

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 06-3521

Victor Ziegler, Sr.,	*
	*
Appellant,	*
	*
v.	*
	*
	*
Dirk Kempthorne, Secretary of	*
Interior, Head Government Official	*
of the Agency,	*
	*
Appellee.	*

Submitted: November 7, 2007
Filed: January 29, 2008

Before MURPHY, SMITH, and SHEPHERD, Circuit Judges.

PER CURIAM.

Victor Ziegler, Sr., appeals following the district court's adverse judgment in his action brought under the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Veterans Employment Opportunities Act (VEOA), and the Age Discrimination in Employment Act (ADEA). We affirm in part and reverse in part.

We conclude dismissal was proper as to Ziegler's USERRA and VEOA claims, because the district court lacked jurisdiction. See 5 U.S.C. §§ 3330a-3330b

(describing required administrative procedure for VEOA claims); 38 U.S.C. § 4324 (USERRA claims must be presented to Merit Systems Protection Board, with right to appeal to Federal Circuit); Stout v. Merit Sys. Prot. Bd., 389 F.3d 1233, 1237 (Fed. Cir. 2004) (Federal Circuit has jurisdiction over appeals from all final decisions of Merit Systems Protection Board).

As to the ADEA claims, the district court invited the parties to address the applicability of res judicata, because Ziegler had filed an earlier lawsuit alleging age discrimination by defendant (Ziegler I), which was resolved adversely to Ziegler. See Ziegler v. Norton, 166 Fed. Appx. 879, 880-81 (8th Cir. 2006) (unpublished per curiam). We disagree with Ziegler that the court acted improperly in inviting the parties to address res judicata. See Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 231 (1995). We conclude, however, that res judicata did not preclude Ziegler's claim in the instant lawsuit that defendant violated the ADEA by constructively discharging him in April 1999 and failing to rehire him in June 1999. See Carter v. Kansas City S. Ry. Co., 456 F.3d 841, 848 (8th Cir. 2006) (reviewing de novo decision to apply res judicata doctrine). These claims were not part of Ziegler I, which alleged age discrimination with regard to defendant's October 1998 decision not to select Ziegler for a criminal investigator position. See Canady v. Allstate Ins. Co., 282 F.3d 1005, 1014 (8th Cir. 2002) (res judicata bars relitigating claim where court of competent jurisdiction rendered prior judgment, prior judgment was final judgment on merits, and both cases involved same cause of action and same parties); see also Daley v. Marriott Int'l, Inc., 415 F.3d 889, 896 (8th Cir. 2005) (under same-cause-of-action element of res judicata, court should consider whether claims arose out of same nucleus of operative facts; final analysis seems to be whether wrong for which redress is sought is same in both actions).

We note, however, that the district court record raises the question whether the instant lawsuit was timely filed: it is undisputed that the decision denying the underlying consolidated Equal Employment Opportunity complaint was issued in

September 2003, and that the instant lawsuit was not filed until June 2004. See 29 C.F.R. § 1614.407(c) (federal sector complainant should file civil action in appropriate district court within 90 days of receipt of Commissioner's final decision on appeal). Further development of the record is necessary to determine timeliness.

Accordingly, we affirm the district court's dismissal of Ziegler's USERRA and VEOA claims, we reverse as to the ADEA claims, and we remand for further development of the record on the issue of timeliness. We deny Ziegler's motion to supplement the record.
