

APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 15-13834
Non-Argument Calendar

D.C. Docket No. 1:14-cv-23237-MGC

ROBERT JOSEPH SARHAN,

Plaintiff-Appellant,

versus

DEPARTMENT OF JUSTICE FEDERAL BUREAU OF PRISONS,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(November 14, 2017)

Before HULL, WILSON, and ROSENBAUM, Circuit Judges.

PER CURIAM:

Robert Sarhan, proceeding *pro se*, is a former federal employee who was terminated by the Federal Bureau of Prisons (“BOP”) in 2007. Since that time,

Sarhan has twice appealed his termination to the Merits Systems Protection Board (“MSPB” or “Board”), which first affirmed his termination and then dismissed his appeal as barred by *res judicata*. After each proceeding before the MSPB, Sarhan appealed to the United States Court of Appeals for the Federal Circuit, which affirmed the final decisions of the MSPB. In 2014 he filed the present complaint in federal district court, alleging that he had been discriminated and retaliated against because of his Arab ethnicity, in violation of Title VII of the Civil Rights Act of 1964 (“Title VII”), 42 U.S.C. § 2000e-2(a), among other statutes. The district court dismissed his complaint with prejudice on two main grounds. The court determined that he had waived his discrimination claims by appealing his termination to the Federal Circuit and that the action was barred by the doctrine of *res judicata*. After careful review, we affirm.

I.

Sarhan worked as a physician assistant for the BOP from 1994 until June 2007, when the BOP terminated his employment. He appealed his termination to the MSPB. After holding a hearing, an administrative law judge (“ALJ”) issued an initial decision sustaining Sarhan’s termination. Sarhan appealed the ALJ’s decision to the full MSPB, which adopted the ALJ’s decision as final. He then sought judicial review from the Federal Circuit, which affirmed the Board’s decision. *Sarhan v. Dep’t of Justice*, 325 Fed. App’x 914 (Fed. Cir. 2009).

After his termination was upheld by the Federal Circuit, Sarhan filed a complaint of discrimination with the equal employment opportunity (“EEO”) office of the U.S. Department of Justice. He alleged that the BOP’s decision to terminate his employment was discriminatory and that his prior MSPB proceedings were improperly conducted. The EEO office dismissed his complaint in September 2009 because he had elected to appeal his termination to the MSPB. The EEO office advised that he could appeal its decision to the Equal Employment Opportunity Commission (“EEOC”) or file a civil action under Title VII in federal district court.

Sarhan took no action until May 2013, when he petitioned the MSPB to reopen his case and reconsider its prior decision. Sarhan alleged fraud and other procedural irregularities in the proceedings upholding his termination. The Board denied his request. Then, in July 2013, Sarhan filed another appeal with the MSPB for review of his termination, again raising his allegations of fraud, perjury, and concealment of evidence. After allowing the parties to respond to an order to show cause why the appeal was not barred by the doctrine of *res judicata*, the ALJ issued an initial decision dismissing Sarhan’s appeal.

Sarhan appealed the ALJ’s decision to the full MSPB, which issued a final decision affirming the ALJ in July 2014. The Board noted that, under the banner of “fraud,” Sarhan had presented myriad allegations, including that the agency

discriminated against him based on his Arab ancestry; the investigation into his misconduct was initiated based on the allegations of his former wife, who suffered from mental illness; the agency hid relevant documents within its discovery production, including an email from his former wife; the deciding official orchestrated his removal and committed perjury; the deciding official denied him due process by failing to consider his response to the notice of proposed removal; the agency failed to establish its charges; and another employee was treated more favorably than he. The Board found that most of these allegations related to the merits of the removal action and either were or could have been raised in the earlier proceedings. As for the allegations of perjury and concealment of evidence, the Board found that, even assuming they were true, they did not constitute fraud sufficient to defeat the application of *res judicata* because they did not substantially change the posture of the case. Thus, the Board found that Sarhan's appeal was barred by *res judicata*.

In its final decision, the Board advised Sarhan of his rights to further review. The Board noted that, because Sarhan had alleged discrimination, he could request review of the decision on his discrimination claims either by submitting a request with the EEOC or by filing a civil action in an appropriate federal district court for review of both his discrimination claims and his other claims.

