

NONPRECEDENTIAL DISPOSITION

To be cited only in accordance with FED. R. APP. P. 32.1

United States Court of Appeals**For the Seventh Circuit****Chicago, Illinois 60604**

Submitted October 30, 2024*

Decided December 3, 2024

BeforeILANA DIAMOND ROVNER, *Circuit Judge*MICHAEL Y. SCUDDER, *Circuit Judge*JOSHUA P. KOLAR, *Circuit Judge*

No. 24-1478

MARY F. BELL,
*Plaintiff-Appellant,**v.*LOUIS DEJOY, Postmaster General,
*Defendant-Appellee.*Appeal from the United States District
Court for the Northern District of
Illinois, Western Division.

No. 3:22-cv-50404

Iain D. Johnston,
*Judge.***ORDER**

Mary Bell, a United States Postal Service worker, sued the Postmaster General in his official capacity, alleging the USPS discriminated against her based on her race, color, and sex and retaliated against her when she pursued Equal Employment Opportunity charges—all in violation of Title VII of the Civil Rights Act of 1964.

* We have agreed to decide the case without oral argument because the briefs and record adequately present the facts and legal arguments, and oral argument would not significantly aid the court. FED. R. APP. P. 34(a)(2)(C).

See 42 U.S.C. § 2000e–2. The district court dismissed her amended complaint on the defendant’s motion, concluding that she did not exhaust her administrative remedies. Bell appeals, and because the district court erroneously concluded—in large part based upon bad information from the USPS and its counsel—that Bell was trying to bring a repeat claim and did not receive a right-to-sue notice, we vacate the dismissal and remand for further proceedings.

Background

Bell’s claims were dismissed on the pleadings, so we take the facts alleged in Bell’s complaint as true. *Nelson v. City of Chicago*, 992 F.3d 599, 602 (7th Cir. 2021). Bell holds a position at the USPS in which she would ordinarily have a supervisor and no subordinates; however, for years, Bell has worked without a supervisor and has had to oversee other employees. In 2020, because of the COVID-19 pandemic, the USPS authorized overtime pay for certain supervisory workers. But, because of Bell’s job description, the USPS did not pay Bell for her overtime hours, so she complained and met with USPS officials to negotiate backpay. In April 2021, the USPS and Bell entered into an agreement for the USPS to pay her retroactively for 263 hours of overtime.

The USPS honored this settlement, and so Bell did not pursue her formal complaint (“Complaint 0122”). But when the practice continued, Bell complained again that the USPS was failing to pay her for overtime and that she wanted her job “downgraded” to involve no supervision—a change that, while a demotion in title, she believed would benefit her. In March 2022, the USPS and Bell agreed to a second settlement: the USPS would pay Bell for 1,240 overtime hours and downgrade her to a non-supervisory position. But a month later, the USPS reneged on both promises. In July 2022, Bell filed a formal complaint (“Complaint 0327”) with the USPS Office of Equal Employment Opportunity (“EEO Office”), which sought enforcement of the second agreement.

In August 2022, the EEO Office returned a “partial acceptance/partial dismissal” of Complaint 0327. It dismissed Bell’s allegations involving overtime backpay (and gave her notice of her right to sue), concluding that Complaint 0327 was identical to Complaint 0122 with respect to the overtime pay issue. See 29 C.F.R. § 1614.107(a)(1). Because Bell had not pursued Complaint 0122, the EEO Office explained, Bell could not revive the same allegations with a new complaint. But the EEO Office decided to investigate the allegation about the USPS’s refusal to follow through with an agreement to downgrade Bell’s position.

Before the EEO Office completed this investigation, in November 2022, Bell filed this suit, alleging the USPS violated Title VII by discriminating against her based on her race, color, and sex and retaliating against her based on her EEO Office activity. *See* 42 U.S.C. § 2000e–2. She challenged the action raised in Complaint 0327 as discriminatory and retaliatory: the reneging of the agreement to pay her overtime backpay and downgrade her position. Attached to her complaint were numerous exhibits, including the partial dismissal of Complaint 0327 but neither complaint itself.

