SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

NICOLE MCCREA,	:	
	:	
Plaintiff,	:	
	:	**Case No. 2016 CA 006968 P**
v.	:	**Calendar 12**
	:	**Judge Brian F. Holeman**
D.C. OFFICE OF HUMAN RIGHTS, *et al.*,	:	
	:	
Defendants.	:	

OMNIBUS ORDER

This matter comes upon consideration of: (1) Petitioner's Non-Consent Motion to Alter and Amend the July 28, 2017 Oral Judgment, filed on August 24, 2017; (2) Petitioner's Non-Consent Motion to New Trial, filed on August 24, 2017; and (3) Petitioner's Non-Consent Motion to Amend Findings of Fact and Make Additional Findings of Fact, filed on August 24, 2017.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On September 19, 2016, Petitioner Nicole McCrea filed the Petition for Review of Agency Decision. Petitioner alleges that "[o]n May 30-31, 2013[,] the Petitioner was the victim of [a] sexual harassment incident involving three DC Fire and EMS employees." (Supp. to Pet. for Review of Agency Decision at 1.) Petitioner alleges that on November 21, 2013, Petitioner filed charges with Respondent United States Equal Employment Opportunity Commission ("EEOC"). (*Id.*) Plaintiff alleges that from May 24, 2014, through November 6, 2015, Plaintiff filed charges asserting under the District of Columbia Human Rights Act "race discrimination and harassment; sex discrimination and harassment and disability discrimination and harassment; hostile work environment and retaliation" with Respondent District of Columbia Office of Human Rights ("OHR"). (*Id.* at 2.) Petitioner alleges that on April 28, 2016, Plaintiff filed a

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"42 U.S.C. 1983 Complaint" with the United States District Court for the District of Columbia ("District Court"). (*Id.*) Petitioner alleges that Respondent OHR sent Petitioner a letter stating that she was "not entitled to seek redress of 42 U.S.C. 1983 claims, outside of" Respondent OHR's jurisdiction, as they arise from the same facts as the Complaint filed with Respondent OHR. (*Id.*) Petitioner alleges that, on August 31, 2016, Petitioner received letters that Respondent OHR was administratively dismissing all of Plaintiff's charges without prejudice for administrative convenience. (*Id.* at 3.) Petitioner seeks relief of Petitioner OHR's dismissal without prejudice. (*Id.*)

On February 2, 2017, Respondent OHR filed Respondent District of Columbia's Motion for Summary Affirmance. On February 2, 2017, Respondent EEOC filed Defendant Equal Employment Opportunity Commission's Motion to Dismiss.

On July 28, 2017, the Court convened the Status Hearing Conference. From the bench, the Court granted Defendant Equal Employment Opportunity Commission's Motion to Dismiss and granted Respondent District of Columbia's Motion for Summary Affirmance.

II. THE APPLICABLE LAW

The Superior Court Rules of Civil Procedure, Rule 52, governs amending findings of fact. It reads, in pertinent part:

> (a) *Findings and conclusions.*
>
> > (1) *In general.* Unless expressly waived by all parties, in an action tried on the facts without a jury or with an advisory jury, the court must find the facts specially and state its conclusions of law separately. The findings and conclusions may be stated on the record or may appear in an opinion or a memorandum of decision filed by the court and are sufficient if they state the controlling factual and legal grounds of decision. Judgment must be entered under Rule 58.

(2) *For an interlocutory injunction.* In granting or refusing an interlocutory injunction, the court must similarly state the findings and conclusions that support its action.

(3) *For a motion.* The court is not required to state findings or conclusions when ruling on a motion under Rule 12 or 56 or, unless these rules provide otherwise, on any other motion.

. . . .

(b) *Amended or additional findings.* On a party's motion filed no later than 28 days after the entry of judgment, the court may amend its findings – or make additional findings – and may amend the judgment accordingly. The motion may accompany a motion for a new trial under Rule 59.

