[DO NOT PUBLISH]

In the

United States Court of Appeals

For the Eleventh Circuit

No. 22-14334

Non-Argument Calendar

LAQUITA DAVIS-HARRISON,

Plaintiff-Appellant,

versus

CHIEF UNITED STATES PROBATION OFFICER MIDDLE DISTRICT OF FLORIDA,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 6:21-cv-01980-MEW-MAF

Before JORDAN, LUCK, and LAGOA, Circuit Judges.

PER CURIAM:

LaQuita Davis-Harrison appeals, *pro se*, the dismissal with prejudice of her second amended complaint against Joseph Collins, in his official capacity as Chief U.S. Probation Officer for the Middle District of Florida. In her second amended complaint, Davis-Harrison alleges violations of Title VII of the Civil Rights Act of 1964 ("Title VII") and 42 U.S.C. § 1981. In later briefing, she also attempts to raise claims under the First, Fifth, and Fourteenth Amendments. Finally, she argues that the district court incorrectly denied her a third opportunity to amend her complaint. For the following reasons, we affirm the district court's dismissal.

I.

We review dismissal for failure to state a claim *de novo*, accepting the allegations in the complaint as true and construing them in the light most favorable to the plaintiff. *Castro v. Sec'y of Homeland Sec.*, 472 F.3d 1334, 1336 (11th Cir. 2006). "[W]e review the denial of a motion to amend a complaint for abuse of discretion." *Corsello v. Lincare, Inc.*, 428 F.3d 1008, 1012 (11th Cir. 2005). Finally, "[w]e 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).

II.

In her complaint, Davis-Harrison alleges that she suffered employment discrimination in violation of Title VII and 42 U.S.C. § 1981. In her response to Collins' motion to dismiss and now on appeal, Davis-Harrison also raises Fifth Amendment and Fourteenth Amendment claims. Finally, for the first time on appeal, Davis-Harrison raises a First Amendment retaliation claim. All of Davis-Harrison's claims fail.

Title VII provides that "[a]ll personnel actions affecting employees . . . in those units of the judicial branch of the Federal Government having positions *in the competitive service* . . . shall be made free from any discrimination based on race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-16(a) (emphasis added). By its plain text, Title VII does not protect federal employees "who are not in the competitive service." *Davis v. Passman*, 442 U.S. 228, 247, 247 n.26 (1979). Competitive service positions are: (1) most executive branch civil service positions; (2) "civil service positions not in the executive branch which are specifically included in the competitive service by statute"; and (3) some positions in the D.C. government. 5 U.S.C. § 2102(a). Although the Middle District of Florida's Probation Office is part of the judicial branch, *cf.* 18 U.S.C. § 3602(a) (empowering district courts to appoint probation officers), no statute includes probation officers in the competitive service. *Dotson v. Griesa*, 398 F.3d 156, 163 (2d Cir. 2005); *see also Lee v. Hughes*, 145 F.3d 1272, 1274 (11th Cir. 1998) (noting that the parties did not dispute that probation officers are in the "excepted service," not the competitive service). Additionally, Davis-Harrison concedes that

probation officers are members of the "excepted service" not the competitive service. Thus, Davis-Harrison fails to a state a claim for relief under Title VII because federal probation officers do not hold "positions in the competitive service." 42 U.S.C. § 2000e-16(a).

Davis-Harrison also fails to state a claim for relief under 42 U.S.C. § 1981. Section 1981 enumerates specific rights and protects those rights from "impairment by nongovernmental discrimination and impairment under color of State law." 42 U.S.C. § 1981(c). "Both circuit precedent and the text of § 1981 compel us to hold that a plaintiff cannot maintain a § 1981 claim against a federal defendant acting under color of federal law." *Lee*, 145 F.3d at 1277. Davis-Harrison alleges that she suffered discrimination by a federal employer who was acting under color of federal law. Section 1981 is categorically inapplicable to this scenario.

