No. 10-35531
[NO. 09-01008-RAJ, USDC, W.D. Washington]

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LANCE P. McDERMOTT,

Plaintiff-Appellant,

v.

JOHN E. POTTER, Postmaster General,
United States Postal Service, et al.

Defendants-Appellees.

ANSWERING BRIEF OF DEFENDANTS-APPELLEES

Appeal from the United States District Court
for the Western District of Washington at Seattle
The Honorable Richard A. Jones
United States District Judge

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I. TABLE OF CONTENTS

II. TABLE OF AUTHORITIES.. iii

A. Federal Cases. iii

B. Federal Statutes.. iv

C. Federal Rules and Regulations. v

D. Miscellaneous. v

III. PRELIMINARY STATEMENT 1

IV. STATEMENT OF JURISDICTION 2

V. ISSUES PRESENTED FOR REVIEW.. 2

1. Did the district court properly find that McDermott failed to file his complaint in the underlying action within the ninety-day statute of limitations under Title VII and the ADEA?. 2

2. Did the district court properly find that there was no equitable reason to toll the statute of limitations because McDermott's untimeliness stemmed from his own lack of diligence?. 3

3. Did the district court properly find that as a matter of law, Postal Service employees cannot bring an independent action under the Whistleblower Protection Act?.. 3

VI. STATEMENT OF THE CASE. 3

A. McDermott's First Administrative EEO Case 3

B. McDermott's Second Administrative EEO Case 4

C. McDermott's First District Court Action 5

D. McDermott's Second District Court Action.. 7

VII. SUMMARY OF ARGUMENT. 8

VIII. ARGUMENT. 9

A. The Standard of Review Applicable to Review of an Order Dismissing a Complaint. 9

B. The District Court Properly Found that the Complaint in the Underlying Action was Filed Outside of the Ninety-Day Statute of Limitations Under Title VII and the ADEA.. 9

C. The District Court Properly Found that there was no Equitable Reason to Toll the Statute of Limitations because McDermott's Untimeliness Stemmed from His Own Lack of Diligence.. 13

D. The District Court Properly Found that as a Matter of Law, Postal Service Employees Cannot Bring an Independent Action Under the WPA. 19

E. The Additional Claims McDermott Raises on Appeal that were not Raised in District Court Should be Denied. 23

IX. CONCLUSION 24

X. CERTIFICATE OF COMPLIANCE. 25

XI . STATEMENT OF RELATED CASES 26

XII . CERTIFICATE OF SERVICE 27

II. TABLE OF AUTHORITIES

A. FEDERAL CASES

Arrington v. Wong,
237 F.3d 1066 (9th Cir. 2001) 9

Berry v. CIGNA/RSICIGNA,
975 F.2d 1188 (5th Cir. 1992) 18

Booker v. Merit System Protection Board,
982 F.2d 517 (Fed. Cir. 1992) 20, 21, 22

Carter v. Seattle Times Co.,
2007 WL 4190408 (W.D. Wash. Nov. 21, 2007). 19

Dumaguit v. Potter,
2008 WL 413733 (N.D. Cal. Feb. 13, 2008). 20, 21

Irwin v. Department of Veterans Affairs,
498 U.S. 89 (1990). 13

Morales v. Instituto Comercial De Puerto Rico Jurior College,
40 F. Supp. 2d 62 (D. Puerto Rico March 2, 1999). 18

O'Donnell v. Vencor, Inc.,
465 F.3d 1063 (9th Cir. 2006) 19

O'Donnell v. Vencor, Inc.,
466 F.3d 1104 (9th Cir. 2006) 9, 18

Partnership Exchange Securities Co. v. National Ass'n of Securities Dealers, Inc,
169 F.3d 606 (9th Cir. 1999) 9