Rule 59 governs motions for new trial. It reads:

(a) *In general.*

(1) *Grounds for new trial.* The court may, on motion, grant a new trial on all or some of the issues - and to any party - as follows:

(A) after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court or District of Columbia courts; or

(B) after a nonjury trial, for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court or District of Columbia courts.

(2) *Further action after a nonjury trial.* After a nonjury trial, the court may, on motion for a new trial:

(A) open the judgment if one has been entered;

(B) take additional testimony;

(C) amend findings of fact and conclusions of law or make new ones; and

(D) direct the entry of a new judgment.

> (b) *Time to file a motion for a new trial.* A motion for a new trial must be filed no later than 28 days after the entry of judgment.
>
> (c) *Time to serve affidavits.* When a motion for a new trial is based on affidavits, they must be filed with the motion. The opposing party has 14 days after being served to file opposing affidavits. The court may permit reply affidavits.
>
> (d) *New trial on the court's initiative or for reasons not in the motion.* No later than 28 days after the entry of judgment, the court, on its own, may order a new trial for any reason that would justify granting one on a party's motion. After giving the parties notice and an opportunity to be heard, the court may grant a timely motion for a new trial for a reason not stated in the motion. In either event, the court must specify the reasons in its order.
>
> (e) *Motion to alter or amend a judgment.* A motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment.

Rule 60(b) governs relief from final judgments. It reads, in pertinent part:

> *Grounds for relief from a final judgment, order or proceeding.* On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) mistake, inadvertence, surprise, or excusable neglect[.]

"The nature of a motion does not turn on its caption or label, but rather its substance." *Nuyen v. Luna*, 884 A.2d 650, 654 (D.C. 2005). If the movant requests consideration of additional circumstances, the motion will be considered under Rule 60(b), but if movant seeks relief from an order on the basis of an error of law, the motion is considered under Rule 59(e). *Frain v. District of Columbia*, 572 A.2d 447 (D.C. 1999). A motion that is proper under either rule will ordinarily be treated as a Rule 59(e) motion, if timely filed. *Wallace v. Warehouse Employees Union #730*, 482 A.2d 801, 805 (D.C. 1984). Rule 59(e) "does not provide a vehicle for a party to undo its own procedural failures." *Nuyen*, 884 A.2d 650, 655. The purpose of

Rule 60(b) is to "respect finality of judgments by providing post-judgment relief only under exceptional circumstances, in unusual and extraordinary situations justifying an exception to the overriding policy of finality." *Clement v. D.C. Dep't of Human Servs.*, 629 A.2d 1215, 1219 (D.C. 1193) (citing *Ohio Valley Constr. Co. v. Dew*, 354 A.2d 518, 521 (1976)).

Rule 61 governs harmless error. It reads:

> Unless justice requires otherwise, no error in admitting or excluding evidence – or any other error by the court or a party – is ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order. At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights.

"In determining whether error was harmless, we must look to the closeness of the case, the centrality of the issue affected by the error, and any steps taken to mitigate the effects of the error." *R. & G. Orthopedic Appliances & Prosthetics, Inc. v. Curtin*, 596 A.2d 530, 541 (D.C. 1991) (citing *Clark v. United States*, 593 A.2d 186, 193 (D.C. 1991)).

D.C. Code § 2-1403.16 governs private causes of action under the District of Columbia Human Rights Act. It reads, in pertinent part:

> (a) Any person claiming to be aggrieved by an unlawful discriminatory practice shall have a cause of action in any court of competent jurisdiction for damages and such other remedies as may be appropriate, unless such person has filed a complaint hereunder; provided, that where the Office has dismissed such complaint on the grounds of administrative convenience, or where the complainant has withdrawn a complaint, such person shall maintain all rights to bring suit as if no complaint had been filed. No person who maintains, in a court of competent jurisdiction, any action based upon an act which would be an unlawful discriminatory practice under this chapter may file the same complaint with the Office. A private cause of action pursuant to this chapter shall be filed in a court of competent jurisdiction within one year of the unlawful discriminatory act, or the discovery thereof, except that the limitation shall be within 2 years of the unlawful discriminatory act, or the discovery thereof, for complaints of unlawful discrimination in real estate transactions

> brought pursuant to this chapter or the FHA. The timely filing of a complaint with the Office, or under the administrative procedures established by the Mayor pursuant to § 2-1403.03, shall toll the running of the statute of limitations while the complaint is pending.