Sarhan appealed the MSPB's decision to the Federal Circuit, which affirmed in April 2015. *See Sarhan v. Dep't of Justice*, 610 Fed. App'x 985 (Fed. Cir. 2015). In its opinion, the Federal Circuit specifically rejected Sarhan's argument that *res judicata* did not apply because the final decision sustaining his removal was tainted by fraud. *See id.* at 987. The Federal Circuit found that "many of [his] allegations go to the merits of the Bureau's removal action, and either were raised or could have been raised in the prior proceeding." *Id.* The court also concluded that Sarhan's allegations of fraud "did not substantially change the posture of the case and thus did not provide a basis for reversing the initial decision." *Id.*

Meanwhile, Sarhan sued the BOP in federal district court in September 2014, which is the lawsuit at issue in this appeal. He alleged national origin discrimination, race discrimination, harassment, and retaliation under both Title VII and the Florida Civil Rights Act, Fla. Stat. § 760.01, *et seq.*, wrongful termination in violation of public policy, violations of California's Fair Employment and Housing Act, Cal. Gov. Code § 12900, *et seq.*, and defamation. Sarhan also broadly challenged the propriety of his termination, restating his allegations of fraud, perjury, and other procedural irregularities.

The district court granted the BOP's motion to dismiss. The court first concluded that Sarhan waived his current discrimination claims when, after the MSPB issued its final decision upholding his termination in 2009, he chose to

appeal to the Federal Circuit instead of bringing an action in federal district court raising both discrimination and non-discrimination claims. Second, and alternatively, the court found that the doctrine of *res judicata* precluded Sarhan from relitigating claims surrounding his termination from the BOP. Finally, the court found that Sarhan’s remaining claims—for violations of the California Fair Employment and Housing Act and the Florida Civil Rights Act and for defamation—failed either because they were preempted by Title VII or barred by the Federal Tort Claims Act. Sarhan now appeals.

II.

We review *de novo* a district court’s order granting a motion to dismiss. *McGinley v. Houston*, 361 F.3d 1328, 1330 (11th Cir. 2004). Likewise, we review *de novo* the district court’s application of the doctrine of *res judicata*. *Griswold v. Cty. of Hillsborough*, 598 F.3d 1289, 1292 (11th Cir. 2010).

We liberally construe the filings of *pro se* parties, but we may not act as “*de facto* counsel.” *Campbell v. Air Jam. Ltd.*, 760 F.3d 1165, 1168–69 (11th Cir. 2014). Issues not briefed on appeal, even by *pro se* litigants, are deemed abandoned. *Timson v. Sampson*, 518 F.3d 870, 874 (11th Cir. 2008).

III.

When a federal employee is subject to a certain serious adverse employment action, such as removal or suspension, he is entitled to appeal to the MSPB under

the Civil Service Reform Act of 1978 (“CSRA”). *See* 5 U.S.C. §§ 7701, 7512, 7513(d). In appealing to the MSPB, the employee may “present a civil-service claim only”—a claim that the agency had insufficient cause for taking the action under the CSRA—or a claim that the agency action was taken, in whole or in part, because of discrimination prohibited by another federal statute, such as Title VII. *Perry v. Merit Sys. Prot. Bd.*, 137 S. Ct. 1975, 1980 (2017).

When an employee appeals his removal from federal employment to the MSPB and asserts that the removal was based totally or partially on discrimination, he has brought a “mixed case” appeal.¹ *Id.*; *see* 5 U.S.C. § 7702(a)(1); 29 C.F.R. § 1614.302(a). If the MSPB upholds the personnel action, the employee may request additional administrative process, with the EEOC, or he may seek judicial review. *Kloeckner v. Solis*, 568 U.S. 41, 45 (2012).

Judicial review of MSPB decisions is governed by § 7703. As a general rule, judicial review of MSPB decisions is available by filing a petition for review with the United States Court of Appeals for the Federal Circuit. 5 U.S.C. § 7703(b)(1). But an exception applies in any mixed case involving discrimination. *See* 5 U.S.C. § 7703(b)(2). Cases involving discrimination must be filed in federal district court. *Kloeckner*, 568 U.S. at 49–50; *Chappell v. Chao*,

¹ Alternatively, a federal employee who believes that her removal was motivated in whole or in part by discrimination may first file a discrimination complaint (a “mixed case complaint”) with the agency itself in the agency’s EEO office. *Perry*, 137 S. Ct. at 1980. If the EEO office decides against the employee, she may then either appeal to the MSPB or bypass further administrative review and sue the agency in federal district court. *Id.*

388 F.3d 1373, 1378 (11th Cir. 2004) (“[F]ederal district court is the only forum in which a federal employee may seek judicial review of a mixed case after a final order from the MSPB.”) District courts have jurisdiction to consider both discrimination claims and civil-service claims when brought jointly in a civil action under § 7703(b)(2). *See Chappell*, 388 F.3d at 1378.

