CANNON v. LOYOLA UNIVERSITY OF CHICAGO

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MEMORANDUM OPINION AND ORDER

Geraldine Cannon wants to be a physician. She applied tenyears ago to seven Illinois medical schools, and each of themrejected her. Still determined to become a doctor, Cannon suedall of these schools in federal court to gain admission. Herten-year journey through the federal judiciary has taken herthrough several district courts, the Seventh Circuit and theSupreme Court. Every suit she brought was ultimately dismissedfor one reason or another. Cannon is here again. This time shehas sued all seven medical schools in one action, allegingdifferent theories of recovery than before, but alleging thesame underlying facts as before. The seven defendants,experiencing deja vu, have moved to dismiss the case under thedoctrine of res judicata. For the reasons spelled out below, wegrant the motions to dismiss.

I.

The undisputed history of Cannon's quest has been detailed inearlier opinions. 559 F.2d 1063 (7th Cir. 1976); 710 F.2d 351(7th Cir. 1983). We will only summarize this history here.

In late 1974 Cannon applied for admission to the 1975entering class of every medical school in Illinois, each ofwhich is a named defendant in this suit. Every school rejectedher application. She was a 39-year old nurse at the time. As amatter of policy, each of these schools either rejected ordisfavored applicants over 30.

In the summer of 1975, Cannon sued two of these schools, theUniversity of Chicago ("Chicago"), No. 75 C 2724, andNorthwestern University ("Northwestern"), No. 75 C 2402. Shealleged, among other things, sex discrimination in violation ofTitle IX of the Education Amendments of 1972, 20 U.S.C. § 1681et seq., age discrimination in violation of the AgeDiscrimination in Employment Act, 29 U.S.C. § 621 et seq., andviolations of constitutional rights under 42 U.S.C. § 1983. Hertheory was that the school's age criteria exerted a disparateimpact on women applicants, who were more likely to be olderthan male applicants because of decisions to bear and raisechildren.[1] The district court dismissed the complaint forfailure to state a claim upon which relief could be granted.406 F. Supp. 1257 (N.D.Ill. 1976) (Hoffman, J.) The mostrelevant part of the decision was that Title IX contained noprivate right of action.[2] 406 F. Supp. at 1259. The SeventhCircuit affirmed. 559 F.2d 1063 (1976). The Supreme Courtreversed, holding that Title IX created an implied right ofaction. 441 U.S. 677, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979). Thecase was remanded for consideration of the Title IX claim only.In an oral order dated May 23, 1980, the district court againdismissed the case under

Fed.R.Civ.P. 12(b)(6), this timeholding that Title IX redresses intentional sex discriminationonly, and that Cannon had failed to state a claim ofintentional discrimination. The Seventh Circuit affirmed,648 F.2d 1104 (1981), and the Supreme Court deniedcertiorari. 460 U.S. 1013, 103 S.Ct. 1254, 75 L.Ed.2d 482(1983). Her avenues of appeal exhausted, Cannon returned to thedistrict court to seek post-judgment relief under Fed.R.Civ.P.60. This Court[3] denied her motion. She did not appeal.

Cannon sued the remaining five schools in one action filed onNovember 29, 1979. No. 79 C 5009. She sought monetary andinjunctive relief under Title IX and also sued the two stateuniversities under 42 U.S.C. § 1983. She had no better luckwith this suit. On October 13, 1981, Judge Robson dismissed thecomplaint for failure to state a claim. The Court held that thedoctrine of laches barred the suit as to all defendants exceptChicago Medical School ("Chicago-Med"), which had not posed thedefense. Leave was granted to file an amended complaint againstChicago-Med, but leave to amend was denied as to the otherdefendants. On June 15, 1982, Judge Robson modified the earlierorder. Chicago-Med, too, was dismissed because of laches. Thedismissal of the two state schools, University of Illinois("Illinois") and Southern Illinois University ("SIU"), wasvacated, but summary judgment was entered in favor of those twoschools on the grounds of mootness. The Seventh Circuitaffirmed, but on the grounds of laches as to all five schools.710 F.2d 351 (7th Cir. 1983). Cannon's petition for a rehearingwas denied, and she did not seek a writ of certiorari.