"To bring a claim against the United States, a plaintiff must identify an unequivocal waiver of sovereign immunity." *Franklin-Mason v. Mabus*, 742 F.3d 1051, 1054 (D.C. Cir. 2014).[1] "Courts are required to read waivers of sovereign immunity narrowly and construe any ambiguities in the statutory language in favor of immunity." *Id.* "But '[e]ven when suits are authorized[,] they must be brought only in designated courts.'" *Id.* (citing *United States v. Shaw*, 309 U.S. 495, 501 (1940)). "This is because 'it rests with Congress to determine not only whether the United States may be sued, but in what courts the suit may be brought.'" *Id.* (citing *Minnesota v. United States*, 305 U.D. 382, 388 (1939)). "'Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit.'" *Ivy v. Comm'r of IRS*, 877 F.3d 1048, 1499 (D.C. Cir. 2017) (citing *FDIC v. Meyer*, 510 U.S. 471, 475 (1994)).

III. ANALYSIS

A. PETITIONER'S NON-CONSENT MOTION TO ALTER AND AMEND THE JULY 28, 2017 ORAL JUDGMENT

On August 24, 2017, Petitioner filed Petitioner's Non-Consent Motion to Alter and Amend the July 28, 2017 Oral Judgment. Petitioner requests that the Court "reconsider" its rulings at the Status Conference Hearing, and represents that a new trial should be granted under the Superior Court Rules of Civil Procedure, Rule 59(e), as the Court's judgment was "[c]lear error through the willful and improper application of the statutory remedies articulated by the Petitioner and applicable to the Petitioner's claim for relief." (Mem. P. & A. at 8.) Petitioner

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[1] Precedent from any federal district court or federal court of appeals is persuasive, not controlling, authority on the Superior Court of the District of Columbia. *M.A.P. v. Ryan*, 285 A.2d 312 (D.C. 1971) (stating that the Court Reform Act declared that "[the] highest court of the District of Columbia is the District of Columbia Court of Appeals.")

represents that the Court does have subject matter jurisdiction over Respondent EEOC. (*Id.*) Petitioner further represents that Petitioner does have standing to challenge Respondent OHR's "characterization of her actions in its determination to administratively dismiss, for their administrative convenience, her charges[, and] the Court does not need to act on her statutory right to fulfill administrative obligations due to her pending [f]ederal appeal." (*Id.* at 8.)

On September 13, 2017, Respondent OHR filed Respondent D.C. Office of Human Rights' Opposition to Plaintiff's Motion to Amend Findings of Fact and Make Additional Findings of Fact, Plaintiff's Motion for a New Trial, and Plaintiff's Motion to Alter and Amend the July 28, 2017 Oral Judgment. Respondent OHR argues that the Court's ruling to grant OHR's motion for summary affirmance with prejudice was on solid grounds as D.C. Code § 2-1403.16(a), states that "[n]o person who maintains, in a court of competent jurisdiction, any action based upon an act which would be an unlawful discriminatory practice under this chapter may file the same complaint with [OHR]." (Opp'n. at 1.) Respondent OHR maintains that the dismissal of Petitioner's Complaint with OHR was required for lack of jurisdiction, as Petitioner filed a federal lawsuit containing the same facts as the OHR compliant. (*Id.* at 2.)