The employee’s choice of forum for judicial review is significant. “[T]he language, legislative history, and underlying policies of 5 U.S.C. § 7702 indicate that Congress did not direct or contemplate bifurcated review of any mixed case.” *Id.* (internal quotation marks omitted). If the employee seeks judicial review from the Federal Circuit, he “waives his right to pursue not only any discrimination claims he raised before the MSPB, but also any other discrimination claims arising out of the same facts.” *Id.* Therefore, a federal employee who wishes “to preserve both discrimination and non-discrimination claims after a final order from the MSPB *must* do so by bringing all his related claims in federal district court.” *Id.* (emphasis in original).

Here, the district court properly concluded that Sarhan waived his discrimination claims relating to his termination when he appealed the MSPB’s final decision upholding his termination to the Federal Circuit. “[A]ll of [Sarhan’s] discrimination claims were related to his termination claims, and could have been brought before the MSPB as mixed claims. Because all of these claims could have

been brought together, they should have been brought together—before the district court, if not before the MSPB.” *Id.* at 1379. But Sarhan instead sought judicial review of the MSPB’s decision from the Federal Circuit, and, by doing so, he “waive[d] his right to pursue . . . any . . . discrimination claims arising out of the same facts.” *Id.* at 1378.

To the extent Sarhan raises independent claims of discrimination relating to the second round of proceedings before the MSPB—though it does not appear that he does—again, he waived such claims when he appealed the MSPB’s final July 2014 decision to the Federal Circuit, which affirmed in April 2015. Accordingly, Sarhan waived his right to pursue any of the discrimination claims he brought in federal district court.

IV.

Liberally construing his complaint, Sarhan also challenges his termination on civil-service grounds. Indeed, that is the focus of his briefing to this Court on appeal. Because he elected to pursue judicial review of the MSPB’s decisions with the Federal Circuit both in 2009 and 2014, however, it does not appear that he can obtain judicial review in federal district court also. *See Chappell*, 388 F.3d at 1378. As we outlined in *Chappell*, the CSRA does not contemplate that a federal employee could obtain judicial review of the same decision in multiple fora.

But even if Sarhan has not waived his right to judicial review by appealing the MSPB's decision to the Federal Circuit, such review is limited to the MSPB's July 2014 decision, which was the basis for Sarhan's lawsuit in federal district court.² *See* 5 U.S.C. § 7703(b)(2); Doc. 1 at 15 ¶ 40. In its July 2014 decision, the MSPB found that Sarhan's second appeal of his termination was barred by the doctrine of *res judicata* notwithstanding his allegations of fraud, concealment of evidence, perjury, and other procedural improprieties.

The doctrine of *res judicata* bars a subsequent suit on the same cause of action when four elements are present: (1) the prior decision was rendered by a forum of competent jurisdiction; (2) there was a final judgment on the merits; (3) both cases involve the same parties or their privies; and (4) both cases involve the same causes of action. *In re Piper Aircraft Corp.*, 244 F.3d 1289, 1296 (11th Cir. 2001). Prior and present causes of action are the same if they arise out of the same nucleus of operative fact or are based upon the same factual predicate. *See id.* at 1296–97. If the claim in the new suit was or could have been raised in the prior action, *res judicata* applies to bar the subsequent suit. *Id.* at 1296.

² As we see it, there is no jurisdictional bar to considering Sarhan's complaint regarding the July 2014 decision. Because Sarhan sought review of a final decision of the MSPB in a mixed case, the district court had subject-matter jurisdiction to consider both discrimination and terminations claims. *See Chappell*, 388 F.3d at 1378 & n.8; 5 U.S.C. §§ 7702–7703. That Sarhan may have waived his rights to pursue these claims in federal district court does not deprive the court of subject-matter jurisdiction. *See Chappell*, 388 F.3d at 1378 n.8.

