concluding that a "finding of no discrimination/no harassment/hostile work environment is appropriate in this matter." *Id.* at 14. The FAD informed Plaintiff that she could either file an appeal with the Equal Employment Opportunity Commission ("EEOC") within 30 days, or "file a civil action in an appropriate United States District Court within 90 days . . . ." *Id.* at 16. The FAD further informed Plaintiff that she could file a civil action "after 180 days from the date of filing an appeal with EEOC if there has been no final decision by EEOC." *Id.* at 17. Although the exact date of Plaintiff's filing with the EEOC is not apparent from the record, Plaintiff did in fact choose to pursue an appeal to the EEOC. *See* EEOC Decision at 1. On September 11, 2015, the EEOC dismissed Plaintiff's appeal as it found that Plaintiff's consolidated civil case in this District *(i.e., Ashbourne I)* raised the same claims that Plaintiff had pursued on appeal to the EEOC, and "Commission regulations mandate dismissal of the EEO complaint under these circumstances so as to prevent a Complainant from simultaneously pursuing both administrative and judicial remedies on the same matters . . . ." *Id.* at 3.

II. LEGAL STANDARD

Defendants, *inter alia,* move to dismiss the Complaint for "failure to state a claim upon which relief can be granted" pursuant to Federal Rule of Civil Procedure 12(b)(6). "[A] complaint [does not] suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v.*

Twombly, 550 U.S. 544, 557 (2007)). Rather, a complaint must contain sufficient factual allegations that, if accepted as true, "state a claim to relief that is plausible on its face." *Twombly,* 550 U.S. at 570. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal,* 556 U.S. at 678. "Res judicata may be raised in a Rule 12(b)(6) motion to dismiss for failure to state a claim when the defense appears on the face of the complaint and any materials of which the court may take judicial notice." *Jessup v. Progressive Funding,* No. CV 15-1214 (CKK), 2016 WL 1452332, at *2 (D.D.C. Apr. 13, 2016) (Kollar-Kotelly, J.) (internal quotation marks omitted); *see also Stanton v. D.C. Court of Appeals,* 127 F.3d 72, 76 (D.C. Cir. 1997) (noting that "courts have allowed parties to assert res judicata by dispositive motions under" Rule 12(b)(6)).

In deciding a Rule 12(b)(6) motion, a court may consider "the facts alleged in the complaint, documents attached as exhibits or incorporated by reference in the complaint," or "documents upon which the plaintiff's complaint necessarily relies even if the document is produced not by the plaintiff in the complaint but by the defendant in a motion to dismiss." *Ward v. District of Columbia Dep't of Youth Rehab. Servs.,* 768 F. Supp. 2d 117, 119 (D.D.C. 2011) (internal quotation marks omitted). The court may also consider documents in the public record of which the court may take judicial notice. *Abbe & Svoboda, Inc. v. Chao,* 508 F.3d 1052, 1059 (D.C. Cir. 2007). Consequently, the Court may take judicial notice of the FAD and the EEOC Decision as those are official, public documents subject to judicial notice. *Grant v. Dep't of Treasury,* 194 F. Supp. 3d

25, 28 n.2 (D.D.C. 2016) ("Treasury's Final Agency Decision . . . [is] official, public document[] subject to judicial notice"); *Buie v. Berrien,* 85 F. Supp. 3d 161, 166 (D.D.C. 2015) ("That final category encompasses 'public records,' . . . including an EEOC decision." (citation omitted)). The Court make also take judicial notice of the *Ashbourne I* docket and the public filings therein. *Al-Aulaqi v. Panetta,* 35 F. Supp. 3d 56, 67 (D.D.C. 2014) ("A court may take judicial notice of facts contained in public records of other proceedings . . . ." (citing *Covad Communications Co. v. Bell Atlantic Co.,* 407 F.3d 1220, 1222 (D.C. Cir. 2005))); *Clark v. D.C.,* No. CV 16-385 (CKK), 2017 WL 1011418, at *7 (D.D.C. Mar. 14, 2017) ("the Court may take judicial notice of docket sheets which are public records" (citation omitted)).

III. DISCUSSION

Under the doctrine of res judicata, "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or *could have been raised* in that action." *Drake v. F.A.A.,* 291 F.3d 59, 66 (D.C. Cir. 2002) (emphasis in original) (internal quotation marks omitted). "A judgment on the merits is one that reaches and determines the real or substantial grounds of action or defense as distinguished from matters of practice, procedure, jurisdiction or form." *Ilaw v. Dep't of Justice,* 148 F. Supp. 3d 24, 35 (D.D.C. 2015) (Kollar-Kotelly, J.) (internal quotation marks omitted), *aff'd sub nom. Ilaw v. Littler Mendelson PC.,* 650 F. App'x 35 (D.C. Cir. 2016). The granting of Defendants' motion to dismiss and motion for summary judgment in *Ashbourne I,* which together disposed of all of Plaintiffs' claims in that matter, *see supra* at 3, were both judgments on the merits. *See Ilaw,* 148 F. Supp.