Price v. Digital Equipment Corp.,
846 F.2d 1026 (5th Cir. 1988) 18

Rann v. Chao,
346 F.3d 192 (D.C. Cir. 2003). 10

Santa Maria v. Pacific Bell,
202 F.3d 1170 (9th Cir. 2000) 9

United States v. Carranza,
289 F.3d 634 (9th Cir. 2002) 19

United States v. Robertson,
52 F.3d 789 (9th Cir. 1994) 17, 24

Williams v. Cox,
2007 WL 1875895 (S.D. Miss. June 27, 2007) 18

Wilson v. Grumman Ohio Corp.,
815 F.2d 26 (6th Cir. 1987) 18

B. FEDERAL STATUTES

5 U.S.C. § 104 .. . . 20, 21

5 U.S.C. § 105 20

5 U.S.C. § 2105(e). 21, 22

5 U.S.C. § 2302. . . . . 20, 22

28 U.S.C. § 1291. 2

28 U.S.C. § 1331. 2

28 U.S.C. § 1346. 2

29 U.S.C. § 626(e). 10

29 U.S.C. § 633 (“Age Discrimination in Employment Act”). . . . . passim

39 U.S.C. § 201 21

39 U.S.C. § 410(e). 22

42 U.S.C. § 2000(e) (“Title VII”). . . . . passim

C. FEDERAL RULES AND REGULATIONS

29 C.F.R. § 1614.407.. 9

Federal Rule Appellate Procedure 4(a)(1)(B). 2

Federal Rule of Civil Procedure 4.. . . . . 6, 14

Federal Rule of Civil Procedure 12(b)(6). 3

D. MISCELLANEOUS

Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 (Pub. L. No. 107-174, 116 Stat. 556 (2002)). 22

Postal Accountability and Enhancement Act of 2006 (Publ. L. No. 109-435, 120 Stat. 3198 (codified in scattered sections of 39 U.S.C.)). 22

Whistleblower Protection Act. . . . . passim

III. PRELIMINARY STATEMENT

With this appeal, Plaintiff-Appellant Lance P. McDermott, a Postal Service employee, seeks review of an order of the district court dismissing as time-barred his complaint raising claims against the United States Postal Service under Title VII of the Civil Rights Act and the Age Discrimination and Employment Act. The complaint giving rise to this appeal is identical to an earlier complaint that was dismissed by the district court because of improper service of process. Although McDermott was warned prior to the dismissal of the first complaint regarding the defects in service, and was instructed as to how service could be perfected, rather than correct service, McDermott filed a frivolous motion for sanctions which was also dismissed. As a result, he cannot now claim that the district court improperly refused to apply equitable tolling based on his first action since it was dismissed based on his own lack of diligence. McDermott also seeks relief under the Whistleblower Protection Act even though the statute does not permit Postal Service employees to bring an independent action, and presents a variety of other claims that he failed to raise before the district court. These claims too were properly dismissed. Therefore, this Court should affirm the district court's dismissal of McDermott's suit against the United States Postal Service.

IV. STATEMENT OF JURISDICTION

This is an appeal from the final order and judgment of the United States District Court for the Western District of Washington dismissing a complaint filed by a pro se employee of the United States Postal Service ("Postal Service"). The judgment of the district court was entered on May 10, 2010. ER 7.[1] Petitioner-Appellant Lance P. McDermott's notice of appeal was filed on June 7, 2010. ER 417-418. The notice of appeal was timely. Fed. R. App. P. 4(a)(1)(B). The district court possessed putative subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1346 for claims brought pursuant to Title VII of the Civil Rights Act of 1964, as amended ("Title VII"), 42 U.S.C. §§ 2000(e) et seq, and the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 633(a). This Court possesses appellate jurisdiction under 28 U.S.C. § 1291.

V. ISSUES PRESENTED FOR REVIEW

1. Did the district court properly find that McDermott failed to file his complaint in the underlying action within the ninety-day statute of limitations under Title VII and the ADEA?

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[1] Citations to "ER __" will refer to Defendants-Appellees' Excerpts of Record, paginated, served, and filed herewith.

2. Did the district court properly find that there was no equitable reason to toll the statute of limitations because McDermott's untimeliness stemmed from his own lack of diligence?

3. Did the district court properly find that as a matter of law, Postal Service Employees cannot bring an independent action under the Whistleblower Protection Act?

VI. STATEMENT OF THE CASE

A. McDermott's First Administrative EEO Case.

The events giving rise to this appeal began on January 4, 2006, when McDermott filed a formal Equal Employment Opportunity ("EEO") complaint with the Postal Service, asserting age discrimination because he allegedly received a "Grinch Award." ER 254.[2] McDermott then filed a second complaint on April 5, 2006, asserting discrimination based on sex because the Postal Service allegedly failed to post a supervisory position. ER 254. These two complaints were consolidated into one EEO case, designated Case No. 1E-981-0018-06. ER 254.