As a general matter, *res judicata* applies where an administrative agency has acted in a judicial capacity and has resolved disputed factual issues that the parties have had an opportunity to litigate. *See Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 107 (1991). The MSPB applies *res judicata* when the criteria set forth above are satisfied. *See Peartree v. U.S. Postal Serv.*, 66 M.S.P.B. 332, 337 (1995). However, according to the MSPB, “[o]ne exception to the doctrine of *res judicata* . . . allows reopening as a matter of discretion where the earlier decision was obtained by fraud, concealment, or misrepresentation by a party.” *See Anderson v. Dep't of Transp., F.A.A.*, 46 M.S.P.B. 341, 349 (1990).

Here, *res judicata* applies. The 2009 decision by the MSPB was a final decision by a forum of competent jurisdiction acting in a judicial capacity, and Sarhan’s subsequent appeal of his termination to the MPSB involved the same parties and arose out of the same factual predicate. *See Peartree*, 66 M.S.P.B. at 337. Sarhan does not dispute that the general elements of *res judicata* are met. Instead, he maintains that *res judicata* does not apply because of fraud, concealment of evidence, procedural-due-process violations, and prohibited personnel practices under the CSRA.

However, in affirming the MSPB’s July 2014 decision, the Federal Circuit rejected the arguments Sarhan presents here. And, upon review of the Board’s July 2014 decision, the Federal Circuit’s affirmance, and Sarhan’s briefs on appeal, we

see no reason to reach a different result. As the Federal Circuit explained, many of Sarhan's assertions and arguments go the merits of the BOP's removal decision, and either were or could have been raised in the initial proceeding upholding his termination. Moreover, Sarhan's allegations of concealment of evidence and perjury do not call into question the integrity of the prior proceeding. In fact, the ALJ relied in large part on Sarhan's own testimony in sustaining the charges against him. Sarhan has not explained how the alleged perjury or the allegedly concealed evidence would have changed the outcome of the prior proceeding. Accordingly, Sarhan has not shown the MSRP improperly applied *res judicata* to bar the second appeal of his termination or that the district court erred by failing to "void the judgment of the administrative courts."

Finally, Sarhan does not address the district court's determinations that his state-law discrimination claims were preempted by Title VII, *see Canino v. U.S. Equal Emp. Opportunity Comm'n*, 707 F.2d 468, 472 (11th Cir. 1983) ("[A] federal employee's exclusive judicial remedy for alleged employment discrimination lies with . . . Title VII."), or that his defamation claim was not cognizable under the Federal Tort Claims Act, *see* 28 U.S.C. § 2680(h) (providing that the United States and its agencies are immune from suits "arising out of . . . libel, slander, [or] misrepresentation"). Accordingly, he has abandoned these issues. *See Timson*, 518 F.3d at 874.

For the reasons stated, we **AFFIRM** the dismissal of Sarhan's complaint.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 14-23237-Civ-COKE/TORRES

ROBERT JOSEPH SARHAN,

Plaintiff,

vs.

DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS,

Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

Plaintiff Robert Joseph Sarhan brings this action against Defendant Federal Bureau of Prisons alleging national origin discrimination, race discrimination, harassment, and retaliation under both Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* ("Title VII") and the Florida Civil Rights Act, Fl. Stat. Ann. §§ 760.01, *et seq.*, as well as wrongful termination in violation of public policy, violation of California's Fair Employment and Housing Act, and defamation. In response, Defendant filed a Motion to Dismiss (ECF No. 29), to which Plaintiff filed his Response to Defendant's Motion to Dismiss (ECF No. 31). Defendant filed its Reply in Support of Motion to Dismiss (ECF No. 32), to which Plaintiff submitted a Response to Defendant's Reply in Support of Second Motion to Dismiss (ECF No. 36). As such, Defendant's Motion to Dismiss is ripe and ready for adjudication. After reviewing the Motion, the Responses and Replies thereto, the record, and relevant legal authorities, Defendant's Motion to Dismiss is granted.

