NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2005 CA 2526

JONATHAN J. PARKER

VERSUS

BOARD OF SUPERVISORS OF UNIVERSITY OF LOUISIANA LAFAYETTE

On Appeal from the 19th Judicial District Court
Parish of East Baton Rouge, Louisiana
Docket No. 488,642, Division "M," Section 26
Honorable Kay Bates, Judge Presiding

Jonathan J. Parker **Lafayette, LA**	**Plaintiff-Appellant** **In Proper Person**
Henry A. Bernard, Jr. **Oats & Hudson** **Lafayette, LA**	**Attorney for** **Defendant-Appellee** **Board of Supervisors of the University of Louisiana-Lafayette**

BEFORE: PARRO, GUIDRY, AND McCLENDON, JJ.

Judgment rendered March 23, 2007

PARRO, J.

In this lawsuit seeking damages and injunctive relief based on allegations of age discrimination, the plaintiff appeals a judgment sustaining the defendant's peremptory exception raising the objections of no cause of action and res judicata. For the following reasons, we affirm the dismissal of the plaintiff's claims.

Factual Background and Procedural History

On October 10, 2001, Jonathan J. Parker filed a petition for damages and injunctive relief against the Board of Supervisors of the University of Louisiana-Lafayette (U.L.L.), claiming discrimination against him in March 2001 on the basis of age when he was denied the opportunity to try out for U.L.L.'s football team. In his petition, he alleged that U.L.L.'s conduct constituted illegal age discrimination in violation of LSA-Const. Art. I, §12.

U.L.L. filed an exception, objecting on the grounds of res judicata and no cause of action. Its objection asserting Parker had no cause of action for age discrimination was based on the fact that he was not a member of the protected class. U.L.L. also claimed that Parker's instant action was barred by the doctrine of res judicata, based on an August 27, 2001 memorandum order in an action that had been filed by Parker in federal court, namely, Parker v. Authement, CV 01-0974 (W.D. La. 2001) (unpublished).

Parker opposed the exception. He asserted that his petition had stated a cause of action based on "34 C.F.R. Part 104 Title 34-Education, Age Discrimination Act of 1975," which was enforced by the United States Department of Education, Office for Civil Rights (OCR). To his opposition, Parker attached a letter from the OCR prepared in November 2002 in response to a complaint, number 06012082, which Parker had filed with the agency. This OCR document evidences that at some point, Parker had pursued available administrative remedies. In his OCR complaint, Parker had alleged that U.L.L. had discriminated against him by denying him the opportunity to participate on its football team because of his age. The OCR response informed Parker that during the course of its investigation, a U.L.L. official had indicated that U.L.L. was

willing to resolve his complaint by assuring the OCR that all students, regardless of age, who desired to participate in its football program, would be provided an equal opportunity to try out for participation. Parker also directed the trial court's attention to the minutes of a hearing on a motion that had been filed in federal court, which allegedly reflected a verbal order to have both parties propose a settlement on or before October 30, 2001. However, those minutes did not mention anything about a settlement of any substantive matters, but merely disclosed that the October 25, 2001 minute entry pertained to a hearing on a motion to enroll counsel that had been filed by Parker. In connection with that motion, the federal court had ordered the parties to "file a motion with proposed judgment as discussed at the hearing, by noon on Tuesday, October 30, 2001."

Following a hearing in this case, the trial court found that Parker was not a member of a protected class and that he was barred from filing suit based on the doctrine of res judicata. Therefore, the trial court sustained the exception that had been filed by U.L.L. Parker appealed.

Res Judicata

When a state court is required to determine the preclusive effects of a judgment rendered by a federal court exercising federal question jurisdiction, the federal law of res judicata must be applied. Reeder v. Succession of Palmer, 623 So.2d 1268, 1271 (La. 1993). Under the federal law of claim preclusion, the effect of a judgment extends to the litigation of all issues relevant to the same claim between the same parties, whether or not raised at trial,[1] in order to avoid multiple suits on identical entitlements or obligations between the same parties. Id. Thus, claim preclusion applies to bar a subsequent action on res judicata principles where parties have previously litigated the same claim to a valid final judgment. Id. If the claim in the second action arises out of the same transaction or occurrence and has a common nucleus of operative facts as the claim asserted in the first action, it will be considered identical to the claim on which the

[1] See Garner v. Giarrusso, 571 F.2d 1330, 1336 (5th Cir. 1978).

parties have previously proceeded to judgment. See Id. at 1271-72. Therefore, if a set of facts gives rise to a claim based on both state and federal law, and the plaintiff brings the action in a federal court which had "pendent" jurisdiction to hear the state cause of action, the federal court's judgment in the action is res judicata and prevents the plaintiff from subsequently asserting a state claim based on those same facts in a state court action. Id. at 1272-73; Rochon v. Whitley, 96-0835 (La. App. 1st Cir. 2/14/97), 691 So.2d 189, 192-94.