The Postal Service completed its formal investigation on July 13, 2006. ER 255. McDermott requested a hearing on August 3, 2006, and the case was

[2] Because this case was decided on a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the allegations in the complaint were taken as true by the district court. ER 3.

assigned to an Administrative Judge. ER 255. During the administrative process, McDermott's deposition was taken and additional discovery was propounded. ER 256-257. On June 11, 2008, the Postal Service filed a motion with the Administrative Judge asking for dismissal of McDermott's complaint. ER 260. McDermott also filed a "Motion for Decision." ER 260. On July 1, 2008, the Administrative Judge issued a decision denying McDermott's claims. ER 260.

On June 24, 2008, McDermott appealed the Administrative Judge's decision to the Equal Employment Opportunity Commission's Office of Federal Operations ("EEOC"). ER 261. The case was accepted by the EEOC on July 7, 2008, and McDermott then submitted extensive briefing in support of his claims. ER 262. On October 2, 2008, the EEOC issued a final decision denying McDermott's appeal and dismissing the claims in Case No. 1E-981-0018-06. ER 262.

B. McDermott's Second Administrative EEO Case.

McDermott filed a formal EEO complaint with the Postal Service on May 3, 2007, asserting age discrimination and retaliation because he was allegedly threatened by a co-worker. ER 257-258. He filed another complaint on March 29, 2008, asserting discrimination based on sex and retaliation because the Postal Service allegedly failed to consider his application for a supervisory position.

ER 259. These two complaints were consolidated into one EEO case, designated Case No. 1E-981-0044-08. ER 260.

On June 18, 2008, an EEO Dispute Resolution Specialist issued a Report recommending dismissal of McDermott's EEO complaint. ER 260. On July 14, 2008, the Postal Service issued a final Agency decision denying McDermott's claims. ER 262. McDermott appealed the Agency's final decision to the EEOC on July 23, 2008. ER 261. The appeal was accepted by the EEOC on August 19, 2008, and McDermott submitted several pleadings in support of his claims to the EEOC. ER 262.

On November 10, 2008, the EEOC issued a final decision directing the Postal Service to accept McDermott's complaint for processing because it contained issues that cannot be resolved without investigation. ER 262-263. The Postal Service accepted McDermott's complaint for remand on November 14, 2008. ER 263. But on November 22, 2008, McDermott filed a Notice of Intent to Sue, alleging that he would proceed in the district court because he believed the administrative process would fail. ER 290.

C. McDermott's First District Court Action.

On December 29, 2008, McDermott filed a 135-page complaint in the district court based on both EEO cases discussed above. ER 8-142. *See Lance P.*

McDermott v. John P. Potter, W.D. WA, CV08-1846JCC. In this complaint, McDermott alleged violations of Title VII, the ADEA, and the Whistleblower Protection Act ("WPA"). ER 9.

Shortly after the complaint was filed, McDermott filed a motion for default judgment, alleging that he had effected service on all parties. ER 143-150. The Postal Service responded on March 23, 2009, with a motion to dismiss for lack of proper service explaining in detail the defects in service. ER 151-158. McDermott opposed the motion to dismiss and, in addition, filed a motion for sanctions against the Postal Service. ER 159-194, 208-211. On May 29, 2009, the Honorable John C. Coughenour granted the Postal Service's motion, and dismissed, without prejudice, McDermott's complaint for failure to properly effectuate service under Federal Rule of Civil Procedure 4. ER 212-215.

McDermott sought reconsideration of the district court's dismissal order, arguing that there was good cause for his failure to follow the Federal Rules on service of process. ER 216-248. In that motion, McDermott asked the district court to extend the time to allow him to effectuate service. ER 223. The district court denied McDermott's motion for reconsideration, and specifically denied his request for additional time to effectuate service. ER 249-250. Specifically, the district court found that McDermott had not established good cause for his failure

to comply with the service rules, and absent good cause, the district court would not extend the service deadline. ER 250. The district court found that McDermott had filed a frivolous motion for sanctions against the Postal Service, and thus denied his request to extend the service deadline. ER 250. McDermott did not appeal the dismissal of this action to this Court.

