

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

STANFORD B. SMALL : CIVIL ACTION  
Plaintiff, :  
 :  
v. :  
 :  
JOHN E. POTTER, et al. :  
Defendants. : No. 01-3108

**MEMORANDUM AND ORDER**

**J. M. KELLY, J.**

**JANUARY , 2002**

Presently before the Court is a Motion To Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(6) filed by the Defendants, John E. Potter, Postmaster General of the United States ("Postmaster General") and the United States Postal Service ("USPS"). Defendants seek dismissal claiming the Complaint filed by Plaintiff Stanford B. Small ("Small") is barred by the doctrine of res judicata or in the alternative barred by the applicable statute of limitations. For the following reasons, Defendants' Motion is granted.

**I. BACKGROUND**

Plaintiff has been a member of the Postal Police Force ("PPF") since October 30, 1976. On June 27, 1991, Plaintiff, along with Edward Prior ("Prior"), another member of the PPF, filed a federal civil action against the Postmaster General, the USPS and the union, the Federation of Postal Police Officers ("FPPO"). Essentially, Small and Prior claimed they were entitled to "out-of-schedule pay" because they had been

mistakenly placed out of order on a seniority list. A complex procedural history resulted in a new complaint in this Court, designated as No. 95-4960 which reiterated the same allegations as No. 91-4122 and added additional allegations concerning the union. (No. 91-4122 and 95-4960 are hereinafter referred to as "prior action"). For a detailed recitation of the facts and procedural history of the prior action, see Small v. Frank, et al., Civ. A. No. 91-4122, 95-4960, slip. op. at 1-9 (E.D. Pa. July 29, 1996). This Court ultimately granted summary judgment in favor of the Defendants, which included the Postmaster General, the USPS and the FPPO. Under the collective bargaining agreement between the FPPO and the USPS ("Agreement"), Plaintiffs could not obtain relief as the Plaintiffs failed to pursue the grievance procedure in a timely manner. see Small, Civ. A. No. 91-4122, 95-4960, slip. op. at 11-12.

Plaintiff now comes before this Court seeking declaratory judgment on the identical matter complained of in the prior action, the matter of out-of-schedule pay. This time, however, Plaintiff attempts to seek relief under the Employee and Labor Relations Manual of the Postal Service ("ELM") § 436.26 which provides: "[a]ny claim made by a postal employee or his or her authorized agent or attorney for back pay must be submitted to the appropriate office within 6 full years after date such claim first accrued." Relying on this language, Plaintiff argues this

instant claim is different from the prior action because the prior action dealt with his rights under the Agreement and the union grievance procedure, not the ELM. Essentially, Plaintiff is seeking a ruling from this Court that the ELM provides a separate cause of action apart from his rights under the Agreement.

## II. STANDARD OF REVIEW

A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of the complaint. Conley v. Gibson, 355 U.S. 41, 45-46 (1957). A court must determine whether the party making the claim would be entitled to relief under any set of facts that could be established in support of his or her claim. Hishon v. King & Spalding, 476 U.S. 69, 73 (1984)(citing Conley, 355 U.S. at 45-46); see also Wisniewski v. Johns-Manville Corp., 759 F.2d 271, 271 (3d Cir. 1985). In considering a motion to dismiss, all allegations in the complaint must be accepted as true and viewed in the light most favorable to the non-moving party. Rocks v. City of Philadelphia, 868 F.2d 644, 645 (3d Cir. 1989)(citations omitted).

In considering a Rule 12(b)(6) motion, the court primarily considers the allegations of the complaint, but may also consider matters of public record, items appearing in the record of the

case and exhibits to the Complaint.<sup>1</sup> Chester County Intermediate Unit v. Pennsylvania Blue Shield, 896 F.2d 808, 812 (3d Cir. 1990). A motion under Rule 12(b)(6) is the appropriate vehicle by which to challenge a complaint which is barred by the doctrine of res judicata. Tyler v. O'Neill, 52 F. Supp. 2d 471, 473-74 (E.D. Pa. 1999).

### **III. DISCUSSION**

Under the doctrine of res judicata, otherwise known as claim preclusion, when a court has entered a final judgment on the merits of a cause of action, the parties to the suit are thereafter bound not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Commissioner v. Sunnen, 333 U.S. 591, 597 (1948). The defendant may assert the affirmative defense of res judicata by showing the following: (1) that there has been a final judgment on the merits in the prior suit; (2) the claims involve

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<sup>1</sup>In support of his position, Plaintiff has submitted an affidavit by Daniel C. Dunlap, Eastern Region National Representative of the Fraternal Order of Police, National Labor council 2. Relying on Mr. Dunlap's expertise, Plaintiff withdrew his request that the Court order an arbitration hearing. Mr. Dunlap opined that this Courts' prior ruling did not dismiss the ELM claim, because ELM claims are solely administrative remedies, not grievances. His opinion, even if it were admitted as an expert opinion, is not relevant to this Court's determination of whether res judicata applies. Moreover, as explained later in this Opinion, there is no authority which allows for judicial review of ELM violations.

the same parties or their privies; and (3) the subsequent suit is based on the same cause of action as the prior suit. African Am. Int'l Bank v. Epstein, 10 F.3d 168, 171 (3d Cir. 1993).

