FILED
United States Court of Appeals
Tenth Circuit

October 26, 2018

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ABDULLAHI HAMU JARA,

Plaintiff - Appellant,

v.

STANDARD PARKING, et al.,

Defendants - Appellees.

No. 18-1240

ORDER

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

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

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UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ABDULLAHI HAMU JARA,

Plaintiff - Appellant,

v.

STANDARD PARKING; TEAMSTERS LOCAL UNION 455,

Defendants - Appellees.

No. 18-1240
(D.C. No. 1:18-CV-01111-LTB)
(D. Colo.)

ORDER AND JUDGMENT*

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

Plaintiff-Appellant Abdullahi Hamu Jara appeals the district court's dismissal of his employment-discrimination action on claim and issue preclusion grounds. Exercising jurisdiction pursuant to 28 U.S.C. § 1291, we affirm.

I

Jara, proceeding pro se and in forma pauperis, filed suit against his former employer and union. Jara alleges that he was discriminated against on the bases of

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* After examining the brief and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

race, religion, and national origin in violation of 42 U.S.C. § 1981 and Title VII, 42 U.S.C. §§ 2000e-2 & 2000e-3(a). Jara also alleges discrimination in violation of the Rehabilitation Act, 29 U.S.C. § 701, as well as various state law causes of action.

Reviewing Jara's complaint sua sponte pursuant to 28 U.S.C. § 1915(e)(2), the district court dismissed Jara's Title VII claim on issue preclusion grounds and his other federal claims on claim preclusion grounds because Jara unsuccessfully brought similar claims against the same defendants in a previous lawsuit. See Jara v. Standard Parking (Jara I), 701 F. App'x 733, 735-37 (10th Cir. 2017) (unpublished). The district court declined to exercise supplemental jurisdiction over the state law claims and entered a final judgment. Jara then filed this appeal.

II

"The preclusive effect of a judgment is defined by claim preclusion and issue preclusion, which are collectively referred to as res judicata." City of Eudora v. Rural Water Dist. No. 4, 875 F.3d 1030, 1034 (10th Cir. 2017) (quotation marks omitted). We review a district court's dismissal on res judicata grounds de novo, id. at 1035, and "a denial of supplemental jurisdiction for abuse of discretion," Koch v. City of Del City, 660 F.3d 1228, 1248 (10th Cir. 2011) (quotation marks omitted).

Issue preclusion "bars a party from relitigating an issue once it has suffered an adverse determination on the issue." Burrell v. Armijo, 456 F.3d 1159, 1172 (10th Cir. 2006). Relitigation is barred when:

> (1) the issue previously decided is identical with the one presented in the action in question, (2) the prior action has been finally adjudicated on the merits, (3) the party against whom the doctrine is

> invoked was a party, or in privity with a party, to the prior adjudication, and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action.

Id. (emphasis omitted). When deciding whether a party "had a full and fair opportunity to litigate an issue[,] we focus on whether there were significant procedural limitations in the prior proceeding, whether the party had the incentive to litigate fully the issue, or whether effective litigation was limited by the nature or relationship of the parties." Id. (quotation marks and alterations omitted).

Jara's complaint again includes a Title VII claim, which raises the issue of whether Jara exhausted administrative remedies. Jara I, 701 F. App'x at 735. In the previous appeal, we "affirm[ed] the dismissal of Jara's Title VII claim" because "he failed to file a timely discrimination charge with the EEOC" and did not establish his entitlement to equitable tolling. Id. at 735-36. Therefore, the issue of whether Jara exhausted administrative remedies was previously decided against him. Jara argues that there is no issue preclusion because he did not have a chance to litigate the prior case given that it was resolved on a motion to dismiss before he could present evidence.