On September 23, 2017, Petitioner filed Petitioner's Reply in Support of Petitioner's Non-Consent Motion to Amend Findings of Fact and Make Additional Findings of Fact; Petitioner's Non-Consent Motion to Alter and Amend the July 28, 2017 Judgment; Petitioner's Non-Consent Motion for a New Trial. Petitioner represents that Respondents OHR and EEOC's arguments are "baseless" and that there is case law found in the Supreme Court of the United States, the United States Court of Appeals District of Columbia Circuit, and the District Court that support Petitioner's arguments in its Motions. (Reply at 1-7.) Petitioner represents that

Title VII of the Civil Rights Act of 1964 allows an individual to pursue different claims arising from the same set of facts through administrative or judicial remedies. (*Id.*)

The Court is unable to find grounds to grant Petitioner's requested relief under Rule 59(e), as there was no clear error in the Court granting Respondent EEOC's motion to dismiss. Respondent EEOC is a United States Government Agency. *See* 42 U.S. C. § 2000e-4 (establishing the EEOC as an agency created by Congress in Section 705 of the Civil Rights Act of 1964). It has been established under *Franklin-Mason* and *Ivy*, that government agencies are protected under sovereign immunity, and lawsuits against these agencies can only be brought in designated courts. On this record, there was no clear error in granting Respondent EEOC's motion to dismiss, as Respondent EEOC is a federal agency and the Court lacks proper subject matter jurisdiction. Petitioner's Reply to the Opposition does nothing to state controlling authority to the contrary.

Similarly, on this record, there was no clear error in granting Respondent OHR's motion for summary affirmance. The Court found that under D.C. Code § 2-1403.16(a), Respondent OHR lacked jurisdiction to determine the merits of Petitioner's Complaint, as Petitioner had filed a Complaint in the District Court. The Court found that it was proper for Respondent OHR to administratively dismiss Petitioner's Complaint as D.C. Code § 2-1403.16(a) precludes Petitioner from maintaining an action based upon the same facts with both Respondent OHR and the District Court. Petitioner fails to provide controlling authority to the contrary. Further, at the time of the Status Hearing Conference convened on July 28, 2017, the parties represented that Petitioner's Complaint *filed in the District Court was on appeal*, implicitly recognizing Petitioner's pursuit of her Complaint and, concomitantly, Respondent OHR's lack of jurisdiction to entertain the Complaint.

B. Petitioner's Non-Consent Motion to New Trial

On August 24, 2017, Petitioner filed Petitioner's Non-Consent Motion to New Trial. Petitioner represents that under rule 59(a)(1) and Rule 61, a new trial should be granted as "Petitioner presented and cited sufficient [p]robative [e]vidence that Respondents created harm to her ability [to] assert that she had satisfied her administrative remedies[,] asserted standing[,]" and that the Court had jurisdiction over EEOC "through [f]ederal and [s]tate provisions of remedy in equity." (Mem. P. & A. 8-9.) Petitioner requests that the Court vacate the oral judgment dismissing Petitioner's Petition for Review of Agency Action with prejudice, and that Petitioner has exhausted her administrative remedies as to claims under Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, and the District of Columbia Human Rights Act. (*Id.* at 11.)

The Court is unable to ascertain grounds to support a grant of Petitioner's requested relief under Rules 59(a)(1) and Rule 61. Rule 59(a)(1) pertains to grounds for a new trial after a jury trial and a non-jury trial. Rule 59(a)(1) would not apply to Petitioner as Petitioner's Petition for Review of Agency Decision was dismissed with prejudice on July 28, 2017, at a Status Conference Hearing and not following a trial or non-jury trial. Further, as there was no presentation of trial evidence in the first instance, there could be no error pertaining to its exclusion under Rule 61.

C. PETITIONER'S NON-CONSENT MOTION TO AMEND FINDINGS OF FACT AND MAKE ADDITIONAL FINDINGS OF FACT

On August 24, 2017, Petitioner filed Petitioner's Non-Consent Motion to Amend Findings of Fact and Make Additional Findings of Fact. Petitioner represents that under Rule 52(b) the facts in the instant Motion "are material, relevant and [are] fully support[ed] in the agency records and/or the entire Court record of proceedings, pleadings, and filings before the

Court." (Mem. P. & A. at 9.) Petitioner requests that the Court make additional findings of facts pertaining to her statutory right to judicial review. (*Id.* at 9-12.) Petitioner requests that the Court render a written statement of the grounds, the findings of facts, and conclusions of the Court's ruling, and consider the additional facts within the instant Motion for further judicial review. (*Id.* at 12-13.)