Then, in February 2023, the EEO Office returned the final agency decision about the downgrade allegation (finding against Bell) and issued a right-to-sue notice. Two and a half weeks later, the USPS moved to dismiss the federal complaint for reasons including failure to exhaust administrative remedies. But the USPS incorrectly stated that Bell had not yet received a right-to-sue notice and so had not exhausted. The district court accepted this representation (which was repeated in the reply brief) and concluded that Bell had not yet exhausted the claim about the downgrade. The court also accepted the USPS’s argument—based on the EEO Office’s partial dismissal of Complaint 0327—that Bell failed to exhaust her administrative remedies involving her overtime backpay because she allowed Complaint 0122 to lapse and restarted the process with identical allegations in Complaint 0327.

Bell filed an amended complaint in June 2023, and the USPS again moved to dismiss. Although the USPS now understood Bell had received a right-to-sue notice on the downgrade allegation before the court’s first dismissal, it argued that her suit was untimely because she had to file a complaint within 90 days *after* receiving the notice, whereas Bell had filed before receipt. With respect to the overtime backpay allegation, the USPS argued that nothing in the amended complaint changed the fact that the “identical” Complaint 0327 could not effectively exhaust the claim. The district court accepted both arguments and dismissed the amended complaint with prejudice.

Analysis

On appeal, Bell challenges the district court’s conclusions on exhaustion. Failure to exhaust is an affirmative defense that is a proper ground for dismissal only when it is clear from the face of the complaint (and any documents appended to the complaint or otherwise properly considered in resolving a motion to dismiss) that the affirmative defense applies. *Mosely v. Bd. of Educ. of City of Chicago*, 434 F.3d 527, 533 (7th Cir. 2006).

A federal employee who believes she has been discriminated against must exhaust an intra-agency process before suing under Title VII. *See* 42 U.S.C. § 2000e-5. First, an employee must attempt to resolve the matter informally through her agency's EEO Office within 45 days of the matter alleged to be discriminatory. 29 C.F.R. § 1614.105(a). If no resolution is reached, the employee has 15 days to file a formal complaint "with the agency that allegedly discriminated against [her]." *Id.* §§ 1614.105(d), 1614.106(a)–(b). The agency's EEO Office then determines whether the complaint should be dismissed on procedural grounds. *Id.* § 1614.107. If not, the EEO Office will investigate, *id.* § 1614.108(a), and will inform the employee that she can request an immediate final decision by the employing agency's EEO Office, *id.* § 1614.108(f). Then, after the final action, she will be given notice of her right-to-sue in federal district court. *Id.* § 1614.410(a).

Here, Bell correctly argues that because her federal complaint alleged that EEO Complaints 0122 and 0327 concerned unpaid overtime for different time periods, the court incorrectly adopted the EEO Office's conclusion that the complaints were identical, and therefore, that Complaint 0327 could not properly exhaust a claim.

In Title VII cases, a district court is "required to perform a *de novo* review of the record, including administrative agency proceedings." *Smith v. Potter*, 445 F.3d 1000, 1011 (7th Cir. 2006) (citations omitted). But here, neither administrative complaint was attached as an exhibit, therefore, neither was before the court for independent review. And Bell repeatedly alleged that the facts behind the two administrative complaints were different: Complaint 0122 involved the first 163 hours of unpaid overtime, and Complaint 0327 involved the refusal to pay 1,240 hours of unpaid overtime and to approve a position downgrade. The court's reliance on the EEO Office's incorrect finding warrants reversal. *See Smith*, 445 F.3d at 1011.

Additionally, in its motions to dismiss and appellate brief, the USPS asked the court to accept its interpretation of "same claim" in 29 C.F.R. § 1614.107(a)(1), which provides: "Prior to a request for a hearing in a case, the agency shall dismiss an entire complaint ... [that] states the *same claim* that is pending before or has been decided by the agency or Commission." (emphasis added). According to the USPS, "same claim[s]" means all complaints about the same employment practice, even if applied in different instances. But neither in the district court nor on appeal has the USPS supported its (mostly implied) argument that the court should defer to its interpretation of the regulation.