But dismissal under Rule 12(b)(6) has issue preclusive effect when the district court has adjudicated an issue, even one that did not go to the merits of the underlying claim. See Matosantos Commercial Corp. v. Applebee's Int'l, Inc., 245 F.3d 1203, 1206, 1209-11 (10th Cir. 2001). Moreover, Jara actively participated in his prior case by, among other things, filing an amended complaint and opposing the defendants' motions to dismiss. Jara had an incentive to litigate the issue of

administrative exhaustion because, absent exhaustion, Jara's Title VII claim would not survive the motions to dismiss. Nor is the preclusive effect of the prior judgment diminished simply because Jara litigated pro se. In re Tsamasfyros, 940 F.2d 605, 607 (10th Cir. 1991). Because Jara previously had a full and fair opportunity to litigate the issue of administrative exhaustion, Jara is precluded from relitigating that issue in this case. Therefore, Jara's Title VII claim was properly dismissed.

Claim preclusion "prevent[s] a party from litigating a legal claim that was or could have been the subject of a previously issued final judgment." Lenox MacLaren Surgical Corp. v. Medtronic, Inc., 847 F.3d 1221, 1239 (10th Cir. 2017). "To apply claim preclusion," there must be: "(1) a final judgment on the merits in an earlier action; (2) identity of parties or privies in the two suits; and (3) identity of the cause of action in both suits." Id. (alteration omitted). "In addition, even if these three elements are satisfied, there is an exception to the application of claim preclusion where the party resisting it did not have a full and fair opportunity to litigate the claim in the prior action." Id. (quotation marks omitted).

With respect to the third element, "a final judgment extinguishes . . . all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose." Wilkes v. Wyoming Dep't of Emp't, 314 F.3d 501, 504 (10th Cir. 2002). "[A]ll claims arising from the same employment relationship constitute the same transaction or series of transactions for claim preclusion purposes." Id. (quotation marks omitted).

The district court properly dismissed Jara's claims under the Rehabilitation Act and § 1981 on claim preclusion grounds. First, there is a prior final judgment that reached the merits of Jara's previous claims under § 1981 and § 310 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185. Jara I, 701 F. App'x at 736-37. Second, the parties are the same in both cases. See id. at 734-35. Third, there is an identity of the cause of action because all of Jara's claims arise from his employment at Standard Parking. Wilkes, 314 F.3d at 504-05. Fourth, as discussed previously, Jara had a full and fair opportunity to litigate his prior case.

Finally, the district court did not abuse its discretion when it declined to exercise supplemental jurisdiction over the state law claims raised in Jara's complaint. "When all federal claims have been dismissed, the court may, and usually should, decline to exercise jurisdiction over any remaining state claims." Koch, 660 F.3d at 1248 (quotation marks omitted).

III

The judgment of the district court is AFFIRMED and Jara's motion to proceed in forma pauperis is DENIED.

Entered for the Court

Mary Beck Briscoe
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 18-cv-01111-GPG

ABDULLAHI HAMU JARA,

Plaintiff,

v.

STANDARD PARKING and
TEAMSTERS LOCAL UNION 455,

Defendants.

ORDER OF DISMISSAL

Acting *pro se*, on May 9, 2018, Plaintiff filed a 39-page document titled "Plaintiff First Amend Complaint," along with 62 pages of exhibits. (ECF No. 1). Plaintiff was granted leave to proceed without prepayment of the filing fee in this matter pursuant to 28 U.S.C. § 1915. (ECF No. 4). This case is now before the Court for review of the Complaint as required under D.C.COLO.LCivR 8.1(a).

The Court must construe Plaintiff's filings liberally because he is not represented by an attorney. *See Haines v. Kerner*, 404 U.S. 519, 520-21 (1972); *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). If the Complaint reasonably can be read "to state a valid claim on which the plaintiff could prevail, [the Court] should do so despite the plaintiff's failure to cite proper legal authority, his confusion of various legal theories, his poor syntax and sentence construction, or his unfamiliarity with pleading requirements." *Hall*, 935 F.2d at 1110. However, the Court should not be an advocate for a *pro se* litigant. *See id.*

Following a review of the Complaint, the Court will dismiss this action because Plaintiff's federal claims are barred under the doctrines of collateral estoppel and res judicata. Based on the dismissal of Plaintiff's federal claims, the Court declines to exercise supplemental jurisdiction over any state law claims.