D. McDermott's Second District Court Action.

Instead of appealing the district court's dismissal, on July 16, 2009, McDermott instituted a new action in the district court, filing the exact same complaint that had been dismissed in the previous action. ER 251-385. This new case was assigned to the Honorable Richard A. Jones. The Postal Service moved to dismiss this action on October 2, 2009, alleging that it was time-barred because the complaint was filed outside of the ninety-day statute of limitations under Title VII and the ADEA, and because Postal Service employees cannot bring independent actions under the WPA. ER 386-397.

On May 11, 2010, the district court granted the Postal Service's motion to dismiss. ER 1-6. The court found that the complaint was filed outside of the ninety-day statute of limitations, and McDermott was not entitled to equitable tolling because his untimeliness stemmed from his own lack of diligence. ER 3-4. The district court also found that McDermott's claims under the WPA failed as a

matter of law, because Postal Service employees cannot bring an independent action under the WPA. ER 5.

A judgment was entered dismissing this action on May 10, 2010. ER 7. McDermott filed a timely appeal on June 7, 2010. ER 417.

VII. SUMMARY OF ARGUMENT

The district court properly dismissed McDermott's complaint. There is no dispute that he filed his complaint outside of the ninety-day statute of limitations under Title VII and the ADEA. The EEOC issued final decisions notifying McDermott of his right to file suit on October 2, 2008, and November 10, 2008, but he did not file suit until July 16, 2009, months after the ninety-day period passed.

The district court also properly concluded that there was no equitable reason to toll the statute of limitations because McDermott's untimeliness stemmed from his own lack of diligence. While McDermott attempted to file a prior suit within the statute of limitations, he never perfected service in that action, never stated good reason for his failure to perfect service, and did not appeal the district court's dismissal of his prior action.

Finally, the district court properly found that, as a matter of law, Postal Service employees cannot bring an independent action under the WPA.

VIII. ARGUMENT

A. **The Standard of Review Applicable to Review of an Order Dismissing a Complaint.**

The court of appeals reviews a district court's dismissal for failure to state a claim de novo. *See Arrington v. Wong*, 237 F.3d 1066, 1069 (9th Cir. 2001); *see also Partnership Exchange Securities Co. v. National Ass'n of Securities Dealers, Inc.*, 169 F.3d 606, 608 (9th Cir. 1999). The court of appeals reviews de novo whether a claim is barred by a statute of limitations. *See O'Donnell v. Vencor, Inc.*, 466 F.3d 1104, 1109 (9th Cir. 2006); *see also Santa Maria v. Pacific Bell*, 202 F.3d 1170, 1175 (9th Cir. 2000). Because the facts in this case are undisputed, the court of appeals reviews de novo whether to apply equitable tolling. *Id.*

B. **The District Court Properly Found that the Complaint in the Underlying Action Was Filed Outside of the Ninety-Day Statute of Limitations Under Title VII and the ADEA.**

Under Title VII, a federal employee must file an employment discrimination claim in the district court within ninety days of receipt of notice of final action by the EEOC. 42 U.S.C. § 2000e-16(c); 29 C.F.R. § 1614.407. Under the ADEA, if a federal employee invokes the EEOC's administrative process, as McDermott did

here, he must file a claim in the district court within ninety days of receiving a final decision from the EEOC.[3] 29 U.S.C. § 626(e).

Here, McDermott claims he appealed both of his discrimination cases to the EEOC, and that the EEOC issued final decisions in both actions. ER 261-263. According to McDermott's own complaint, the EEOC issued a final decision in Case No. 1E-981-0018-06 on October 2, 2008, and the EEOC issued a final decision in Case No. 1E-981-0044-08 on November 10, 2008. ER 262-263.

Under the ninety-day statute of limitations, McDermott had until December 31, 2008, to file a civil action in district court on the first EEOC case, and until February 9, 2009, to file an action on the second EEOC case.[4] The

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[3] The ADEA does have an alternate exhaustion scheme allowing an employee to go directly to district court, after complying with notice requirements to the EEOC, instead of following the administrative route which requires contacting an EEO counselor at the agency. *See* 29 U.S.C. § 633a(d); *Rann v. Chao*, 346 F.3d 192, 195 (D.C. Cir. 2003). But McDermott did not choose the direct route. Rather than filing a notice of his intent to sue with the EEOC within 180 days of the alleged unlawful conduct, he pursued EEO complaints with the Postal Service.