Parker argued that the doctrine of res judicata did not apply to his complaint, claiming the August 27, 2001 memorandum order was not a final judgment, because the federal court had subsequently ordered both sides to propose a settlement.[2] The memorandum order in Parker's federal action stated, in pertinent part:

> Before the Court is defendants' motion to dismiss for failure to state a claim upon which relief can be granted or alternatively, motion for more definite statement and defense of insufficiency of service of process ... as well as plaintiff's response thereto ... and defendants' reply ... . For the reasons that follow, the motion will be GRANTED.
>
> Plaintiff, Jonathan Jay Parker ("Parker") alleges that defendant Ron Brown ("Brown") discriminated against him on February 15, 2001, when Brown informed Parker that he would not consider Parker for the ULL football team because of his age. Parker asserts his claim under the Age Discrimination Act of 1975, 42 U.S.C. § 1601, et seq., ("1975 Act") which provides that no person may be discriminated against on the basis of age from any program or activity receiving Federal financial assistance.
>
> A district court "may not dismiss a complaint under [R]ule 12(b)(6) 'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Shipp v. McMahon*, 199 F.3d 256, 260 (5th Cir. 2000) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).
>
> As noted by the defendants in their reply memorandum, Parker has failed to state a cause of action because he has not alleged facts supporting that the football program at ULL receives Federal financial assistance. Additionally, he cannot establish that he is within the protected class, i.e., forty years of age of older. Although there is no specific age mentioned in the 1975 Act, section 6103(c) specifically states that the Age Discrimination in Employment Act ("ADEA") remains unaffected by the 1975 Act. 42 U.S.C. § 6103(c). As the ADEA defines the protected class as those individuals age forty and older, it logically

[2] Parker insinuated this settlement process had something to do with the motion to enroll counsel that was granted in October 2001. However, the only letter of record by the OCR referencing an administrative investigation was prepared in November 2002. While it appears that Parker's contentions may be based on some other proceedings in the OCR or in the federal court suit, the record in this case does not include any such evidence from those proceedings to support his argument.

> follows that the Age Discrimination Act of 1975 is likewise intended to be applied to individuals age forty and older. Because Parker admits that he was 31 years of age on February 15, 2001, the date of the alleged discrimination, he is not within the protected class. . . .
>
> Lastly, under the regulations through which the 1975 Act is enforced, a complainant must exhaust [his] administrative remedies prior to filing a civil action to enforce rights under § 6101, *et seq.* 28 C.F.R. § 42.736(a). Parker's complaint makes no mention of exhausting administrative remedies.
>
> Based on the foregoing, Parker cannot prove any set of facts upon which relief may be granted and has thus failed to state a cause of action under Federal Rule of Civil Procedure 12(b)(6).
>
> Accordingly,
>
> IT IS ORDERED that defendants' motion to dismiss for failure to state a claim is GRANTED and plaintiff's complaint is DISMISSED WITH PREJUDICE.

Although the federal court granted the motion and ordered the complaint dismissed in this memorandum order, it did not order the entry of a judgment dismissing the lawsuit.

In federal court, the dismissal of a complaint is not the dismissal of the lawsuit,[3] since the plaintiff may be able to amend his complaint to cure whatever deficiencies had caused it to be dismissed. As long as the suit itself remains pending in the district court, there is no final judgment. If, however, it is plain that the complaint will not be amended, perhaps because the grounds of the dismissal make clear that no amendment could cure the defects in the plaintiff's case, the order dismissing the complaint is final in fact, despite the absence of a formal judgment under Fed. R. Civ. P. 58. Coniston Corp. v. Village of Hoffman Estates, 844 F.2d 461, 463 (7th Cir. 1988).

Although a judgment of dismissal of the federal action was not filed in the record in connection with U.L.L.'s objection of res judicata, the grounds for dismissal provided in the memorandum order make it clear that no amendment could have cured all the defects in Parker's federal action. Parker could perhaps have amended his complaint to cure one or more of the deficiencies that had caused his complaint to be dismissed, but because of his age, he was not within the protected class and could never have set

---

[3] See Bieneman v. City of Chicago, 838 F.2d 962, 963 (7th Cir. 1988) (per curiam); Benjamin v. United States, 833 F.2d 669, 671 (7th Cir. 1987) (per curiam).

forth facts to allege a claim under the 1975 act. Thus, at that point, Parker had no feasible options in the federal action. Therefore, the order dismissing Parker's complaint was a *de facto* final judgment, despite the absence of a formal judgment under Fed. R. Civ. P. 58. There is no evidence that Parker sought an appeal or moved to reopen the judgment and amend the complaint pursuant to Fed. R. Civ. P. 59 or 60.[4]

With a valid and final judgment in favor of U.L.L., dismissing Parker's claims based on age discrimination, another legal action by Parker against U.L.L. on the same claim was barred by the doctrine of res judicata. Parker was the plaintiff in both actions, and U.L.L., through its board of supervisors, was a defendant in both. Having reviewed the state court petition, we conclude that the state law claims in this case arise from the same set of facts and the same transaction as the federal civil rights claim, which the parties litigated to a final judgment in the federal court suit.

Reeder is dispositive of this case. Under the guidelines of Reeder, Parker's state-court claims were properly dismissed on the basis of res judicata. The judge in the federal court suit specifically addressed most of Parker's arguments and found he had failed to state a cause of action for which relief could be granted. Although the federal court did not address whether Parker had stated a claim for violation of the Louisiana Constitution, since this claim was not raised in his federal complaint, the Reeder case would preclude re-litigation in state court of any issues arising out of the same set of facts which gave rise to the federal court suit.[5]

Decree

For the foregoing, the judgment dismissing Parker's claim is affirmed. Costs of this appeal are assessed to Jonathan J. Parker.

AFFIRMED.

---

[4] See Benjamin, 833 F.2d at 671.

[5] Since the ruling on the objection of res judicata supports the trial court's dismissal of Parker's petition, we pretermit discussion of the propriety of the trial court's ruling on U.L.L.'s objection of no cause of action.