I. The Complaint

In his pleading filed on May 9, 2018, Plaintiff alleges that his former employer, Defendant Standard Parking, managed issues concerning his employment in a discriminatory fashion and ultimately discharged him on May 27, 2014 under discriminatory circumstances based on race, ethnicity, and religion and also for retaliatory reasons. (ECF No. 1 at 5-6). Plaintiff further alleges that even though he filed many grievances with the Defendant Teamsters Local Union 455 ("Union Defendant") against Defendant Standard Parking, the Union Defendant discriminated against him in failing to take appropriate action regarding his complaints and also did not properly represent him in violation of the collective bargaining agreement. (ECF No. 1 at 6-7).

Plaintiff's complaint reflects that he invokes the federal question jurisdiction of this Court under 28 U.S.C. § 1331 and he designates what appear to be ten claims which the Court quotes verbatim by the titles the Plaintiff has given them without correcting or identifying errors in spelling, grammar, or punctuation:

1. FIRST CLAIM FOR RELIEF (Racial Discrimination in Violation of Title VII of the Civil Rights Act of 1964, 42, U.S.C. 2000e. Et seq.)

2. SECOND CLAIM FOR RELIEF (Violation of the Rehabilitation Act of 1973, 28 U.S.C. § 710 et seq.)

3. THIRD CLAIM FOR RELIEF (VIOLATION OF 42, U.S.C. 1981, 1990 and 1991).

4. FOURTH CLAIM FOR RELIEF (FRAUD)

5. FIFTH GENERAL NEGLIGENCE CLAIM FOR RELIEF

6. SIXTH CLAIM FOR RELIEF (VIOLATION OF COLORADO UNIFORM [Deceptive Trade Practices Act])

7. SEVENTH CLAIM FOR RELIEF (UNLAWFUL RETALIATION TITLE VII AND 42, U.S.C. 1981a and act 42 U.S.C. 1991)

8. EIGHTH CLAIM FOR RELIEF (COLORADO LABOR LAW WAGE ISSUE)

9. NINETH ADVERSE EMPLOYMENT ACTION CLAIM FOR RELIEF DISCRIMINATION AND MISTREATMENT CONSTITUTIONAL VIOLATION.

10. DISREGARDED OF RIGHTS AND SAFETY

(ECF No. 1).

Plaintiff seeks injunctive and declaratory relief with regard to the collective bargaining agreement and injunctive relief with regard to his personnel file, along with monetary damages. (*Id.* at 31).

II. Analysis

Claims may be dismissed as frivolous or malicious under 28 U.S.C. § 1915(e)(2) if they duplicate previous litigation. *See McWIlliams v. State of* Colorado, 121 F.3d 573, 574-75 (10th Cir. 1997) (citing *Bailey v. Johnson*, 846 F.2d 1019, 1021 (5th Cir. 1988)); *see also Griffin v. Zavaras*, No. 09-1165, 336 F. App'x 846, 849 (10th Cir. July 14, 2009) (unpublished). It is clear from a review of the Complaint pursuant to D.C.COLO.LCivR 8.1(a) that the allegations in the pleading and from the exhibits attached to it that Plaintiff is challenging the decision in and seeking to re-litigate further the claims from his prior lawsuit in *Jara v. Standard Parking and Teamster Local 455*, No. 15-cv-02018-MSK-MJW (D. Colo. Dec. 22, 2016) and that he is also seeking to bring additional claims that arise

out of and are centered on the same events or occurrences which provided the basis for Plaintiff's claims in his prior case.

In his 2015 lawsuit, Plaintiff asserted federal and other claims against the same named Defendants related to his employment and discharge from employment and also concerning the collective bargaining agreement. In the prior case, the Court dismissed Plaintiff's claims that he was terminated from employment on the basis of race, ethnicity, and religion and based on retaliation in violation of Title VII of the Civil Rights Act of 1964 and the Court also dismissed his claims that the Defendants each discriminated and interfered with his rights to contract in violation of 42 U.S.C. § 1981. *See Jara*, No. 15-cv-02018-MSK-MJW at ECF No. 126. Further, since Plaintiff was appearing *pro se*, the Court "also reviewed the Second Amended Complaint to determine if it is sufficient to state claims under other theories that do not require a showing of discrimination based on race, ethnicity, or religion." *Id.* The Court found that the only other cognizable claim which could be identified was a claim under section 301 of the Labor Management Relations Act for violations of a collective bargaining agreement, but dismissed the allegations as insufficient to state a claim. *Id.*