There are no grounds supporting a grant of the requested relief under Rule 52. Under Rule 52(a)(3), the Court is not required to state findings of fact or conclusions of law for rulings under Rule 12 or Rule 56, or unless specified in the rules, on any other motion. The instant Motion proposes additional findings of fact presented in prior filings with the Court and argued at the Status Conference Hearing. Consequently, these proposed additional facts do not alter the reasoning articulated above for granting Respondent EEOC's motion to dismiss and Respondent OHR's summary affirmance. (*See supra* Part III. A at 8-9.) The Court's rulings from the bench establishes the record of the case.

WHEREFORE, it is this 10th day of November 2018, hereby

ORDERED, that Petitioner's Non-Consent Motion to Alter and Amend the July 28, 2017 Oral Judgment is **DENIED**; and it is further

ORDERED, that Petitioner's Non-Consent Motion to New Trial is **DENIED**; and it is further

ORDERED, that Petitioner's Non-Consent Motion to Amend Findings of Fact and Make Additional Findings of Fact is **DENIED**.

COPIES MAILED FROM
CHAMBERS ON 11/10/2018

SIGNED IN CHAMBERS

BRIAN F. HOLEMAN
JUDGE

Copies e-served to:

Christina Okereke, Esquire
Assistant Attorney General
441 Fourth Street, N.W., Suite 630 South
Washington, D.C. 20001
Counsel for Respondent the District of Columbia Office of Human Rights

Savannah E. Marion, Esquire
Office of Legal Counsel
U.S. Equal Employment Opportunity Commission
131 M Street, N.E.
Washington, DC 20507
Counsel for Respondent the Equal Employment Opportunity Commission

Copy mailed to:

Nicole Rena McCrea
5205 East Capitol Street, N.E.
Washington, DC 20019
Petitioner

District of Columbia
Court of Appeals

Nos. 17-CV-987 & 18-CV-1289

NICOLE RENA MCCREA,
Appellant,

v.

2016 CAP 6968

DISTRICT OF COLUMBIA
OFFICE OF HUMAN RIGHTS, *et al.*,
Appellees.

BEFORE: Glickman and Beckwith, Associate Judges, and Nebeker, Senior Judge.

JUDGMENT

On consideration of appellant's motions for summary reversal, appellees' (District of Columbia Office of Human Rights (OHR) and United States Equal Employment Opportunity Commission (EEOC)) oppositions/cross-motions for summary affirmance, appellant's motion to extend the time to file her lodged replies/oppositions thereto, appellant's consent motion to consolidate, and the records on appeal, it is

ORDERED that appellant's motion to consolidate is granted, and Appeal Nos. 17-CV-987 and 18-CV-1289 are hereby consolidated for all purposes. It is

FURTHER ORDERED that appellant's motion to extend is granted, and appellant's lodged replies/oppositions to appellees' cross-motions for summary affirmance are hereby filed. It is

FURTHER ORDERED that appellant's motions for summary reversal are denied. *See Oliver T. Carr Mgmt., Inc. v. Nat'l Delicatessen, Inc.*, 397 A.2d 914, 915 (D.C. 1979). It is

FURTHER ORDERED that appellees' cross-motions for summary affirmance are granted. *See id.* OHR did not err in dismissing appellant's complaints for violations of the Human Rights Act (HRA), D.C. Code § 2-1401.01 *et seq.* (2018 Supp.), where it is undisputed that she had filed suit in federal district

Appendix A

court based on the same acts. *See Carter v. District of Columbia*, 980 A.2d 1217, 1223 (D.C. 2009) (explaining that a complainant who files with OHR may not also file suit based on the same acts unless the OHR complaint is dismissed for administrative convenience or voluntarily withdrawn before OHR decides it) (citing D.C. Code § 2-1403.16(a)).

