[DO NOT PUBLISH]

In the United States Court of Appeals

For the Eleventh Circuit

No. 21-11149

Non-Argument Calendar

FRANCIS OKIEMUTE AKPORE,

Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Alabama
D.C. Docket No. 4:20-cv-01956-ACA

Before WILSON, LUCK, and LAGOA, Circuit Judges.

PER CURIAM:

Francis Akpore, a Nigerian citizen, appeals the dismissal of his Federal Tort Claims Act claims for lack of subject matter jurisdiction. Mr. Akpore brought two types of claims: those related to his alleged sexual assault and harassment by Immigration and Customs Enforcement officers; and those related to his removal. Because the removal claims fall within the Immigration and Nationality Act's jurisdiction-stripping provision, 8 U.S.C. section 1252(g), and because the sexual assault claims did not comply with the notice requirements under the Federal Tort Claims Act, we affirm the district court's dismissal of Mr. Akpore's claims.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On August 26, 2002, Mr. Akpore arrived in the United States.[1] He was ordered removed in April 2005, but he "never left." On June 22, 2017, he was served with a notice to appear and taken into the custody of United States Immigration and Customs Enforcement.

On August 1, 2017, an immigration judge terminated Mr. Akpore's removal proceedings "without prejudice to the initiation

[1] We accept the complaint's allegations as true and view them in the light most favorable to the plaintiff. *See Carmichael v. Kellogg, Brown & Root Servs.*, 572 F.3d 1271, 1279 (11th Cir. 2009).

of a reasonable fear proceeding after a review by an asylum officer and, if necessary, by an immigration judge." The immigration judge terminated the proceedings because Mr. Akpore was "subject to a removal order following the [Board of Immigration Appeals]'s denial of a motion to reopen on" November 29, 2006.

About two weeks after the August 1 order, Mr. Akpore's deportation officer gave Mr. Akpore a fabricated order dated August 17, 2017 and told him that because the immigration judge had "amended" the August 1 order, Immigration and Customs Enforcement "would disregard" the earlier order. According to the fabricated order, the Department of Homeland Security had moved to amend the August 1 order "to exclude the language pertaining to reasonable fear proceedings," arguing that Mr. Akpore was not entitled to the proceedings because he was not subject to an expedited or reinstated removal order. The fabricated order purported to grant the motion to amend, terminate the June 22 notice to appear without prejudice, and start the running of Mr. Akpore's time to appeal the amended order on August 18, 2017.

Around the time when Mr. Akpore was appealing the fabricated order, "different officers were consistently picking on and provoking" him, and "two officers sexually assaulted and harassed" him. On July 29, 2017, Mr. Akpore filed a grievance with Immigration and Customs Enforcement describing his harassment by the officers, but the grievance "amounted to nothing because the [c]aptain at the [d]etention facility" denied receiving it. On August 2, 2017, Mr. Akpore filed a grievance alleging that, on July 16, 2017,

he was sexually assaulted. Mr. Akpore also filled out a form dated November 24, 2017 in which he alleged that an immigration officer sexually harassed him in the bathroom.

On November 15, 2017, Immigration and Customs Enforcement attempted to remove Mr. Akpore, but he refused to sign a consent form. On August 14, 2018, Mr. Akpore was removed back to Nigeria.

On August 22, 2018 and December 19, 2019, Mr. Akpore sent letters to the United States Attorney General and the Inspector General. The letters asked for an investigation into his removal but they did not request a specific amount of compensatory damages. On May 10 and October 15, 2020, Mr. Akpore sent letters to Immigration and Customs Enforcement threatening suit and requesting first one million dollars and then five million dollars as compensation for his claims. Immigration and Customs Enforcement didn't respond to the letters.

On December 9, 2020, Mr. Akpore filed a "petition for redress of intentional-unlawful removal" against the United States under the Federal Tort Claims Act. Mr. Akpore sought one million dollars in compensatory damages, the return of his passports, and a declaration that his removal was unlawful. He claimed that Immigration and Customs Enforcement "fabricat[ed]" an order by an immigration judge and a travel certificate and "confiscat[ed]" Mr. Akpore's "valid and expired international Nigerian passports" to remove him from the United States to Nigeria. Mr. Akpore also

alleged that the immigration officers sexually assaulted and harassed him and that his grievances against them "amounted to nothing."

Observing no docket activity for over three months, the district court on March 12, 2021 ordered Mr. Akpore to show cause why his complaint should not be dismissed without prejudice for failure to serve the United States or for lack of subject matter jurisdiction under the Immigration and Nationality Act. Mr. Akpore timely responded by sending a notice of lawsuit and request for waiver of summons to the United States Attorney General, Immigration and Customs Enforcement, and the Birmingham, Alabama office of the United States Attorney and by amending his complaint. Specifically, he changed the title of the complaint from "Petition for Redress of Intentional-Unlawful Removal" to "Petition for Compensatory Damages" and eliminated his requests for declaratory and injunctive relief.