I. BACKGROUND

Plaintiff Robert Joseph Sarhan ("Plaintiff" or "Mr. Sarhan"), proceeding *pro se*, brings this action against his former employer, the Federal Bureau of Prisons ("Defendant" or "BOP"). Plaintiff was first employed by the BOP as a Physician's Assistant on June 5, 1994, but his employment was terminated on June 5, 2007. Compl. ¶ 14. Plaintiff alleges that during the course of his employment, he was denied raises and promotions because of his race and national origin, was subjected to harassment in the form of teasing, jokes, and rude

comments, and was subjected to differing terms and conditions of employment with regard to vacation, sick leave, desired shifts, etc. *Id.* at ¶¶ 14-17. Plaintiff further alleges that his termination was discriminatory, motivated in part due to his race and national origin. *Id.* at ¶¶ 19-23.

Plaintiff timely appealed his removal from the BOP to the Merit Systems Protection Board (“MSPB”) on June 29, 2007. Def.’s Mot. Dismiss 2.¹ After a hearing, the MSPB issued an Initial Decision on October 19, 2007 affirming Plaintiff’s removal from employment. *Id.* Plaintiff appealed the Initial Decision to the full MSPB, which adopted the Initial Decision as final in an order dated March 28, 2008. *Id.* at 3. Plaintiff then timely appealed the MSPB’s decision to the United States Court of Appeals for the Federal Circuit, which denied Plaintiff’s appeal on May 19, 2009. *Id.* Plaintiff petitioned for a rehearing *en banc*, but was denied on August 19, 2009. *Id.* Plaintiff also filed a Complaint of Discrimination with the Equal Employment Opportunity Commission (“EEOC”) on July 2, 2009, wherein he alleged both that he had been discriminated against when he was terminated by the BOP and that his prior MSPB proceedings were improperly conducted. *Id.* The EEOC denied Plaintiff’s Complaint of Discrimination on September 22, 2009, noting that Plaintiff had already appealed his issues to the MSPB. *Id.* at 3-4. The EEOC also apprised Plaintiff of his right to appeal the EEOC’s decision to the Director, Office of Federal Operations within thirty (30) days or to file a civil action in the appropriate United States District Court within ninety (90) days. *Id.* at 4.

Plaintiff took no further action until May 13, 2013, when he petitioned the MSPB to reopen his case and reconsider its prior decisions. *Id.* On May 24, 2013, the MSPB denied Plaintiff’s request in the form of a letter from the Clerk of the MSPB. *Id.* In response, Plaintiff sent a letter to the Clerk of the MSPB demanding that his request be considered by a quasi-judicial office or judge at the MSPB, but his request was denied on June 24, 2013. *Id.* Plaintiff then filed another appeal with the MSPB on July 8, 2013, in response to which the Administrative Law Judge (“ALJ”) assigned to his case issued an order to show cause why

¹ Defendant has attached to its Motion to Dismiss a number of exhibits concerning previous administrative and judicial determinations related to Plaintiff’s claims. I will consider these documents without first converting Defendant’s Motion to Dismiss into a Motion for Summary Judgment as these documents are central to Plaintiff’s claims and their authenticity has not been challenged. See *SFM Holdings, Ltd. v. Banc of Am. Sec., LLC*, 600 F.3d 134, 1337 (11th Cir. 2010) (“In ruling upon a motion to dismiss, the district court may consider an extrinsic document if it is (1) central to the plaintiff’s claim, and (2) its authenticity is not challenged.”).

Plaintiff's appeal should not be dismissed on *res judicata* grounds. *Id.* The ALJ eventually dismissed Plaintiff's appeal, finding that the doctrine of *res judicata* applied and that Plaintiff's additional claims of fraud were without merit. *Id.* Plaintiff then appealed the ALJ's dismissal to the full MSPB, and, in a decision dated July 31, 2014, the full MSPB affirmed the ALJ's decision to dismiss Plaintiff's appeal on *res judicata* grounds and determined that the fraud exception to *res judicata* did not apply. *Id.* Plaintiff then simultaneously appealed the MSPB's decision to the United States Court of Appeals for the Federal Circuit while also filing the instant lawsuit. *Id.* The United States Court of Appeals for the Federal Circuit issued its decision, ruling against Plaintiff, on April 10, 2015. *Id.*