Plaintiff's claims in the 2015 case were dismissed pursuant to dispositive motions filed by each of the Defendants. *Jara*, No. 15-cv-02018-MSK-MJW, ECF No. 126 at p. 9. Plaintiff's employment discrimination claim under Title VII was dismissed for lack of subject matter jurisdiction based on the Court's finding that Plaintiff failed to exhaust administrative remedies through the EEOC and that equitable tolling considerations did not apply. *Id.* at p. 6-7. Plaintiff's two other claims were dismissed pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. *Id.* at p. 7-8.

The Court's dismissal of Plaintiff's claims was subsequently upheld by the Tenth Circuit in an Order and Judgment of July 13, 2017. *Jara v. Standard Parking, et al.,* 701 Fed.Appx. 733 (10th Cir. 2017) (unpublished). Plaintiff's petition for writ of certiorari to the United States Supreme Court was denied. *Jara v. Standard Parking, et al.,* 138 S.Ct. 658 (Mem) (2018).

The Court finds that Plaintiff is precluded by the doctrine of collateral estoppel from re-litigating the issue of his failure to exhaust administrative remedies and application of equitable tolling concerning his Title VII claims and further barred by the doctrine of res judicata from pursuing his remaining claims in this action since all of the remaining claims or allegations which he now seeks to advance were or could have been resolved in his prior lawsuit. The Court may raise the doctrines of res judicata and/or collateral estoppel on its own motion in the interests of avoiding "unnecessary judicial waste." *See U.S. v. Sioux Nation,* 448 U.S. 371, 432-33 (1980) (citing *Warthen v. United States,* 157 Ct.Cl. 798, 800 (1962)).

A. The Doctrine of Collateral Estoppel

The doctrine of collateral estoppel, also known as issue preclusion, mandates that the final decision of a court on an issue actually litigated and determined is conclusive of that issue in any subsequent suit. Collateral estoppel bars re-litigation of an issue when: (1) the issue previously decided is identical with the one presented in the instant case; (2) the merits of the prior action have been finally adjudicated; (3) the party against whom the doctrine is invoked was a party or in privity with a party in the prior action; and (4) in the prior action, the party against whom the doctrine is invoked has had a full and fair opportunity to litigate the issue. *Novitsky v. City of Aurora,* 491 F.3d 1244, 1252 n.2 (10th

Cir. 2007) (citing *Murdock v. Ute Indian Tribe,* 975 F.2d 683, 687 (10th Cir. 1992); *Frandsen v. Westinghouse Corp.,* 46 F.3d 975, 978 (10th Cir. 1995). With regard to a full and fair opportunity to litigate the issue in the earlier case, the fairness of the process is determined by examining any procedural limitations, the party's incentive to fully litigate the claim, and whether effective litigation was limited by the nature or relationship of the parties. *Nwosun v. General Mills Restaurants, Inc.*, 124 F.3d 1255, 1257-58 (10th Cir. 1997).

In *Jara v. Standard Parking and Teamster Local 455*, No. 15-cv-02018-MSK-MJW (D. Colo. Dec. 22, 2016), the issue of exhaustion of administrative remedies concerning the Plaintiff's Title VII claims was initially raised by the Court pursuant to initial review under D.C.COLO.LCivR 8.1(a) and 28 U.S.C. § 1915(e)(2) in an Order to Show Cause dated September 23, 2015. *Id.* at ECF No. 6. On October 22, 2015, in answer to the Order to Show Cause, the Plaintiff submitted an Amended Complaint, *id.* at ECF No. 7, and a separate response, *id.* at ECF No. 8. In the response, Plaintiff asserted that his lawsuit should not be dismissed for failure to exhaust because he had originally filed a complaint with the National Labor Relations Board ("NLRB") and that he did not know until too late that he was required to pursue remedies through the Equal Employment Opportunity Commission ("EEOC"). *Id.* at ECF No. 8. Since Plaintiff's Amended Complaint added a separate claim for relief under different statutory authority, that being 42 U.S.C. § 1981, and because of the potential for arguments concerning waiver, estoppel, and equitable tolling with regard to the Title VII claims, the matter was drawn to a presiding judge and a magistrate judge. *Id.* at ECF No. 10.