On March 24, 2021, the district court dismissed the amended complaint without prejudice for lack of subject matter jurisdiction. The district court explained that, "[a]lthough Mr. Akpore . . . changed the title of his petition and removed some of his previously requested forms of relief, his underlying claim[s] remain[ed] the same."

STANDARD OF REVIEW

"We review de novo a district court's determination of whether it has subject-matter jurisdiction." *Gupta v. McGahey*,

709 F.3d 1062, 1064–65 (11th Cir. 2013). "We may affirm the judgment below on any ground supported by the record, regardless of whether it was relied on by the district court." *Statton v. Fla. Fed. Jud. Nominating Comm'n*, 959 F.3d 1061, 1065 (11th Cir. 2020).

DISCUSSION

Mr. Akpore identifies "two major components" of his claims: (1) his sexual assault and harassment by Immigration and Customs Enforcement officers and (2) his "[i]ntentional unlawful removal" from the United States, which resulted from "[Immigration and Customs Enforcement]'s violation of a mandatory duty" and involved "the fabrication of an [immigration judge's] order," the "intentional misrepresentation of [Mr. Akpore]'s actual immigration status . . . against [his] warnings," perjury about his removal proceedings, and "the fabrication of a travel certificate." Mr. Akpore contends that the jurisdiction-stripping provision of the Immigration and Nationality Act does not apply to his sexual assault and harassment claims because these claims, "on [their] face, do[] not come within the parameters of the discretionary function exception," and the provision doesn't apply to his other claims because his removal was "coordinated solely with the intent to obstruct justice" regarding his sexual assault and harassment. Mr. Akpore further maintains that "as long as [Immigration and Customs Enforcement] is bound by its unconstitutional actions," "the district court has subject matter jurisdiction to review the merits of [his] [Federal Tort Claims Act] suit."

The Immigration and Nationality Act provides that "no court shall have jurisdiction to hear any cause or claim by or on behalf of any [noncitizen] arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any [noncitizen] under this Act." 8 U.S.C. § 1252(g). We give this provision a "narrow reading." *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 487 (1999). The limitation on jurisdiction "applies only to three discrete actions that the Attorney General may take: h[is] 'decision or action' to '*commence* proceedings, *adjudicate* cases, or *execute* removal orders.'" *Id.* at 482. To accomplish the provision's purposes, we "apply it to preclude efforts to challenge the refusal to exercise favorable discretion on behalf of specific [noncitizens], as well as those claims that would lead to the deconstruction, fragmentation, and hence prolongation of removal proceedings." *Alvarez v. U.S. Immigr. & Customs Enf't*, 818 F.3d 1194, 1205 (11th Cir. 2016) (alterations adopted and quotations omitted).

"When asking if a claim is barred by [section] 1252(g), [we] focus on the action being challenged." *Canal A Media Holding, LLC v. U.S. Citizenship & Immigr. Servs.*, 964 F.3d 1250, 1257–58 (11th Cir. 2020). "By its plain terms, [section 1252(g)] bars us from questioning [Immigration and Customs Enforcement]'s discretionary decisions to commence removal" proceedings, adjudicate cases, and execute removal orders. *Alvarez*, 818 F.3d at 1203. Here, Mr. Akpore's removal claims arise from discretionary decisions and actions by Immigration and Customs Enforcement

relating to the commencement, adjudication, and execution of Mr. Akpore's removal to Nigeria. In the claims, Mr. Akpore "challenge[s] the refusal to exercise favorable discretion on [his] behalf." *Id.* at 1205. Thus, the claims come within section 1252(g), and we lack jurisdiction over them, even to the extent they allege constitutional violations. *See Gupta*, 709 F.3d at 1063 (affirming dismissal for lack of subject matter jurisdiction under section 1252(g) when the complaint "allege[d] that three U.S. Immigration and Customs Enforcement agents violated [the plaintiff's] Fourth and Fifth Amendment rights").

Mr. Akpore's sexual assault and harassment claims do not relate to administrative decisions or actions to commence proceedings, adjudicate cases, or execute removal orders against him. And they would not prolong Mr. Akpore's removal proceedings because he has already been removed. Although section 1252(g) does not deprive us of jurisdiction over these claims, they are due to be dismissed anyway because Mr. Akpore failed to comply with the notice requirements in the Federal Tort Claims Act.

Under the Federal Tort Claims Act, the United States is liable in tort "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674. The Act "is a specific, congressional exception to the general rule of sovereign immunity. It allows the government to be sued by certain parties under certain circumstances for particular tortious acts committed by employees of the government." *Suarez v. United States*, 22 F.3d 1064, 1065 (11th Cir. 1994). One condition to this

waiver of sovereign immunity is that "the administrative agency being sued receive notice and an opportunity to resolve the dispute without litigation." *Barnett v. Okeechobee Hosp.*, 283 F.3d 1232, 1236 (11th Cir. 2002); *see* 28 U.S.C. § 2675(a) ("An action shall not be instituted . . . against the United States for money damages for . . . personal injury . . . caused by the negligent or wrongful act or omission of any employee of the [g]overnment while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate [f]ederal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim . . . .").