II. LEGAL STANDARD

Defendant, in part, premises its Motion to Dismiss on Rule 12(b)(1) of the Federal Rules of Civil Procedure.² When considering a Rule 12(b)(1) challenge, a court is faced with either a facial attack or a factual attack. *See Morrison v. Amway Corp.*, 323 F.3d 920, 925 (11th Cir. 2003). "Facial attacks challenge subject matter jurisdiction based on the allegations in the complaint." *Id.* In other words, the allegations themselves reveal that subject matter jurisdiction is deficient. By contrast, factual attacks contest the truth of the allegations, which, by themselves, would be sufficient to invoke federal jurisdiction. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004); *Morrison*, 323 F.3d at 925 n. 5 ("Factual attacks challenge subject matter jurisdiction in fact, irrespective of the pleadings."). In resolving a factual attack, the district court may consider evidence outside the pleading, such as testimony and affidavits. *Morrison*, 323 F.3d at 925 n. 5. However, "[f]acial attacks on the complaint require the court merely to look and see if the plaintiff has sufficiently alleged a basis of subject matter jurisdiction, and the allegations in his complaint are taken as true for the purposes of the motion." *Garcia v. Copenhaver, Bell & Associates, M.D.'s, P.A.*, 104 F.3d 1256, 1261 (11th Cir. 1997) (quoting *Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir. 1990)) (internal quotation marks omitted).

In the instant case, Defendant asserts a factual attack, essentially arguing that even if all of the allegations in Plaintiff's complaint are true, this Court lacks subject matter jurisdiction to adjudicate Plaintiff's claims because Plaintiff's claims are barred by his

² Fed. R. Civ. P. 12(b)(1) challenges a district court's subject matter jurisdiction, thereby challenging its authority to hear an action or certain claims in an action.

previous choice of forum and by *res judicata*. Therefore, I will consider the Complaint, any attachments thereto, as well as any evidence produced by either side in deciding whether this Court has jurisdiction to hear this case.

Additionally, although a *pro se* litigant's pleadings are construed more liberally than pleadings drafted by attorneys, "this leniency does not give the court license to serve as de facto counsel for a party ... or to rewrite an otherwise deficient pleading in order to sustain an action." *GJR Invs., Inc. v. County of Escambia*, Fla., 132 F.3d 1359, 1369 (11th Cir. 1998) (citations omitted).

III. ANALYSIS

Defendant argues that Plaintiff's Title VII claims should be dismissed for lack of subject matter jurisdiction because Plaintiff chose to address his claims in the MSPB and the Federal Circuit, thus foreclosing him from pursuing any other means of redress. *Id.* at 6-7. Defendant also argues that any challenges to Plaintiff's removal from employment are barred by *res judicata*, that Plaintiff's Title VII suit is barred because Plaintiff did not timely file an EEO claim, that Plaintiff cannot sue the United States government under state statutes, and that Plaintiff's defamation claim is not cognizable under the Federal Tort Claims Act ("FTCA"). *Id.* at 8-10. In response, Plaintiff argues that his case is properly before the District Court per instructions he received from the MSPB in their July 31, 2014 decision and that *res judicata* should not be applied in this case because of the alleged fraud committed by the Defendant in prior proceedings. *See generally* Pl.'s Resp. I will address each of Defendant's arguments in turn.

A. Lack of Subject Matter Jurisdiction

Defendant argues that Plaintiff's mixed Complaint, with its allegations that Plaintiff was, in part, terminated as a result of discriminatory and retaliatory reasons, should be dismissed for lack of subject matter jurisdiction. In response, Plaintiff argues that he timely filed his case in this Court pursuant to instructions he received from the MSPB.

"A federal employee with a 'mixed case,' that is, a case alleging that a federal government agency terminated him as a result of unlawful race or gender discrimination, has the option of raising that issue before the agency's EEO office or the MSPB, but not both simultaneously." *Council v. American Fed'n of Gov't Employees (AFGE) Union*, 477 Fed. Appx. 648, 652 (11th Cir. 2012) (citing 29 C.F.R. § 1614.302(a)-(b); *Chappell v. Chao*, 388 F.3d 1373,

1375 (11th Cir. 2004)). An employee who chooses to bring a mixed case to the MSPB has three options following the MSPB's disposition of the claims: (1) appeal the discrimination claim, on its own, to the Equal Employment Opportunity Commission; (2) drop the discrimination claims and appeal the other actions directly to the Federal Circuit; (3) or raise the action in district court. *See* 5 U.S.C. §§ 7702(b)(1), (e)(1)(B); 7703(b). "The Federal Circuit has held that a federal employee cannot split a mixed case into discrimination and non-discrimination claims in order to pursue two separate appeals from an MSPB final order." *Chappell*, 388 F.3d at 1377 (citing *Williams v. Dep't of Army*, 715 F.2d 1485, 1490 (Fed. Cir. 1983) ("Congress did not direct or contemplate bifurcated review of any mixed case").

