United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-5246 **September Term, 2016**

FILED ON: JULY 14, 2017

DARIN JONES,

APPELLANT

v.

UNITED STATES DEPARTMENT OF JUSTICE AND FEDERAL BUREAU OF INVESTIGATION,

APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 1:13-cv-00008)

Before: ROGERS, BROWN, and GRIFFITH, *Circuit Judges*.

J U D G M E N T

This appeal was considered on the record from the district court and was briefed and fully argued by the parties. The Court has accorded the issues full consideration and has determined that they do not warrant a published opinion. *See* FED. R. APP. P. 36; D.C. CIR. R. 36(d). It is

ORDERED AND ADJUDGED that the judgment of the district court be affirmed. It is well-established that a federal employee must exhaust his administrative remedies before filing suit in a federal court. *See Butler v. West*, 164 F.3d 634, 638 (D.C. Cir. 1999). This Court has recently applied federal exhaustion requirements to the statute at issue in this case—5 U.S.C. § 7702(e)(1)(B)—in *Morris v. McCarthy* and held that an appeal must be actively pending before the Merit Systems Protection Board ("MSPB") for 120 days before a litigant may file suit in federal court. 825 F.3d 658, 667 (D.C. Cir. 2016). Here, Jones appealed his termination by the FBI to the MSPB on September 20, 2012 and filed a complaint in the district court on January 4, 2013. Thus, Jones filed his complaint two weeks earlier than the 120-day period required by law. Because Jones did not wait the 120 days required by the statute and this Court's precedent, his suit was untimely, and the district court correctly dismissed the case for failing to exhaust administrative remedies.

Also, the fact that the MSPB had issued an initial decision prior to Jones filing his suit in the district court has no bearing on this case because only a final MSPB decision constitutes judicially reviewable action under 5 U.S.C. § 7702(e). *Butler*, 164 F.3d at 640–42. Under the MSPB's regulations, an initial decision "becomes a final decision if neither party, nor the MSPB on its own

motion, seeks further review within [35] days." *Id.* at 638–39. Here, the MSPB released its initial opinion on December 6, 2012. Therefore, its initial decision was scheduled to automatically become final on January 10, 2013. However, instead of waiting until January 10, Jones filed his suit on January 4, six days before the Board's decision became final. Because Jones seeks review on a decision that was not final, his claim is not judicially reviewable.

As to Jones's argument that his suit ripened for review once it was pending before the district court after the 120-day period required by statute, this Court has already rejected similar arguments that a failure to exhaust may somehow be cured. *See Murthy v. Vilsack*, 609 F.3d 460, 465 (D.C. Cir. 2010) (holding "the filing of an amended complaint after the 180-day period [required by statute] expired cannot cure the failure to exhaust"). Therefore, Jones filed his suit in the district court prematurely, and the district court's dismissal was appropriate.

Finally, Jones has failed to show he is entitled to equitable avoidance of the FBI's exhaustion defense. While this Court does recognize that plaintiffs are entitled to an opportunity to "plead[] and prov[e] facts supporting equitable avoidance" of affirmative defenses like failure to exhaust administrative remedies, *Bowden v. United States*, 106 F.3d 433, 437 (D.C. Cir. 1997), Jones has failed to show he is entitled to such avoidance. The Board's initial decision clearly stated it would "become final on **January 10, 2013**, unless a petition for review [was] filed by that date." GA 31. Below this notice, the Board provided detailed instructions regarding the process for seeking further review from the Board or judicial review of the Board's decision. Because Jones was put on notice about the proper procedures for appealing the Board's decision, he has not met his "burden of pleading and proving facts supporting equitable avoidance." *Bowden*, 106 F.3d at 437. Nor has he shown that the FBI waived its right to raise exhaustion as a defense. *See id.* at 438–39; *Brown v. Marsh*, 777 F.2d 8, 15–16, 18 (D.C. Cir. 1985). The FBI raised exhaustion as a defense in its Answer and not moving immediately to dismiss the complaint falls short of precluding the FBI from now raising the exhaustion doctrine, *see id.* at 15.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing or petition for hearing *en banc*. *See* FED. R. APP. P. 41(b); D.C. CIR. RULE 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: **/s/**

Ken Meadows
Deputy Clerk