In December of 2015, Defendants filed separate motions to dismiss. *Jara*, No.

15-cv-02018-MSK-MJW at ECF Nos. 25, 26 & 28. At the Scheduling Conference held on January 14, 2016, Plaintiff was granted until February 3, 2016 in which to file his responses to the dispositive motions. *Id.* at ECF No. 37. In his responses to the motions filed by the Plaintiff on February 2, 2016, Plaintiff admitted that he did not timely file his claims of wrongful termination, discrimination, and retaliation with the EEOC and, as he had in response to the earlier Order to Show Cause, claimed it was because he did not know about the EEOC. *Id.* at ECF Nos. 46 at p. 2 & 47 at p. 2. Plaintiff again stated that he instead filed his complaints with the NLRB. *Id.* Plaintiff argued he should be entitled to equitable tolling because he was never told by anyone during the NLRB process about the administrative exhaustion requirements of the EEOC. *Id.* In August of 2016, Plaintiff was allowed to file a Second Amended Complaint, *id.* at ECF No. 78, and the dispositive motions were denied as moot, *id.* at ECF No. 77.

Shortly after the filing of the Second Amended Complaint, the Defendants filed respective motions to dismiss concerning the Plaintiff's newly filed pleading, again raising the issue of exhaustion of administrative remedies concerning the Plaintiff's Title VII claims. *Jara*, No. 15-cv-02018-MSK-MJW at ECF Nos. 80 & 82. In his response to the motions, the Plaintiff repeated his previous arguments that he should be entitled to equitable tolling because the NLRB never told him about the EEOC. *Id.* at ECF Nos. 92 & 93. Plaintiff, however, also admitted that he learned about having to file a charge with the EEOC in April, 2014 when he was contacting attorneys to represent him. *Id.* Plaintiff claimed that when he contacted the EEOC office, that office explained it was too late for him to file an EEOC charge. *Id.* Plaintiff alleged that he additionally pursued filing through the EEOC in June 2015, after again talking with an attorney who he claimed

told him that EEOC would still give him a right to sue letter even if it was too late to file a charge and that his efforts resulted in the EEOC issuing a letter saying he filed too late. *Id.*

The Defendants' dispositive motions were referred to a Magistrate Judge for review and consideration in issuing a Report and Recommendation. *Jara*, No. 15-cv-02018-MSK-MJW at ECF Nos. 81 & 83. In the Report & Recommendation issued by Magistrate Judge Michael J. Watanabe on November 14, 2016, he found based on case law from the Tenth Circuit that equitable tolling could not save the Plaintiff's Title VII claims because there were no facts or circumstances reflecting a deliberate design or deliberate actions by the Defendants which caused the Plaintiff to delay filing his charge with the EEOC. *Id.* at ECF No. 116. Magistrate Judge Watanabe also found that Plaintiff's confusion in this regard did not warrant equitable tolling. *Id.*

Plaintiff filed his objection to Magistrate Judge Watanabe's Report & Recommendation on November 28, 2016. *Id.* at ECF No. 120. Plaintiff objected to factual and legal determinations made in the Report & Recommendation, and requested that the presiding District Judge make a *de novo* determination of the issue based on his objections. *Id.* Plaintiff contended that he was entitled to equitable tolling because he did not know until June 2015 that he needed to exhaust his administrative remedies through the EEOC process. *Id.* at p. 10.

Ultimately, Plaintiff's employment discrimination claims under Title VII were dismissed by District Judge Marcia S. Krieger for lack of subject matter jurisdiction based on her finding that Plaintiff failed to exhaust administrative remedies through the EEOC and that equitable tolling considerations did not apply. *Jara*, No.