[4] The district court incorrectly stated that McDermott had until December 21, 2010 to file a complaint on the first EEO case. ER 4. Ninety days from October 2, 2008 is December 31, 2008, not December 21, 2008. This was obviously a typographical error, as the district court also found that McDermott's first complaint, filed on December 29, 2008, was timely. ER 4. Either way, the mistake does not affect the district court's finding that the complaint in the underlying case, filed on July 16, 2009, was filed outside the ninety-day statute of limitations.

district court properly found that McDermott had timely filed his first complaint on December 29, 2008. ER 4. But by the time McDermott filed the second complaint in the underlying action, on July 16, 2009, the ninety-day period had expired. ER 4. The district court's conclusion, that the complaint in the underlying case was time-barred because it was filed outside the ninety-day statute of limitations of both Title VII and the ADEA, was therefore proper and should be affirmed.

McDermott argues that he timely filed his complaint in the underlying action because Judge Coughenour waived the ninety-day statute of limitations when he dismissed McDermott's first action without prejudice. Appellant's Opening Brief at 15, 17.[5] In short, McDermott argues that because the first dismissal was without prejudice and he properly served his second complaint, the dismissal of his second complaint as untimely constituted some sort of due process violation. *See* Appellant's Opening Brief at 15, 17.

The district judge addressing McDermott's first civil action did not waive the ninety-day time limit for McDermott to file a new civil action under Title VII or the ADEA. That order simply stated, "Plaintiff's Complaint is hereby

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[5] Because McDermott's Opening Brief is not paginated, Respondents-Appellees' Answering Brief will refer to page numbers as if they begin immediately following the cover page of the Opening Brief.

DISMISSED without prejudice." ER 215. The district court's order denying McDermott's motion for reconsideration stated, "[b]ecause this matter has been dismissed without prejudice, Plaintiff may re-file the action and follow the proper rules for service and establishing personal jurisdiction." ER 250.

The order in the first action contained no findings about the timeliness of McDermott's first action, or any other action that McDermott might file in the future. The court did not address the jurisdictional timing requirements under Title VII or the ADEA, and made no representations or orders that waived the statute of limitations to allow McDermott to file a new action outside of the ninety-day statute of limitations under Title VII and the ADEA. Notably, the district court did not discuss whether equitable tolling is applicable to Title VII or ADEA actions, or weigh any of the factors courts must consider in determining whether to apply the narrow exception of equitable tolling in these cases. Rather, the district court was only concerned with McDermott's failure to establish personal jurisdiction in the first action.

Thus, McDermott's argument, that the district court in the first action waived the statute of limitations to allow McDermott to file the underlying action outside of the ninety-day statute of limitations, lacks all merit. This Court should affirm

the district court's finding that the complaint in the underlying action was filed outside the ninety-day statute of limitations of Title VII and the ADEA.

C. **The District Court Properly Found that There was no Equitable Reason to Toll the Statute of Limitations Because McDermott's Untimeliness Stemmed from His Own Lack of Diligence.**

The Supreme Court has held that equitable tolling principles apply in actions against the United States, just as they apply in suits between private parties. *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990). However, the *Irwin* Court went on to explain that the traditional limits on the doctrine of equitable tolling also apply:

> Federal courts have typically extended equitable relief only sparingly. We have allowed equitable tolling in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass. We have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights. Because the time limits imposed by Congress in a suit against the Government involve a waiver of sovereign immunity, it is evident that no more favorable tolling doctrine may be employed against the Government than is employed in suits between private litigants.

Id. at 96 (internal citations omitted).

Having found that the complaint in the underlying action was filed outside the statutory period, the district court properly considered whether the statute of limitations should be equitably tolled in light of the fact that McDermott timely

filed his complaint in the first action. ER 4. The district court found that equitable tolling should not be applied because McDermott's prior action was dismissed due to his own failure to effectuate service, despite clear warning. ER 4. The district court held, "because McDermott's untimeliness stems from his own lack of diligence, there is no equitable reason to toll the statute of limitations." ER 4.