With these considerations in mind, the Eleventh Circuit in *Chappell* held that "because 'the issues of a mixed case are tied together for resolution at the same time' ... and because the Federal Circuit does not have jurisdiction over appeals of mixed cases ... [a] federal district court is the only forum in which a federal employee may seek judicial review of a mixed case after a final order from the MSPB." *Id.* at 1378. Furthermore, "it necessarily follows from this statutory scheme that a federal employee who wants to preserve both discrimination and non-discrimination claims after a final order from the MSPB *must* do so by bringing all his related claims in federal district court." *Id.* (emphasis in original). Therefore, "an employee who chooses to appeal an adverse action to the Federal Circuit waives his right to pursue not only any discrimination claims he raised before the MSPB, but also any other discrimination claims arising out of the same facts." *Id.*

Here, Plaintiff chose to appeal the final decision of the MSPB to the Federal Circuit, which denied *en banc* review of his case in August 2009. Thus, because Plaintiff elected to appeal his termination claim to the Federal Circuit, rather than bringing his related discrimination and termination claims in one forum, before a district court, he has waived his right to pursue his discrimination claims. *See id.* Therefore, while Defendant was incorrect in asserting that this Court lacks subject matter jurisdiction over Plaintiff's action,³ Defendant is correct in its assertion that Plaintiff has waived his right to pursue his discrimination claims here. Plaintiff had an opportunity to bring his discrimination and termination claims together

³ *See Chappell*, 388 F.3d at n. 8 ("Title VII gives the district court subject matter jurisdiction over federal employees' employment discrimination claims when administrative remedies have been exhausted...[n]o statutory provision strips the district court of subject matter jurisdiction in a mixed case like Chappell's. Although the federal district court had subject matter jurisdiction over all of Chappell's claims once the MSPB issued its final order, Chappell waived his right to file in that court by proceeding in the Federal Circuit.").

in a district court after he received a final ruling from the MSPB, and his failure to do so constitutes a waiver of his right to pursue his discrimination claims now. *See id.* at 1379. Plaintiff's argument that he has a right to proceed here because the MSPB ordered him to file his case in a United States District Court within thirty days is unavailing. Plaintiff fully litigated his wrongful termination and discrimination claims before the Federal Circuit and he cannot now elect to pursue them in a district court.

B. Res Judicata

“*Res judicata* bars the filing of claims which were raised or could have been raised in an earlier proceeding.” *Ragsdale v. Rubbermaid, Inc.*, 193 F.3d 1235, 1238 (11th Cir. 1999). Four elements are required for *res judicata* to bar a subsequent suit: “(1) there must be a final judgment on the merits; (2) the decision must be rendered by a court of competent jurisdiction; (3) the parties, or those in privity with them, must be identical in both suits; and (4) the same cause of action must be involved in both cases.” *I.A. Durbin, Inc. v. Jefferson Nat'l Bank*, 793 F.2d 1541, 1549 (11th Cir. 1986). Additionally, the Supreme Court has found that *res judicata* applies to administrative agency decisions “[w]hen [the] administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate.” *United States v. Utah Constr. & Mining Co.*, 38 U.S. 394, 422 (1966).

Here, Plaintiff argues that the doctrine of *res judicata* should not be applied to bar litigation of his claims because his prior proceedings were marred by fraud, concealment, and misrepresentation perpetrated by the Defendant. Essentially, Plaintiff argues that the current action is not based on the same set of facts as the prior action adjudicated by the Federal Circuit because of his additional claims of fraud and misrepresentation. However, Plaintiff makes a number of unsubstantiated allegations in support of his theory and fails to cite to any legal precedent to support his argument.