15-cv-02018-MSK-MJW at ECF No. 126 at p. 6-7. District Judge Krieger reviewed the issue *de novo*, noting there were no facts or plausible allegations that either of the Defendants deceived the Plaintiff with regard to filing of EEOC charges. *Id.* at p. 6. Further, in making her determination, District Judge Krieger deemed Plaintiff's reason for not filing charges with the EEOC as contained in his Objection as a proffer of how he could further amend the Second Amended Complaint to address the timeliness of his EEOC complaints. *Id.* at p. 6 n.4. Even construing the allegations as a proffer, however, District Judge Krieger found that "it would be futile to allow [Plaintiff] to amend his complaint a third time in an effort to withstand dismissal of his Title VII claims." *Id.*

On appeal, the United States Court of Appeals for the Tenth Circuit ("Tenth Circuit") determined that:

> Jara has conceded that he failed to file a timely discrimination charge with the EEOC. He argues that the deadline should have been equitably tolled because he was unaware of it. This is insufficient to warrant equitable tolling because Jara does not claim he was "deceived, lulled into inaction, actively misled, or has in some extraordinary way been prevented from asserting his . . . rights." Montes v. Vail Clinic, Inc., 497 F.3d 1160, 1168 n.13 (10th Cir. 2007) (quotation omitted) [footnote omitted]. Accordingly, we affirm the dismissal of Jara's Title VII claim.

Jara, 701 Fed.Appx. at 735-36.

Further, the Tenth Circuit rejected an argument the Plaintiff attempted to raise for the first time on appeal that the EEOC misled him in connection with filing a timely discrimination charge. *Id.* at 735 n.1.

Plaintiff appears to argue in the current action that he did not receive a full and fair opportunity to litigate the issue of equitable tolling in his earlier case because he was misled with regard to the EEOC process. (ECF No. 1 at 19-21). Plaintiff again relies upon his confusion in filing of a complaint with the NLRB, but now argues that since

"[b]oth defendants never direct me to EEOC," the Defendants "purposely deceived, lulled into inaction and actively misled" him and prevented him from asserting his rights in this regard. (*Id.* at 21). However, this is just a repurposing of the same argument under which the Plaintiff attempted to attribute responsibility to the NLRB for his failure to timely file an EEOC discrimination charge in his prior lawsuit before District Judge Krieger and that he attempted to use to place responsibility on the EEOC in his appeal to the Tenth Circuit. Both District Judge Krieger in Plaintiff's prior lawsuit and the Tenth Circuit in his appeal determined that Plaintiff's confusion regarding the EEOC process did not warrant equitable tolling. Not only did Plaintiff have ample opportunity to have raised his current argument against the Defendants in his previous lawsuit, since no new facts or circumstances are involved, but his allegations also fail under the law to demonstrate a purposeful deception or action designed to mislead attributable to either Defendant. *See Biester v. Midwest Health Services, Inc.*, 77 F.3d 1264, 1267-68 (10th Cir. 1996) (circumstances of the case must demonstrate a level of action to deceive the employee or to lull the employee into inaction by the past employer for equitable tolling of Title VII time limitations to apply); *see also Johnson v. Department of Veterans Affairs,* 611 Fed.Appx. 496, 498-99 (10th Cir. 2015) (allegation of a failure to inform an employee of all available remedies after firing determined to be insufficient to demonstrate that employee was prevented from a full and fair opportunity to litigate his claim in order to avoid application of res judicata).

The record in *Jara v. Standard Parking and Teamster Local 455*, No. 15-cv-02018-MSK-MJW (D. Colo. Dec. 22, 2016) demonstrates the parties were provided sufficient opportunity to address the issue of equitable tolling, not only through

Plaintiff's filing of amended pleadings and the twice filing of the Defendants' motions to dismiss to which the Plaintiff responded, but also through the process of objections made to Magistrate Judge Watanabe's Report & Recommendation. Plaintiff was on notice from the initiation of his 2015 action that exhaustion of his administrative remedies concerning his Title VII claims was at issue, and during the motions and objection process he was aware and responded to the fact that dismissal was warranted if he did not fully litigate and defend the matter of administrative exhaustion of his Title VII claims. The record provides no basis for determining that the litigation was limited by the nature or relationship of the parties. Finally, District Judge Krieger's dismissal of Plaintiff claims under Title VII clearly addressed the fact that there were no circumstances reflecting a deliberate design or any actions by the Defendants which caused the Plaintiff to delay filing his charge with the EEOC and that Plaintiff's confusion in this regard did not warrant equitable tolling. The Tenth Circuit's basis for affirming the dismissal is equally as clear.