Cannon filed this suit on September 18, 1984, joining allseven schools as defendants. The material facts in thecomplaint are the same as those in the earlier cases: shechallenges her rejections as being sex discrimination becauseof the age criteria. Cannon's legal theories now differsomewhat. The complaint contains two "counts," which bothallege contract theories. Count I alleges that when Cannonapplied to each of the schools and filed her application fee,she had contracted with them that they would consider herapplication according to their written policies, unless thosepolicies violated public policy. Each defendant allegedlybreached the contract by relying on the age criteria, whichviolated public policy.

Count II rests on a third-party beneficiary theory.Allegedly, when the federal government gave money to eachschool, each school agreed to comply with Title IX. Applicantsfor admission, including Cannon, were allegedly third partybeneficiaries of this "contract." Each school breached itscontract with the government when it allegedly violated TitleIX in denying Cannon admission.

Cannon seeks injunctive relief and damages. The defendantshave moved to dismiss, raising the defense of res judicata.

II.

Before addressing the res judicata issue, we briefly discussa threshold question concerning the Court's subject matterjurisdiction. Although neither side questioned ourjurisdiction, it is of course proper, indeed required, that theCourt raise any questions going to our jurisdiction over thecase.

It appears that the well-pleaded complaint states two statelaw claims for breach of contract. While the causes of actionare apparently grounded in state law,[4] the contracttheories will inevitably depend on an interpretation of federallaw, that is, whether "public policy," as expressed in TitleIX, was offended by Cannon's rejection. Cannon alleges in hercomplaint that the suit "arises under" Title IX, thus givingthis Court jurisdiction under28 U.S.C. § 1331.[5] Our threshold question, then, is whetherCannon's contract claims do in fact "arise under" Title IX.This question is not simple, since the doctrine interpretingthe meaning of "arising under" is a quagmire, to say the least.See generally 13B C. Wright, A. Miller & E. Cooper, FederalPractice & Procedure, § 3562 (1984).

Because state law creates Cannon's causes of action, hercomplaint fails Justice Holmes' threshold test that "a suitarises under the law that creates the cause of action."American Well Works Co. v. Layne & Bowler Co., 241 U.S. 257,260, 36 S.Ct. 585, 586, 60 L.Ed. 987 (1916). But JusticeHolmes' test defines cases which clearly fall within federaljurisdiction, it does not necessarily describe which cases areoutside. See, e.g., Franchise Tax Bd. v. Construction Laborers,463 U.S. 1, 103 S.Ct. 2841, 2846, 77 L.Ed.2d 420 (1983). A casemay "arise under" federal law where the well-pleaded complaintreveals that the "vindication of a right under state lawnecessarily turn[s] on some construction of federal law." Id.at 9, 103 S.Ct. at 2846, citing Smith v. Kansas City Title &Trust Co., 255 U.S. 180, 41 S.C. 243, 65 L.Ed. 577 (1921); seealso T.B. Harms Co. v. Eliscu, 339 F.2d 823, 827 (2d Cir.1964). Cannon's complaint appears to satisfy this "pivotalfederal question" test, since her right to relief wouldnecessarily turn on a construction of Title IX, and perhapsother federal policies.

However, it is not enough to allege a "federal question." Aplaintiff must allege a "substantial" federal question in orderto invoke the court's subject matter jurisdiction. See, e.g.,Molina-Crespo v. Califano, 583 F.2d 572, 573-74 (1st Cir.1978); Wright, Miller and Cooper, § 3564 at 66. To beinsubstantial, a federal claim must be "obviously withoutmerit" or clearly foreclosed by prior Supreme Court precedent,"leaving no room for the inference that the question sought tobe raised can be the subject of controversy." Hagans v. Lavine,415 U.S. 528, 536-37, 94 S.Ct. 1372, 1379, 39 L.Ed.2d 577(1974) (quotations omitted); Wright, Miller & Cooper, § 3564 at67-70. This test for dismissal is rigorous; if the claim is atall plausible, jurisdiction exists. See Wright, Miller &Cooper, supra at 70-71.