In this case, the requirement of a final judgment on the merits and identity of the parties is clearly satisfied. The only issue is whether this lawsuit is based on the same cause of action as the prior action. In defining a "cause of action," courts are to focus on whether the acts complained of are the same, whether the material facts alleged in each suit are the same, and whether the witnesses and documentation required to prove the allegations were the same. United States v. Athlone Indus., Inc., 746 F.2d 977, 984 (3d Cir. 1984). "A single cause of action may comprise claims under a number of different statutory and common law grounds.... Rather than resting on the specific legal theory invoked, res judicata generally is thought to turn on the essential similarity of the underlying events giving rise to the various legal claims." Id. at 983. Furthermore, the present trend requires that a plaintiff present in one suit all the claims for relief that he may have arising out of the same transaction or occurrence. Id. at 984.

Plaintiff argues that this lawsuit is not based on the same cause of action as the prior action because he is asserting his rights under the ELM, not under the Agreement as in the prior action. Plaintiff's argument is entirely devoid of merit. It is

clear that the underlying claims in both actions are identical. Both actions involve the "out-of-schedule pay" Plaintiff claims is due to him as a result of his improper placement on the seniority list. The identical factual underpinnings of both actions will naturally result in identical documentation and witnesses to prove the allegations.

Under the doctrine of res judicata, Plaintiff is required to present in one suit all the claims for relief that he may have arising out of the same transaction or occurrence. As such, even if Plaintiff did have a separate right under the ELM to complain about the out-of-schedule payment, Plaintiff should have raised this legal theory in the prior action. As such, he would still be barred under the doctrine of res judicata.<sup>2</sup> Here, there is no doubt that res judicata applies. In fact, Plaintiff made the same argument in the prior action as he makes here, that § 436.26 applies "aside and apart from the grievance procedure" and that he is allowed six years to file his claim. This Court rejected

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<sup>2</sup>The Court notes that Plaintiff provided no authority for the proposition that Plaintiff is free to disregard the grievance procedure in seeking a claim for out-of-schedule pay. Plaintiff attempts to bypass the grievance procedure by labeling his claim as one for back pay, this time around. Even if the out-of-schedule pay is a type of back pay, this does not help the Plaintiff. As this Court noted in the prior action and as case law indicates, § 436.26 of the ELM only applies after back pay entitlement has already been determined, presumably through the proper grievance procedure where applicable. See Mellin v. USPS, No. 93-2486, 1995 U.S. App. LEXIS 10189, at \*7, n.4 (6th Cir. May 4, 1995).

the Plaintiffs' argument, addressing the interplay of the ELM and the grievance procedure as follows:

section 436.26 allows an employee six years in which to seek back pay at the administrative level, not at the court level: The section states that the employee must submit the claims to the appropriate office, not to the appropriate court. Plaintiffs have failed to cite any authority, and the Court has found none, that would allow them six years in which to pursue their claim in court, or that would allow judicial review of a claim brought under section 436.26 of the ELM. See Harper v. Frank, 985 F.2d 285, 288-90 (6th Cir. 1993)(holding that the [Postal Reorganization Act] "contains a comprehensive scheme of employment rights within the Postal Service" and finding no cause of action where PRA did not explicitly provide for judicial review of challenged decision).

Second, sections 436.11 and 436.26 appear to apply only after an unwarranted personnel action has been established. See ELM § 436.22 ("Back pay is allowed, unless otherwise specified in the appropriate award or decision, provided the person has made reasonable efforts to obtain other employment.") (emphasis added). Thus, Plaintiffs were still required to comply with the requirements of the Agreement in establishing that there was, in fact, an unwarranted action.

See Small, Civ. A. No. 91-4122, 95-4960, slip. op. at 14-15.

Hence, the prior action, which had identical factual allegations and parties, even disposed of the very issue now presented to the Court in this instant action.

As such, all the elements of res judicata are satisfied and the Plaintiff is barred from bringing this present action.

Accordingly, Defendants' Motion To Dismiss is granted.

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**O R D E R**

**AND NOW**, this                    day of January, 2002, in consideration of the Motion to Dismiss filed by the Defendants, John E. Potter, Postmaster General of the United States and the United States Postal Service (Doc. No. 5) and the Response of the Plaintiff, Stanford B. Small, thereto, it is **ORDERED** that the Motion to Dismiss is **GRANTED** and the Plaintiff's Complaint is dismissed with prejudice.

BY THE COURT:

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JAMES MCGIRR KELLY, J.