Accordingly, the Court's prior ruling that it lacked jurisdiction to consider Plaintiff's Title VII claims because equitable tolling did not apply to excuse his failure to exhaust his administrative remedies prevents Plaintiff from raising and litigating that issue and those claims again in this matter. *See Park Lake Resources Ltd. Liability Co. v. U.S. Dept. of Agriculture,* 378 F.3d 1132, 1136 (10th Cir. 2004) (although a dismissal on jurisdictional grounds is not a final adjudication on the merits, "dismissals for lack of jurisdiction preclude relitigation of the issues determined in ruling on the jurisdictional question.").

B. The Doctrine of Res Judicata

The doctrine of res judicata, or claim preclusion, will "prevent a party from re-litigating a legal claim that was or could have been the subject of a previously issued

final judgment." *MACTEC, Inc. v. Gorelick*, 427 F.3d 821, 831 (10th Cir. 2005). Res judicata acts to "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication." *Allen v. McCurry*, 449 U.S. 90, 94 (1980) (citation omitted). Res judicata bars a claim where three factors are met: (1) a final judgment on the merits was entered in the earlier action; (2) the earlier action involved the same parties or their privies; and (3) the earlier action involved the same claims as the new action. *See Yap v. Excel Corp.*, 186 F.3d 1222, 1226 (10th Cir. 1999).

The Tenth Circuit employs a transactional approach to claim preclusion, and has held that "a claim arising out of the same 'transaction or series of connected transactions' as a previous suit, which was concluded in a valid and final judgment, will be precluded." *Yapp,* 186 F.3d at 1227 (citation omitted). Likewise, in the Tenth Circuit, a dismissal for failure to state a claim for relief is a qualifying prior dismissal that bars a subsequent filing arising from the same facts. *State Farm Mutual Automobile Ins. Co. v. Dyer,* 19 F.3d 514, 518 n.8 (10th Cir. 1994) ("A ruling that a party has failed to state a claim on which relief may be granted is a decision on the merits with full res judicata effect.").

In the present case, Plaintiff claims that he is entitled to declaratory and injunctive relief and that Defendants are also liable to him for damages under identical and a few new legal theories concerning the same events and circumstances as were litigated in *Jara v. Standard Parking and Teamster Local 455*, No. 15-cv-02018-MSK-MJW (D. Colo. Dec. 22, 2016). In his 2015 case, along with his Title VII claims, Plaintiff also asserted allegations under 42 U.S.C. § 1981 and what the Court found to be a cognizable claim identified under section 301 of the Labor Management Relations Act for violations of a

collective bargaining agreement. In this case, Plaintiff raises identical § 1981 and section 301 claims against the same Defendants and then also seeks to broaden the lawsuit to encompass several more legal or equitable theories of recovery. However, comparing the operative pleading in this matter with the Plaintiff's pleadings in his prior 2015 action, all arguments or claims Plaintiff has made in this action arise from the same transaction and core of operative facts as presented in his previous lawsuit. Therefore, any additional factual arguments or claims were available to the Plaintiff at the time he litigated his first case against these Defendants and could have been raised at that time. *See Nwosun*, 124 F.3d at 1257 (all claims arising out of the transaction, event, or occurrence must therefore be presented in one suit or be barred from subsequent litigation).

Plaintiff's prior action against these same Defendants for the identical claims relating to his employment and discharge from employment and concerning the collective bargaining agreement proceeded to a final judgment on the merits for failure to state a claim for relief. The judgment was upheld by the Tenth Circuit on appeal. The law is clearly established that a party cannot defeat the application of res judicata by simply alleging new legal theories. *Clark v. Haas Group, Inc.*, 953 F.2d 1235, 1238 (10th Cir. 1992).