The "federal question" in this case, like that in Cannon'searlier suits, appears to be whether defendants' conductviolated Title IX. The Seventh Circuit has already squarelyheld that it did not. 648 F.2d at 1106-09. In so holding, theCourt drew upon Supreme Court precedent that interpretation ofTitle IX depends upon interpretation of Title VI, and that thelatter statute reaches only claims of intentionaldiscrimination. The Court concluded that the Supreme Courtwould hold that Title IX as well does not reach intentionaldiscrimination. Id. at 1109. In this suit, as in the earlierone, Cannon has alleged only an unintentional violation ofTitle IX. Therefore, an argument can be made that her claim iseither wholly meritless or clearly foreclosed by controllinglaw.

However, we do not finally resolve this jurisdictionalquestion. Because the Supreme Court has not ruled directly onthe Title IX issue, and because the "insubstantiality" test isvery rigorous, we are

reluctant to hold, sua sponte, that welack jurisdiction. But in light of our holding below that thecase is res judicata, we need not ask the parties to brief thejurisdictional issue.

III.

The doctrine of res judicata, or claim preclusion," has threeelements. The defendants must show that (1) the parties to thissuit are the same or inprivity with those to the earlier suit; (2) this suit allegesthe same cause of action as the earlier suit did; (3) a courtof competent jurisdiction entered a valid final judgment on themerits in the earlier suit. See, e.g., Federated Dept. Storesv. Moitie, 452 U.S. 394, 398, 101 S.Ct. 2424, 2428, 69 L.Ed.2d103 (1981); Mandarino v. Pollard, 718 F.2d 845, 849 (7th Cir.1983), cert. denied, ___ U.S. ___, 105 S.Ct. 116, 83 L.Ed.2d 59(1984). The parties agree that the first two requirements aremet. The parties to this suit are obviously identical to thosein the earlier suits. Moreover, the present complaint is basedon identical facts as the earlier one. While the theories ofrelief differ slightly, that does not matter for res judicatapurposes, since Cannon could have alleged the contract theoriesin the earlier suit. See, e.g. Mandarino, 718 F.2d at 849-50.The only dispute is whether the judgments operated asadjudications on the merits.

Fed.R.Civ.P. 41(b) provides the starting point for thatanalysis:

Unless the court in its order of dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

It is clear from this Rule that a case need not go to fulltrial to be "on the merits" and thus have preclusive effect.But we cannot simply conclude from the Rule that the Rule12(b)(6) dismissals in the earlier cases were necessarily "onthe merits." Mere reliance on the literal language of Rule41(b) is improper; the Rule's list of adjudications that arenot on the merits is not exclusive. See Rinehart v. Locke,454 F.2d 313, 314-15 (7th Cir. 1971). General preclusion principlesshould control our analysis. Id. These principles dictate thatin general a dismissal for failure to state a claim under Rule12(b)(6) operates as an adjudication "on the merits," eventhough only the pleadings have been examined in dismissing thecase. See Federated Dept. Stores, 452 U.S. at 399 n. 3, 101S.Ct. at 2428; Bell v. Hood, 327 U.S. 678, 681-82; 66 S.Ct.773, 775-76, 90 L.Ed. 939 (1946); Mandarino, 718 F.2d at849 (state court judgment on pleadings is preclusive); 18 C.Wright, A. Miller & E. Cooper, Federal Practice & Procedure, §4439 (1981) at 354-62. While courts used to distinguishdismissals for defective pleading from dismissals which go tothe merits of a well-pleaded complaint, see Wright, Miller &Cooper at 354-57, that distinction generally has been discardedin light of modern rules which allow liberal amendments in thefirst suit. Id. at 357-58.