3d at 35 ("A decision on a motion to dismiss under Rule 12(b)(6) presents a ruling on the merits with res judicata effect." (internal quotation marks omitted)); *Alford v. Providence Hosp.,* 60 F. Supp. 3d 118, 126 (D.D.C. 2014) ("it is well established that summary judgment . . . constitutes a final judgment on the merits" (citing *Prakash v. Am. Univ.,* 727 F.2d 1174, 1182 (D.C. Cir. 1984))).

In deciding whether res judicata applies, the Court must consider "if there has been prior litigation (1) involving the same claims or cause of action, (2) between the same parties or their privies, and (3) there has been a final, valid judgment on the merits, (4) by a court of competent jurisdiction." *NRDC v. EPA,* 513 F.3d 257, 260 (D.C. Cir. 2008) (internal quotation marks omitted). "Whether two cases implicate the same cause of action turns on whether they share the same 'nucleus of facts.'" *Drake,* 291 F.3d at 66 (quoting *Page v. United States,* 729 F.2d 818, 820 (D.C. Cir. 1984)). To determine whether two cases share the same nucleus of facts, courts consider "whether the facts are related in time, space, origin, or motivation[;] whether they form a convenient trial unit[;] and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage." *Stanton,* 127 F.3d at 78 (internal quotation marks omitted).

This matter and *Ashbourne I* plainly implicate the same cause of action. Although Plaintiff has pursued different legal claims in this matter than *Ashbourne I,* both matters arise out Plaintiff's termination from the Treasury Department, and certain alleged adverse employment actions that were taken in relation to that termination, and therefore share the "same nucleus of facts." *Compare* Compl. ¶¶

8-25 (describing circumstances of Plaintiff's termination from the Treasury Department), *with* Amended Compl. TT 20-40 (same), ECF No. *49, Ashbourne I; see Coleman v. Potomac Elec. Power Co.,* 310 F. Supp. 2d 154, 160 (D.D.C. 2004) ("The Court also finds that Mr. Coleman's discharge, which might otherwise be timely raised, cannot be re-litigated under a Title VII or DCHRA theory when it has already been tried, and formally dismissed, as an alleged violation of the FMLA."), *aff'd,* No. 04-7043, 2004 WL 2348144 (D.C. Cir. Oct. 19, 2004); *Gresham v. D.C.,* 66 F. Supp. 3d 178, 189 (D.D.C. 2014) ("Because Plaintiff does not identify any reason that prevented him from asserting employment discrimination claims on the basis of race in that suit, he is not entitled to another bite of the same factual apple now."). Furthermore, both actions involved the same parties, and *Ashbourne I,* for the reasons stated, reached a final, valid judgment on the merits, before a court of competent jurisdiction.

Plaintiff contends, however, that dismissal is not warranted on the basis of res judicata because she requested a "right-to-sue" letter from the EEOC, and moved to stay proceedings in *Ashbourne I*on February 11, 2013 to await the decision of the EEOC. Opp'n Mem. at 9. However, the public docket in *Ashbourne I* reflects no motion to stay on February 11, 2013, and in fact, the only motion to stay on the docket was filed by Defendants due to a lapse of government funding. Mot. for a Stay, ECF No. *47, Ashbourne I.* Furthermore, although Plaintiff cites an exhibit attached to her opposition brief as the purported motion to stay, that document is styled as "Plaintiff's Responses to Defendant's Statement of Material Facts," and contains no mention of a motion to stay. Opp'n Mem. at 9-10;

Opp'n Mem., App. M. In short, Plaintiff's assertion in her opposition brief that she moved for a stay in *Ashbourne I* is belied by the public docket in that case, and is otherwise unsupported by competent evidence.[3]

Plaintiff also seems to contend that she was not required to pursue her race and gender discrimination claims in *Ashbourne I* while those claims were pending with the EEOC. However, numerous federal courts have held that "Title VII claims are not exempt from the doctrine of res judicata where plaintiffs have neither sought a stay from the district court for the purpose of pursuing Title VII administrative remedies nor attempted to amend their complaint to include their Title VII claims." *Owens v. Kaiser Found. Health Plan, Inc.,* 244 F.3d 708, 714-15 (9th Cir. 2001); *see also Davis v. Dallas Area Rapid Transit,* 383 F.3d 309, 316 (5th Cir. 2004) (holding that Title VII claims were