Although Davis-Harrison's complaint alleges claims under Title VII and section 1981, she attempted to raise new claims under the First, Fifth, and Fourteenth Amendments in later briefing. In her response to the motion to dismiss, Davis-Harrison alleges—for the first time—that the Middle District of Florida's EDR plan denies her "equal protection of the law" and "substantive due process," thereby violating the Fifth Amendment and the Equal Protection Clause (of the Fourteenth Amendment, presumably). Then, in her objection to the magistrate judge's recommendation, Davis-Harrison alleges that the Middle District of Florida violated her procedural due process rights under the Fifth and Fourteenth

Amendments by failing to adequately investigate her claims against Chief Collins. Finally, in her opening brief on appeal, Davis-Harrison alleges that Chief Judge Corrigan violated her right to procedural due process under the Fifth and Fourteenth Amendments. However, the Chief Judge is not a party to this lawsuit. On appeal, Davis-Harrison also argues that the EDR plan violates her equal protection rights, and that Chief Collins violated the First Amendment by retaliating against her.

We need not consider theories of liability that are not alleged in Davis-Harrison's complaint. An appellant cannot amend her complaint "by arguments made in an appellate brief," *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 799 (11th Cir. 2022) (en banc), and more generally, "a plaintiff cannot amend [her] complaint on appeal." *Durango-Georgia Paper Co. v. H.G. Est.*, LLC, 739 F.3d 1263, 1272 n.23 (11th Cir. 2014). Additionally, a plaintiff cannot amend her complaint through a response to a motion to dismiss, even if she is "proceeding *pro se*." *Dorman v. Aronofsky*, 36 F.4th 1306, 1317 (11th Cir. 2022). Therefore, we decline to consider Davis-Harrison's arguments under the First, Fifth, and Fourteenth Amendments.

III.

Davis-Harrison argues that the district court improperly denied her a third opportunity to amend her complaint. However, Davis-Harrison never moved to amend her complaint in the district court. At the very end of her objection to the magistrate judge's report and recommendation, she stated, "Considering the above-

stated objections, the Plaintiff respectfully asks that she be given the opportunity to amend the complaint or that the case be dismissed without prejudice." She provided no other explanation regarding why amendment was necessary, and she never described the substance of a proposed amendment.

Under Federal Rule of Civil Procedure 15(a)(2), Davis-Harrison could not amend her complaint without the "opposing party's written consent or the court's leave." FED. R. CIV. P. 15(a)(2). Although she requested the court's leave in a sentence at the end of her objection, a "request for a court order must be made by motion" that "state[s] with particularity the grounds for seeking the order." FED. R. CIV. P. 7(b)(1). Furthermore, a party moving to amend their complaint "must either attach a copy of the proposed amendment to the motion or set forth the substance thereof." *U.S. ex rel. Atkins v. McInteer*, 470 F.3d 1350, 1362 (11th Cir. 2006) (citing *Long v. Satz*, 181 F.3d 1275 (11th Cir.1999)).

"Where a request for leave to file an amended complaint simply is imbedded within an opposition memorandum, the issue has not been raised properly." *Cita Tr. Co. AG v. Fifth Third Bank*, 879 F.3d 1151, 1157 (11th Cir. 2018) (quoting *Rosenberg v. Gould*, 554 F.3d 962, 967 (11th Cir. 2009)) (alteration omitted). We have repeatedly affirmed district courts that declined to allow a plaintiff to amend their complaint when the plaintiff failed to submit a motion to amend. *See Fifth Third Bank*, 879 F.3d at 1157; *McInteer*, 470 F.3d at 1362; *Chabad Chayil, Inc. v. Sch. Bd. of Miami-Dade Cnty., Fla.*, 48 F.4th 1222, 1236 (11th Cir. 2022); *Carvelli v. Ocwen Fin. Corp.*, 934

F.3d 1307, 1332 n.17 (11th Cir. 2019); *Newton v. Duke Energy Fla., LLC*, 895 F.3d 1270, 1277 (11th Cir. 2018); *Long v. Satz*, 181 F.3d at 1279–80.

Here, Davis-Harrison raised her request to file a third amended complaint in one sentence at the end of her objection to the magistrate judge's report and recommendation. Additionally, she never described or attached a copy of the proposed amendments. The district court acted within its discretion by denying Davis-Harrison's one-sentence request to amend her complaint.

IV.

Accordingly, for the reasons stated, we affirm the district court's order dismissing Davis-Harrison's complaint with prejudice.

AFFIRMED.