These standards lead us to hold that Cannon's original suitsagainst Chicago and Northwestern preclude her attempt to suethose parties in this case. That case was dismissed because shehad not

and could not allege intentional discrimination underTitle IX. The dismissal for failure to state a claim wasaffirmed, and post-judgment relief was denied. She cannotsuccessfully dress the same cause of action in contractclothing in this suit.[6]

Cannon's main argument rests on a clever, but meritless,syllogism. Jurisdiction in the earlier suit was based on28 U.S.C. § 1343(4), which states in part that federal courts havejurisdiction "of any civil action authorized by law . . . [t]orecover damages or to secure equitable or other relief underany Act of Congress providing for the protection of civilrights." Cannon contends that because the earlier suit wasdismissed for failure to state a claim under Title IX, it wasno longer a "civil action authorized by law," thereby deprivingthe court of jurisdiction under § 1343(4). Thus, concludesCannon, the dismissal in the earlier suit was for lack ofjurisdiction and not entitled to preclusive effect. Thisargument is flawed. Its logic converts every dismissal forfailure to state a claim underfederal civil rights law into a dismissal for lack ofjurisdiction. It converts many motions under Rule 12(b)(6) intoones under Rule 12(b)(1). Finally, it ignores Supreme Courtstatements that dismissals for failure to state a federal claimare not jurisdictional and are preclusive. Federated Dept.Stores, 452 U.S. at 399 n. 3, 101 S.Ct. at 2428; Bell v. Hood,327 U.S. at 681-82; 66 S.Ct. at 775-76. Costello v. UnitedStates, 365 U.S. 265, 285-86, 81 S.Ct. 534-544-46, 5 L.Ed.2d551 (1960), relied upon by Cannon does not suggest a contraryresult. At most, Costello holds that a dismissal based on aplaintiff's "failure to comply with a precondition requisite tothe Court's going forward to . . . the merits" may not bepreclusive under Rule 41(b). Cannon's earlier suits involved noissue about her compliance with "preconditions." Thus, Costellois irrelevant here, and certainly does not weaken the force ofthe general rule that a Rule 12(b)(6) dismissal is "on themerits."

Similarly, the previous dismissal of the remaining partiesprecludes Cannon's attempt to sue them in this case. As notedearlier, the Seventh Circuit ultimately premised the dismissalon laches as to all parties. An appellate decision may havepreclusive effect, even if resting on different grounds thanthe lower court decision. 1B J. Moore, J. Lucas & T. Currier,Moore's Federal Practice, ¶ 0.416[2] (1984) at 518. Dismissalsbased on laches or the running of a statute of limitationspreclude a second action based on the same claim brought in thesame system of courts. McCrocklin v. Fowler, 285 F. Supp. 41(E.D.Wis. 1968) (laches), aff'd on opinion below, 411 F.2d 580(7th Cir. 1969); see also Ellingson v. Burlington Northern,Inc., 653 F.2d 1327, 1330-31 n. 3 (9th Cir. 1981)(limitations); Myers v. Bull, 599 F.2d 863, 865 (8th Cir. 1979)(per curiam) (limitations), cert. denied, 444 U.S. 901, 100S.Ct. 213, 62 L.Ed.2d 138 (1979); Mathis v. Laird,457 F.2d 926, 927 (5th Cir. 1972) (per curiam) (limitations), cert.denied, 409 U.S. 871, 93 S.Ct. 201, 34 L.Ed.2d 122 (1972);Wright, Miller & Cooper, § 4441 at 366. Although the presentclaim is based on a contract theory, with possibly differentlimitations or laches considerations, it is the same "claim" asthe previous one for res judicata purposes, and is thereforeprecluded. See Nilsen v. City of Moss Point, 674 F.2d 379, 383n. 5 (5th Cir. 1982), rev'd on other grounds, 701 F.2d 556 (5thCir. 1983) (en banc); Cemer v. Marathon Oil Co., 583 F.2d 830,832 (6th Cir. 1978) (dismissal of employment discriminationclaim under short federal time limits precludes later "timely"contract action based on same facts).

In sum, we hold that the doctrine of res judicata preventsCannon from bringing this lawsuit. We have examined Cannon'sremaining arguments to the contrary and find that they lackmerit.

IV.

The defendants argue that they are entitled to costs and feesincurred in dismissing this complaint, because the complaintwas filed in violation of Fed.R.Civ.P. 11. That Rule states:

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. . . . The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extention, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper including a reasonable attorney's fee.