A review of McDermott's course of conduct in the first action supports the district court's findings. Shortly after McDermott filed the complaint in the first action, he filed a motion for default judgment, alleging that he had effected service on all parties. ER 143-150. The Postal Service responded to McDermott's motion with a motion to dismiss for lack of proper service. ER 151-158. In its pleading, the Postal Service quoted the relevant portions of Rule 4 of the Federal Rules of Civil Procedure, clearly identified the deficiencies in McDermott's service of process, and even described how the errors could be corrected. ER 152-153. The motion stated:

> The Federal Rules require that Plaintiff must serve the Attorney General, the Postmaster General (agency), and the United States Attorney with ***both*** the summons and the complaint.

* * *

> To the contrary, [Plaintiff's] certificate of service indicates that neither the United States Attorney, the United States Attorney General nor the United States Postmaster general received a summons with the Complaint.

ER 152-153.

In its reply brief, the Postal Service explained who the proper defendant was in the action stating, "[b]ecause Plaintiff is claiming that the alleged discriminatory actions occurred at the USPS, and John Potter is the head of the USPS, only he is the proper defendant in this case." ER 196. The Postal Service went on to explain how McDermott could effectuate service on Mr. Potter stating,

> In order to obtain personal jurisdiction over the Government, Plaintiff should have issued a summons directed at Mr. Potter and should have personally served him with the summons and complaint. Plaintiff should also have sent a copy of the aforementioned summons to Jeffrey Sullivan, the United States Attorney for the Western District of Washington, and to Eric Holder, the Attorney General of the United States.

ER 196-197.

Despite these clear warnings and instructions from the Postal Service, McDermott refused to acknowledge that his service was defective and failed to correct his service errors. Instead, McDermott continued to litigate the matter by opposing the Postal Service's motion to dismiss, and filing a frivolous motion for sanctions against the Postal Service. ER 159-194.

McDermott was on clear notice as of March 23, 2009, that his service of process was deficient, yet he simply continued to litigate the issues in the underlying claim for two additional months until the district court granted the Postal Service's motion to dismiss. In denying McDermott's motion for reconsideration in the first action, the district court specifically found that McDermott had not established good cause for his failure to comply with the service rules. ER 250. Rather, it found that McDermott had filed a frivolous motion for sanctions against the Postal Service, and it properly exercised its discretion by denying McDermott's request to extend the service deadline. ER 250. Moreover, it is significant that McDermott did not appeal the district court's decision. Having not appealed, he cannot now contend that the district court should have found that he established good cause for failing to comply with the service rules.

The facts surrounding McDermott's behavior in the first district court action support the district court's finding at issue here. In its order dismissing the second complaint, the district court found that equitable tolling should not be applied in this case because the first action was dismissed due to McDermott's own failure to effectuate service, despite clear warning. Because McDermott's prior lawsuit was

dismissed due to his own lack of diligence in failing to effectuate service despite warning, these findings should be affirmed.

McDermott admits that he was warned by the Postal Service that he had failed to properly effectuate service in the first action, but he argues that he was justified in not heeding the Postal Service's warning because he had been lied to by other Postal Service employees during the EEO process. Appellant's Opening Brief at 13-14. McDermott also argues that the district court should have applied equitable tolling in his case because pro se briefs should be construed liberally. Appellant's Opening Brief at 23. But, McDermott failed to raise these arguments in the district court, and issues not presented to the district court cannot generally be raised for the first time on appeal. *See United States v. Robertson*, 52 F.3d 789, 791 (9th Cir. 1994).

Moreover, even if McDermott's failure to heed the Postal Service's warning and correct his service errors was due to a lack of trust or a misunderstanding of the rules, these reasons do not fall within the limited circumstances under which equitable tolling is available. These issues are not unique to McDermott's case. Numerous courts have encountered cases with fact patterns similar to McDermott's, - where a timely-filed complaint was dismissed without prejudice for failure to effectuate service, failure to timely obtain counsel, or for want of

prosecution, and a second complaint was filed outside the ninety-day period. In these circumstances, courts have consistently found that if a complaint is filed within the ninety-day period, but is subsequently dismissed, the statute of limitations will bar a second complaint that does not also fall within the ninety-day period. *See, e.g., O'Donnell*, 466 F.3d at 1111; *Wilson v. Grumman Ohio Corp.*, 815 F.2d 26, 29 (6th Cir. 1987); *Price v. Digital Equipment Corp.*, 846 F.2d 1026, 1027 (5th Cir. 1988); *Berry v. CIGNA/RSICIGNA*, 975 F.2d 1188 (5th Cir. 1992); *Williams v. Cox*, 2007 WL 1875895, at *2 (S.D. Miss. June 27, 2007); *Morales v. Instituto Comercial De Puerto Rico Jurior College*, 40 F. Supp. 2d 62, 67 (D. Puerto Rico March 2, 1999).