Under *Kisor v. Wilkie*, a court may accept an agency's interpretation of its own rule only if, after exhausting traditional tools of statutory construction, the court finds the regulation genuinely ambiguous. 588 U.S. 558, 573 (2019). Further, if the regulation is ambiguous, the agency's interpretation still must be reasonable. *Id.* at 575. Here, the USPS has not developed any argument to show that its interpretation of "same claim" is faithful to the plain language of the regulation, nor has it suggested that any canons of construction or other interpretative tools make its interpretation plausible, let alone reasonable. Thus, it is entirely possible that "same claim" means "same legal claim" or same "claim" as we typically understand it in the context of claim preclusion.

Here, Bell's "claim" arguably differs in at least two ways from the previous one. It arises from a separately negotiated settlement, and it pertains to nonpayment over a new time period—a different period of damages. But the government never explained why these differences are insufficient to make Bell's current claim different from the previous one. Without addressing these issues, a court cannot simply accept the USPS's interpretation of § 1614.107(a).

The district court also erred in dismissing Bell's claim arising from her allegations that, out of discrimination or retaliation, the USPS refused to downgrade her position, despite having agreed to do so.¹ The court concluded, incorrectly under the law of this circuit, that the issuance of the right-to-sue notice after Bell prematurely filed suit obligated her to file a new lawsuit within 90 days of receiving it. Receiving a right-to-sue is not a jurisdictional prerequisite to a Title VII suit but rather, "a defense to a Title VII claim." *Worth v. Tyer*, 276 F.3d 249, 259 (7th Cir. 2001). A federal suit can be dismissed if it is clear that the plaintiff did not receive a right-to-sue notice (rendering the suit premature) or filed suit too long after receiving one. But if the plaintiff prematurely files a complaint without a right-to-sue notice but receives one before the dismissal, the defect in the complaint is "effectively cured." *Perkins v. Silverstein*, 939 F.2d 463, 471 (7th Cir. 1991); *see also Worth*, 276 F.3d at 249. Here, Bell sued before she had received her right-to-sue notice for her downgrade allegation but received that notice even before the USPS moved to dismiss her complaint. Thus, her premature

¹ The USPS and its counsel did the district court a substantial disservice in its briefing with respect to this aspect of the claim. With respect to the motion to dismiss the original complaint, it misinformed the court—in both its opening and reply briefs—that there was no right-to-sue notice. And in seeking dismissal of the amended complaint, the USPS overlooked binding precedent in attempting to persuade the district court that Bell's complaint was not too early (as it originally argued, based on incorrect information) but too late.

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complaint was “cured” under *Perkins*. She did not have an obligation to file another complaint within 90 days after receiving the notice.

On the other hand, we find no error in the district court’s dismissal of Bell’s remaining claims. Only actions taken under color of state law are actionable under § 1981, but the USPS is a federal actor. *See Davis v. U.S. Dep’t of Just.*, 204 F.3d 723, 725–26 (7th Cir. 2000). Title VII is an exclusive remedy for employees of the federal government. *Mlynczak v. Bodman*, 442 F.3d 1050, 1057 (7th Cir. 2006). Bell also invoked 29 C.F.R. § 1614.504, which establishes an administrative process for enforcing an agency’s compliance with a settlement agreement. To the extent she intended this to be a separate claim, regulations cannot create a private right of action, *see Alexander v. Sandoval*, 532 U.S. 275, 291 (2001), and so dismissal was proper. (In any case, the Title VII claim encompasses the same allegations.) Finally, Bell argues for the first time on appeal that she pleaded a claim under the Equal Pay Act. But Bell never presented this theory to the district court in opposing the motions to dismiss her original and amended complaints in full. *See Braun v. Village of Palatine*, 56 F.4th 542, 553 (7th Cir. 2022) (litigants waive arguments not made before the district court). In any case, we see nothing in the amended complaint supporting a plausible claim that the USPS pays different wages to employees of opposite sexes for equal work under the same conditions. *See Rongere v. City of Rockford*, 99 F.4th 1095, 1102 (7th Cir. 2024) (explaining the pleading standards for EPA claims).

Because the district court erred in dismissing Bell’s complaint based on a failure to exhaust her administrative remedies, we VACATE the judgment and REMAND for further proceedings. The district court has discretion on remand to structure future proceedings including whether to allow Bell leave to amend her complaint again.