The defendants assert that the complaint was obviously barredby res judicata, and that its filing was frivolous andvexatious. They also point to the history of the original suitsagainst Chicago and Northwestern as indications that Cannon'scounsel knew this suit was frivolous. Following the SeventhCircuit's affirmance of Judge Hoffman's dismissal, the Courtdenied Cannon leave to amend her complaint or to petition thedistrict court for leave to amend. The Supreme Court thendenied her petitions for writs of mandamus and certiorari.454 U.S. 811, 102 S.Ct. 373, 70 L.Ed.2d 197 (1981) (mandamus);454 U.S. 1128, 102 S.Ct. 981, 71 L.Ed.2d 117 (1981) (certiorari).Back in the district court, Judge Hoffman denied another motionfor leave to amend. Cannon went up the appellate ladder again,lost and then moved this Court for relief under Rule 60. Wedenied the motion. Finally, she filed this suit over a yearlater.

Attorneys are expected, even required, to represent theirclients' interests zealously. But they are also expected toknow when to give up on an obviously lost cause. It should havebeen apparent to Cannon's counsel that Cannon's cause was dead.It should also have been apparent to him that bringing anotheraction on the same facts would be barred by res judicata,collateral estoppel or both. We think that upon "reasonableinquiry," counsel would have found that this suit was not"warranted by existing law." Accordingly, we hold under Rule 11that Cannon's counsel shall pay defendants' costs andattorney's fees incurred from litigating this motion todismiss. Imposing these sanctions on counsel only is properunder the Rule. See Fed.R.Civ.P. 11 (Advisory Committee Notes).Defendants

may file a petition for reasonable costs and fees onor before March 1, 1985. Cannon's counsel may respond on orbefore March 20, 1985. His response may include an argumentthat sanctions should not be imposed at all. We give him leaveto do so because he did not previously respond to defendants'Rule 11 arguments, even though he submitted two briefs in whichhe could have done so. Defendants may reply if they so chooseon or before April 1, 1985.

V.

Defendants' motions to dismiss are granted. They are furtherentitled to costs and fees. It is so ordered.

1. If Cannon were rejected because of age today, she mightnot have had to use this indirect sex discrimination theory. Inlate 1975, Congress passed the Age Discrimination Act of 1975,42 U.S.C. § 6101-07, which became effective in 1979, when theDepartment of Health, Education & Welfare passed interpretativeregulations. These regulations stated that medical schoolscould not base admissions decisions on age. See Cannon v.University of Health Sciences/The Chicago Medical School.710 F.2d 351, 354 (7th Cir. 1983).

2. The court also held that the schools were not "employers"under the Age Discrimination in Employment Act, and that nostate action supported the § 1983 claim.

3. The case was reassigned to this Court after Judge Hoffmanretired.

4. Conceivably, the third-party beneficiary claim isgrounded in a federal common law of contract, since thegovernment was a "party" to the alleged contract, withsignificant interests at stake. Cf. United States v. LittleLake Misere Land Co., Inc., 412 U.S. 580, 591-94, 93 S.Ct.2389, 2396-98, 37 L.Ed.2d 187 (1973); Clearfield Trust Co. v.United States, 318 U.S. 363, 63 S.Ct. 573, 63 S.Ct. 573, 87L.Ed. 838 (1943). This consideration is not relevant in lightof our decision below not to decide the jurisdictional issuefinally.

5. Cannon also alleges jurisdiction under 28 U.S.C. § 1343(4),2201 and 2202. These additional statutes do not change the focus ofthe analysis below. With the elimination of the amount in controversyrequirement from § 1331, § 1343(4) essentially overlaps that section.Sections 2201 and 2202, the Declaratory Judgment Act, are proceduralonly. It expands the range of remedies without extendingjurisdiction. Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667,70 S.Ct. 876, 879, 94 L.Ed. 1194 (1950).

6. Even if res judicata did not apply, it is likely thatcollateral estoppel, or "issue preclusion," would preventCannon from relitigating the question whether defendants'conduct violated Title IX. We need not reach this question,however.