This rule applies equally when a plaintiff is proceeding pro se, as McDermott was in the underlying case. The Sixth Circuit has found that a pro se plaintiff's lack of diligence in effecting service within the necessary period cannot be the basis for an equitable tolling of the statutory filing period in her favor. *See Wilson*, 815 F.2d at 29.

Furthermore, equitable tolling under these circumstances - absent malfeasance by the Postal Service - is inconsistent with the text of Title VII. "The Title VII statutory scheme contemplates a 90-day statute of limitations upon receipt of the notice of right to sue; absent any indication of malfeasance by a

defendant, application of equitable tolling to the EEOC limitations period would not be consistent with the language or intent of the statute." *Carter v. Seattle Times Co.*, 2007 WL 4190408, at *2 (W.D. Wash. Nov. 21, 2007) (*citing O'Donnell v. Vencor, Inc.*, 465 F.3d 1063, 106 (9th Cir. 2006)). Here, there is no evidence of malfeasance by the Postal Service, and application of equitable tolling under these circumstances is inconsistent with the text of Title VII.

Thus, McDermott's arguments in favor of equitable tolling should be denied. The district court's finding, that equitable tolling should not be applied because McDermott's prior lawsuit was dismissed due to his own lack of diligence in failing to effectuate service despite warning, was proper and should be affirmed.

D. The District Court Properly Found that as a Matter of Law, Postal Service Employees Cannot Bring an Independent Action Under the WPA.

The Court of Appeals reviews a district court's interpretation of a statute de novo. *United States v. Carranza*, 289 F.3d 634, 642 (9th Cir. 2002) *cert. denied*, 537 U.S. 1037, 123 S.Ct. 572, 154 L.Ed.2d 458 (2002).

Here, the district court found that, to the extent that McDermott alleged any claims under the WPA, these claims failed as a matter of law because Postal Service employees cannot bring an independent action under the WPA. ER 5. This is a correct statement of the law. In making this finding, the district court

cited *Booker v. Merit System Protection Bd.*, 982 F.2d 517, 519 (Fed. Cir. 1992), and *Dumaguit v. Potter*, 2008 WL 413733, at *15 (N.D. Cal. Feb. 13, 2008), both of which held that Postal Service employees are not eligible to file whistleblower claims under the Individual Right of Action provisions of the WPA. ER 5.

In *Booker*, the Federal Circuit concluded that, although a Postal Service employee can assert whistleblowing activities as an affirmative defense, an employee cannot bring an independent action based on whistleblowing activities. *Booker*, 982 F.2d at 519. This conclusion was basis on an analysis of the statute. In particular, the Court observed that Section 2302(a)(2)(C) of the WPA defines an "agency" as an "Executive agency and the Government Printing Office." *Id.* The term "executive agency" is defined in 5 U.S.C. § 105 as "an Executive department, a Government corporation, and an independent establishment." *Id.* As the *Booker* Court observed, 5 U.S.C. § 104[6] specifically excludes the United States Postal Service from the definition an "independent establishment" and thus,

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[6] Title 5, United States Code, Section 104 provides in relevant part:

> For purposes of this title, "independent establishment" means -
> (1) an establishment within the executive branch (other than the Untied States Postal Service or the Postal Regulatory Commission) which is not an Executive department, military department, Government corporation, or part thereof, or part of an independent establishment. . . .

the United States Postal Service is excluded from the definition of an independent establishment under the WPA. *Id.* (citing 39 U.S.C. § 201, 5 U.S.C. § 104(1)).

The district court in *Dumaguit* followed the Federal Circuit's ruling in *Booker*, and noted that the only Ninth Circuit authority relating to the issue was a 2005 unpublished memorandum disposition. That memorandum in turn cited *Booker* with approval and reached the same conclusion.