Additionally, Plaintiff has now received two final rulings from the Federal Circuit that fully address all claims he is attempting to litigate here. The Federal Circuit first affirmed the MSPB's decision regarding Plaintiff's wrongful termination claims and subsequently affirmed the ALJ's decision not to reconsider Plaintiff's claims on the basis of *res judicata*. In that second proceeding, the Federal Circuit fully considered and denied Plaintiff's attempts to circumvent the effects of *res judicata* on the basis of alleged fraud and misrepresentation

perpetrated by the BOP. As such, Plaintiff has now had multiple opportunities to litigate and re-litigate all of his claims surrounding his termination of employment from the BOP. He received a final judgment on the merits after a full and fair opportunity to litigate all of his issues, the parties have been identical in all suits, and all proceedings have involved the same cause of action. Therefore, in addition to waiving his right to litigate his claims in this Court, Plaintiff is also barred from bringing his claims here because of the doctrine of *res judicata*.

C. Failure to File a Timely EEO Claim

Defendant argues that Plaintiff's Title VII claims are also time barred because Plaintiff failed to timely file an EEO claim. I will not address the merits of this argument as this time because as previously stated above, once Plaintiff chose to appeal his claims to the Federal Circuit, he essentially waived his rights to proceed in any other available forum. *See Chappell*, 388 F.3d at 1378-79.

D. State Statute Claims

In addition to filing suit under Title VII, Plaintiff also included claims of racial discrimination, harassment, and retaliation under the Florida Civil Rights Act and, confusingly since Plaintiff was employed by the BOP in Miami, the California Fair Employment and Housing Act. However, the Supreme Court has held that "a precisely drawn, detailed statute pre-empts more general remedies," and that Title VII "provides the exclusive judicial remedy for claims of discrimination in federal employment." *Brown v. Gen. Servs. Admin.*, 425 U.S. 820, 834-35 (1976); *see also Canino v. U.S. Equal Emp't Opportunity Comm'n*, 707 F.2d 468, 472 (11th Cir. 1983) (holding that a federal employee's exclusive judicial remedy for a claim of employment discrimination lies with Section 717 of Title VII of the 1964 Civil Rights Act). Therefore, Plaintiff's claims under both the Florida Civil Rights Act and the California Fair Employment and Housing Act are preempted by Title VII and must be dismissed.

E. Defamation

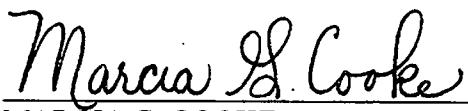
Finally, Defendant argues that Plaintiff's defamation claim must be dismissed as it is not cognizable under the Federal Tort Claims Act ('FTCA'), and I agree. Any claims of defamation are expressly excluded from the FTCA's limited waiver of sovereign immunity, and, therefore, must be dismissed for lack of subject matter jurisdiction. *See* 28 U.S.C. § 2680(h); *see also Nadler v. Mann*, 951 F.2d 301, 304, n.6 (11th Cir. 1992). Therefore, Plaintiff's

defamation claim must be dismissed.

IV. CONCLUSION

For the foregoing reasons, it is **ORDERED** and **ADJUDGED** that Defendant's Motion to Dismiss (ECF No. 29) is **GRANTED**. Plaintiff's Mixed Complaint Against the Defendant's [sic] for Discrimination and Wrongful Termination (ECF No. 1) is **DISMISSED with prejudice**.⁴ The Clerk shall **CLOSE** this case. All pending motions, if any, are **DENIED as moot**.

DONE and ORDERED in chambers at Miami, Florida, this 27th day of July 2015.



MARCIA G. COOKE
United States District Judge

Copies furnished to:

*Edwin G. Torres, U.S. Magistrate Judge
Counsel of Record
Robert Joseph Sarhan, pro se*

⁴ See *Jemison v. Mitchell*, 380 F. App'x 904, 907 (11th Cir. 2010) ("Dismissal with prejudice is proper, however, ... if a more carefully drafted complaint could not state a valid claim.").

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 15-13834-AA

ROBERT JOSEPH SARHAN,

Plaintiff - Appellant,

versus

DEPARTMENT OF JUSTICE FEDERAL BUREAU OF PRISONS,

Defendant - Appellee.

Appeal from the United States District Court
for the Southern District of Florida

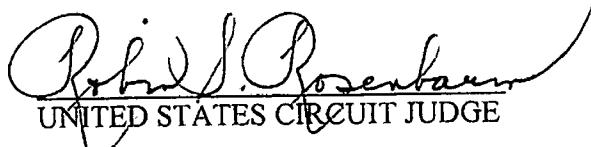
ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: WILSON, ROSENBAUM and HULL, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:


UNITED STATES CIRCUIT JUDGE

ORD-42