Plaintiff appears to contend in this action that he did not receive a full and fair opportunity to litigate his claims in the 2015 case because the Court did not resolve the motions for summary judgment which had been filed by each of the Defendants in September of 2016. (ECF No. 1 at 1-2). However, it was not necessary to resolve the summary judgment motions in the prior action in order to address and determine the issue

of exhaustion of administrative remedies with regard to Plaintiff's Title VII claims or to determine whether the Plaintiff's complaint alone concerning the remaining claims was legally sufficient to state claims for which relief may be granted. The record in his prior lawsuit reflects that Plaintiff was afforded a full and fair opportunity to litigate his claims along with any of the additional claims he now seeks to pursue in this action. *See SIL-FLO, Inc. v. SFHC, Inc.*, 917 F.2d 1507, 1520 (10th Cir. 1990) (doctrine of res judicata also requires that the party or parties against whom the earlier decision is asserted had a full and fair opportunity to litigate the claim).

The record in the 2015 case clearly reflects there were no significant procedural limitations, as evidenced by the Plaintiff's filing of two amended pleadings during the course of the litigation, his participation in the Rule 16(b) Scheduling Conference and in establishing the statement of claims and defenses set forth in the resulting Scheduling Order, the briefing of issues under the motions to dismiss, and the opportunity to object and seek *de novo* review provided under the Report & Recommendation process. A general Protective Order did enter in the matter, but was made to shield confidential information produced by either the Plaintiff or the Defendants during litigation from disclosure except in discovery and in the preparation and trial of the case. *Jara*, No. 15-cv-02018-MSK-MJW at ECF No. 45. Further, the Plaintiff had the incentive to litigate fully his claims because of the injunctive relief regarding his personnel records he was requesting and the broad scope of monetary relief he sought. The record in Plaintiff's prior proceeding contains no basis for determining that the nature or relationship of the parties limited effective litigation. The fact that Plaintiff was unsuccessful in his prior case and remains dissatisfied with the result, to include his

appeal to the Tenth Circuit, does not demonstrate he not receive a full and fair opportunity to litigate his claims. *See SIL-FLO, Inc.*, 917 F.2d at 1521 (disagreement with a legal ruling does not mean that a dissatisfied litigant was denied the full and fair opportunity to litigate).

Review of Plaintiff's remaining claims in this case establish that the claims are barred because they are premised on the same factual allegations as the prior 2015 action, are asserted against the same Defendants, and could have been presented in the earlier case. Therefore, all of the elements of res judicata are satisfied and Plaintiff's complaint in this regard will be dismissed.

III. Conclusion and Orders

The Court concludes that Plaintiff's federal claims under Title VII are collaterally estopped and his remaining claims are barred under the doctrine of res judicata as set forth above.

For the reasons set forth above, it is

ORDERED that the Complaint (ECF No. 1) and this action are DISMISSED with prejudice as follows:

(1) To the extent Plaintiff asserts claims that were previously raised in *Jara v. Standard Parking and Teamster Local 455*, No. 15-cv-02018-MSK-MJW (D. Colo. Dec. 22, 2016), the claims are precluded by collateral estoppel or barred by res judicata and are therefore dismissed pursuant to 28 U.S.C. § 1915(b),

(2) To the extent Plaintiff asserts claims or issues that were or could have been raised in *Jara v. Standard Parking and Teamster Local 455*, No. 15-cv-02018-MSK-MJW (D. Colo. Dec. 22, 2016), the claims are barred by res judicata, and

(3) It is ORDERED that the Court declines to exercise supplemental jurisdiction over the state law claims because any federal claims over which the Court has original jurisdiction are dismissed. *See* 28 U.S.C. § 1367(c)(3). It is

FURTHER ORDERED that leave to proceed *in forma pauperis* is denied for the purpose of appeal. The Court certifies pursuant to 28 U.S.C. § 1915(a)(3) that any appeal from this order would not be taken in good faith. *See Coppedge v. United States*, 369 U.S. 438 (1962). If Plaintiff files a notice of appeal he must also pay the full $505 appellate filing fee or file a motion to proceed *in forma pauperis* in the United States Court of Appeals for the Tenth Circuit within thirty days in accordance with Fed. R. App. P. 24.

DATED at Denver, Colorado, this 16th day of May, 2018.

BY THE COURT:

s/Lewis T. Babcock
LEWIS T. BABCOCK, Senior Judge
United States District Court

Additional material from this filing is available in the Clerk's Office.