Not only does the definition of "agency" and "executive agency" in the WPA exclude the Postal Service from coverage, but the WPA also specifically excludes Postal Service employees from being "covered" employees under the WPA. 5 U.S.C. § 2105(e). Section 2105(e) of the WPA provides, "Except as otherwise provided by law, an employee of the United States Postal Service or of the Postal Regulatory Commission is deemed not an employee for purposes of this title." *Id.* Thus, the terms of the WPA clearly prohibit Postal Service employees from bringing individual claims under the Act.

McDermott appears to argue that whistleblower, antidiscrimination, and retaliation laws apply to the Postal Service, and because he complained about retaliation during the EEO process, he should have been able to proceed on his

WPA claim in district court. Appellant's Opening Brief at 26-27.[7] But Postal Service employees may only raise whistleblowing claims as a defense in an otherwise appealable Merit Systems Protection Board action. *See Booker*, 982 F.2d at 519. Thus, McDermott could have properly raised retaliation claims based on activity protected by Title VII in his EEO action, and appealed the EEOC's final decision to the district court under Title VII and the ADEA, as he alleges he did in the underlying action. But the district court's basis for jurisdiction for those retaliation claims would be Title VII and the ADEA, not the WPA.

As noted above, the Postal Service is not included in the definition of "agency" under the WPA (5 U.S.C. § 2302(a)(2)(C)), and Postal Service employees are not "covered" employees under the Act (5 U.S.C. § 2105(e)). Furthermore, the statute governing the Postal Service provides that "except as otherwise provided . . . no Federal law dealing with . . . employees . . . including the provision of title 5 . . . shall apply to the exercise of the powers of the Postal Service." 39 U.S.C. § 410(e). These statutory provisions taken together clearly

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[7] Neither of the recent acts that McDermott cites makes the WPA applicable to the Postal Service and its employees. *See* the Postal Accountability and Enhancement Act of 2006 (Pub. L. No. 109-435, 120 Stat. 3198 (codified in scattered sections of 39 U.S.C.)); the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 (Pub. L. No. 107-174, 116 Stat. 556 (2002) ("No Fear Act").

establish that McDermott could not bring an independent action under WPA in the district court. Thus, the district court properly found that McDermott's attempt to raise independent claims under the WPA failed as a matter of law, and the district court's findings should be affirmed.

E. The Additional Claims McDermott Raises on Appeal that were not Raised in District Court Should be Denied.

McDermott devotes a considerable portion of his Opening Brief to a section entitled, "Additional Considerations for the Court of Appeals not asked in District Court." *See* Appellant's Opening Brief at 28-35. In this section, McDermott invites this Court to consider the following issues raised for the first time on appeal: (1) whether McDermott's wife's rights were violated when she was not allowed to be present with him during a deposition conducted as a part of the administrative process; (2) whether the district court in the first action made any reversible errors; and (3) whether the use of an attorney during the administrative process is a violation of the Administrative Dispute Resolution Act of 1996. *See* Appellant's Opening Brief at 28-35.

McDermott openly admits that he failed to raise these arguments at the district court level, and issues not presented to the district court cannot generally

be raised for the first time on appeal. *See Robertson*, 52 F.3d at 791. This Court should not hear them for the first time in this appeal.

IX. CONCLUSION

For these reasons this Court should affirm the district court's dismissal of McDermott's complaint.

DATED at Seattle, Washington this 15th day of October, 2010.

Respectfully submitted,

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X. CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains **5218** words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect Version 12 in Times New Roman 14-point type style.

DATED this 15th day of October, 2010.

s/Kristin B. Johnson
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Western District of Washington
Counsel for Defendants-Appellees

XI. STATEMENT OF RELATED CASES

To the best of Appellees counsel's knowledge, the following is the only known related case pending before the Court: Lance P. McDermott v. John E. Potter, et al., 9th CCA No. 09-35999.

DATED this 15th day of October, 2010.

s/Kristin B. Johnson
KRISTIN B. JOHNSON
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XII. CERTIFICATE OF SERVICE

I hereby certify that on October 15, 2010, I electronically filed the foregoing Answering Brief of Defendants-Appellees with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system, and transmitted via Federal Express four copies of the Excerpts of Record, Volumes I - III, to the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit.

I further certify that on October 15, 2010, I caused to be mailed two copies of this brief and one copy of the Excerpts of Record, Volumes I - III, to Appellant Lance P. McDermott:

Lance P. McDermott
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DATED this 15th day of October, 2010.

s/Dung Phan
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