Further, "a tort claim against the United States [is] forever barred unless it is presented in writing to the appropriate [f]ederal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented." 28 U.S.C. § 2401(b). "[A] claim [is] deemed to have been presented when [the] [f]ederal agency receives from [the] claimant, . . . an executed Standard Form 95 or other written notification of an incident, accompanied by a claim for money damages in a sum certain for . . . personal injury . . . alleged to have occurred by reason of the incident . . . ." 28 C.F.R. § 14.2(a). "[T]he [Act] requires, at a minimum, that [the] claimant

expressly claim a sum certain or provide documentation which will allow the agency to calculate or estimate the damages to the claimant." *Suarez*, 22 F.3d at 1066. "When the sum certain is omitted, the administrative claim fails to meet the statutory prerequisite to maintaining a suit against the government, and leaves the . . . court without jurisdiction to hear the case." *Id.* at 1065.

On July 29, 2017, Mr. Akpore reported immigration officers' general harassment of him to Immigration and Customs Enforcement. On August 2, 2017, he reported to Immigration and Customs Enforcement and the Department of Homeland Security that, on July 16, 2017, he was sexually assaulted. Mr. Akpore also filled out a form dated November 24, 2017 in which he alleged that an immigration officer sexually harassed him in the bathroom. Mr. Akpore didn't request a sum certain in damages in any of these grievances.

The first time that Mr. Akpore mentioned his sexual assault and harassment claims to an appropriate federal agency in connection with a request for a sum certain was May 10, 2020. On that date, he sent a letter to Immigration and Customs Enforcement and attached a document entitled "Claim" in which he mentioned "two grievances [he] filed against two detention officers for sexual assault and harassment" and "request[ed] compensation [in] the sum of one million dollars." Thus, assuming Immigration and Customs Enforcement received his letter, Mr. Akpore presented his sexual assault and harassment claims on May 10, 2020 at the earliest. *See* 28 C.F.R. § 14.2(a).

Mr. Akpore does not allege in his complaint that Immigration and Customs Enforcement, the Department of Homeland Security, or another agency sent him a notice of final denial of his claims by certified or registered mail, and no such notice appears in the record. In fact, Mr. Akpore alleges that Immigration and Customs Enforcement "did not respond" to him regarding his claims. Thus, Mr. Akpore had to present his claims within two years after they accrued. *See* 28 U.S.C. § 2401(b). In the light most favorable to him, he presented them on May 10, 2020—more than two years after they accrued on July 16 and 29 and November 24, 2017. Thus, the claims are "forever barred." *Id.*

AFFIRMED.

In the
United States Court of Appeals
For the Eleventh Circuit

No. 21-11149

FRANCIS OKIEMUTE AKPORE,

Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Alabama
D.C. Docket No. 4:20-cv-01956-ACA

JUDGMENT

It is hereby ordered, adjudged, and decreed that the opinion issued on this date in this appeal is entered as the judgment of this Court.

Entered: March 14, 2023

For the Court: DAVID J. SMITH, Clerk of Court

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 21-11149-DD

FRANCIS OKIEMUTE AKPORE,

Plaintiff - Appellant,

versus

UNITED STATES OF AMERICA,

Defendant - Appellee.

Appeal from the United States District Court
for the Northern District of Alabama

BEFORE: WILSON, LUCK, and LAGOA, Circuit Judges.

PER CURIAM:

The Petition for Panel Rehearing filed by Francis Akpore is DENIED.

ORD-41

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION

FRANCIS OKIEMUTE AKPORE,	}	
	}	
Petitioner,	}	
	}	
v.	}	**Case No.: 4:20-cv-01956-ACA**
	}	
UNITED STATES OF AMERICA,	}	
	}	
Respondent.	}	

FINAL ORDER

Petitioner Francis Okiemute Akpore filed a petition against the United States challenging the legality of his removal to Nigeria. (Doc. 1). The court ordered Mr. Akpore to show cause why the court should not dismiss this action without prejudice for lack of subject matter jurisdiction.[1] (Doc. 2). Mr. Akpore responded to the order (doc. 3) and filed an amended petition (doc. 4). Neither Mr. Akpore's amended petition nor his response to the court's order cure the deficiency of his claim. Although Mr. Akpore has changed the title of his petition and removed some of his previously requested forms of relief, his underlying claim remains the same.

[1] The court also ordered Mr. Akpore to show cause why it should not dismiss his claim for failing to serve Respondent United States. (Doc. 2 at 1). Because Mr. Akpore's claim is due to be dismissed for lack of subject matter jurisdiction, the court does not address the adequacy of his service on Respondent.

Accordingly, for the reasons set out in the court's order to show cause (doc. 2), the court **DISMISSES WITHOUT PREJUDICE** Mr. Akpore's petition for lack of subject matter jurisdiction.

DONE and **ORDERED** this March 24, 2021.

ANNEMARIE CARNEY AXON
UNITED STATES DISTRICT JUDGE