The trial court did not err in dismissing appellant's petition for review of EEOC's administrative closure of her complaint with that agency. *See FDIC v. Meyer*, 510 U.S. 471, 475 (1994) ("Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit."); *Aminoil U.S.A., Inc. v. Calif. State Water Res. Control Bd.*, 674 F.2d 1227, 1233 (9th Cir. 1982) (determining that the legislative history unambiguously demonstrates an intent that the United States would remain immune from suit in state courts under the federal Administrative Procedure Act); *Palmore v. United States*, 411 U.S. 389, 407-09 (1973) (delineating the distinctions between the two court systems of the District of Columbia and concluding that this court and Superior Court are "strictly local courts" whose functions are "essentially similar to those of the local courts found in the 50 States"). Even assuming for the sake of argument that EEOC could be sued in Superior Court, appellant provides no authority for the proposition that EEOC's investigative and claim-handling decisions are judicially reviewable under the APA. *See, e.g.*, *Stewart v. EEOC*, 611 F.2d 679, 682-84 (7th Cir. 1979) (reasoning that the complainant's right to sue the employer after the EEOC investigation is an "adequate other remedy in a court" to remove it from the APA's purview) (quoting 5 U.S.C. § 704).

Lastly, the trial court did not err in declining appellant's request to issue a declaratory judgment that she had exhausted her administrative remedies. With respect to appellant's HRA claims, there is no requirement to exhaust administrative remedies prior to filing a civil complaint; therefore no "substantial controversy" exists as to whether she has exhausted them. *See McIntosh v. Washington*, 395 A.2d 744, 755 n.24 (D.C. 1978) ("Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interest, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment."). With respect to appellant's federal claims, exhaustion of administrative remedies appears to be moot to the extent EEOC issued her a right-to-sue letter, but this would in any event be an issue properly reserved for resolution in her federal district court case. *See In re D.M.*, 562 A.2d 618, 620 (D.C. 1989) (emphasizing that declaratory relief is not appropriate where the "ultimate question depends on contingencies which may not come about"); *Congress v. District of Columbia*, 277 F. Supp. 3d 82, 86 (D.D.C.

2017) ("Since failure to exhaust remedies is an affirmative defense, the defendant bears the burden of pleading and proving it."). It is

FURTHER ORDERED and ADJUDGED that the judgment and orders on appeal are affirmed.

ENTERED BY DIRECTION OF THE COURT:

Julio A. Castillo

JULIO A. CASTILLO
Clerk of the Court

Copies mailed to:

Honorable Brian F. Holeman

QMU – Civil Division

Nicole R. McCrea
5205 East Capitol Street, SE
Washington, DC 20019

~~Copies e-served to:~~

Loren L. AliKhan, Esquire
Solicitor General for DC

Savannah Marion Felton, Esquire
US Equal Employment Opportunity Commission

Jane M. Lyons, Esquire
Assistant United States Attorney

cml

District of Columbia
Court of Appeals

Nos. 17-CV-987 & 18-CV-1289

NICOLE RENA MCCREA,

Appellant,

v. CAP6968-16

DISTRICT OF COLUMBIA
OFFICE OF HUMAN RIGHTS, *et al.*,

Appellees.

BEFORE: Blackburne-Rigsby, Chief Judge; Glickman,* Fisher, Thompson, Beckwith,* Easterly, and McLeese, Associate Judges; Nebeker,* Senior Judge.

O R D E R

On consideration of appellant's petition for rehearing or rehearing *en banc*, it is

ORDERED by the merits division* that the petition for rehearing is denied; and it appearing that no judge of this court has called for a vote on the petition for rehearing *en banc*, it is

FURTHER ORDERED that the petition for rehearing *en banc* is denied.

PER CURIAM

Copies mailed to:

Honorable Brian F. Holeman

Director, Civil Division
Quality Management Unit

Appendix C