---

[3] The Court notes that in her opposition to the first motion to dismiss in *Ashbourne I,* Plaintiff represented to that court that she "intends to file a Title VII complaint but is waiting for the agency to issue to her a right to sue letter which she requested several months ago." Mem. in Opp'n to Mot. to Dismiss at 4, ECF No. *31, Ashbourne I.* In that same filing, Plaintiff requested a stay of proceedings pending her appeal of the order transferring her case to this District. *Id.* That order was affirmed by the Fourth Circuit on December 26, *2012. Ashbourne v. Geithner, et al.,* No. 12-2029 (4th Cir. Dec. 26, 2012). Defendants' initial motion to dismiss in *Ashbourne I* was denied without prejudice on August 9, 2013, Order, ECF No. 44, meaning that Chief Judge Howell did not reach Plaintiffs request for a stay in her opposition brief, as it was rendered moot by the Fourth Circuit's affirmance. In any event, that request was plainly unrelated to Plaintiffs EEOC appeal.

barred by res judicata even though appellants claimed to have not received their right to sue letters); *Jang v. United Techs. Corp.,* 206 F.3d 1147, 1149 (11th Cir. 2000) (holding that appellant's Americans with Disabilities Act claim was barred by res judicata even though appellant claimed that the EEOC had failed to furnish him with a right to sue letter); *Alford,* 60 F. Supp. 3d at 127-30; *Robinson v. District of Columbia,* No. 99-1694, 2000 U.S. Dist. LEXIS 14476, at *9—*11 (D.D.C. Sept. 30, 2000) (collecting additional appellate decisions from the Second, Third, Sixth, and Seventh Circuits, and concluding that, "[a]s every court of appeals to have addressed the issue has held, the pendency of an EEO complaint in the administrative process does not alter the res judicata effect of a previously adjudicated civil action based on the same set of facts").

In this case, Plaintiff could have pursued her Title VII claims in *Ashbourne I,* but did not seek to amend the complaint in that action to include those claims, nor has Plaintiff presented any credible evidence that she sought a stay of that action to pursue her appeal with the EEOC. Unlike an employee of a private entity, a federal government employee need not wait for a right to sue letter prior to commencing a civil action in federal court. Rather, upon receipt of the FAD, Plaintiff had "either 30 days to appeal to the [EEOC] . . . or 90 days to file suit in federal court . . . ." *Fields v. Vilsack,* No. CV 13-2037 (RDM), 2016 WL 6477025, at *4 (D.D.C. Sept. 16, 2016) (quoting *In re James,* 444 F.3d 643, 644 (D.C. Cir. 2006)) (citations omitted). A federal employee "is also authorized to file suit in federal court if 180 days have passed from the date of filing an appeal with the EEOC and the EEOC has failed to render a final decision." *Id.* (internal quotation marks and citations omitted). The Treasury

Department issued its FAD on December 12, 2012, which was during the pendency of *Ashbourne I.* Consequently, Plaintiff could have chosen to pursue her Title VII claims in *Ashbourne I* by seeking to amend her complaint in that action to join those claims after she received the FAD. *See Turner v. Shinseki,* 824 F. Supp. 2d 99, 111 (D.D.C. 2011) ("In order to determine when a party received notice of a final agency decision, courts generally presume that the plaintiffs receive decisions either three or five days after their issuance." (internal quotation marks and alterations omitted)). Plaintiff apparently chose instead to pursue an appeal to the EEOC, but even under those circumstances, Plaintiff could have pursued her Title VII claims in *Ashbourne I* within 215 days of receiving the FAD (i.e., assuming that Plaintiff waited the maximum 30 days to pursue an EEOC appeal, plus an additional 5 days for receipt of the FAD, plus the requisite 180-day waiting period). Consequently, Plaintiff could have sought to add her Title VII claims to *Ashbourne I* by July 2013, two months before the court-ordered deadline for her to file a consolidated amended complaint in that action. *See supra* at 3. Importantly, Plaintiff was informed of these procedural options and the applicable time limits by the FAD, and Plaintiff only contests her obligation to have brought these claims in *Ashbourne I,* not her ability to have done so. *See* Opp'n Mem. at 9-10. As such, Plaintiff "certainly could have sought to consolidate all of her legal claims in a single action, and it was her responsibility to do so" in order to avoid preclusion of her Title VII claims by res judicata. *Alford,* 60 F. Supp. 3d at 129.

Accordingly, the Court has concluded that this matter presents the same cause of action as

Ashbourne I, which involved the same parties, and wherein a court of competent jurisdiction issued a final decision on the merits. This action is therefore barred in its entirety by the doctrine of res judicata, and that determination is unaffected by the pendency of Plaintiff's Title VII claims with the EEOC at the time she pursued her other claims in *Ashbourne I.*[4]

IV. CONCLUSION

For all of the foregoing reasons, the Court **GRANTS** Defendant's [6] Motion pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted, as the doctrine of res judicata bars all of Plaintiff's claims. As a result, this case is dismissed in its entirety.

An appropriate Order accompanies this Memorandum Opinion.

Dated: March 29, 2017

/s/
COLLEEN KOLLAR-KOTELLY
United States District Judge

---

[4] Given the Court's resolution of this matter on the basis of res judicata upon a review of the Complaint and certain materials of which the Court may take judicial notice, the Court finds that discovery in this action is unwarranted. *See* Opp'n Mem. at 4.