

NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

2006-3294

RAYMOND H. WILKES,

Petitioner,

v.

DEPARTMENT OF THE TREASURY,

Respondent.

ON MOTION

Before BRYSON, Circuit Judge, FRIEDMAN, Senior Circuit Judge, and PROST, Circuit Judge.

PER CURIAM.

ORDER

The Department of the Treasury moves to waive the requirements of Fed. Cir. R. 27(f) and to dismiss Raymond H. Wilkes' petition for review of the decision of the Merit Systems Protection Board in Wilkes v. Treasury, No. CH-0432-04-0774-I-1 (Apr. 20, 2006). Wilkes opposes and submits an amended opposition.

Treasury removed Wilkes from his position as a revenue agent and Wilkes appealed to the Board alleging, inter alia, discrimination based on race. The Administrative Judge (AJ) determined that Wilkes had not proven his discrimination claim and affirmed the removal action. The Board denied Wilkes' petition for review of the AJ's decision. Wilkes sought review of the Board's decision both in this court and with the Equal Employment Opportunity Commission (EEOC). EEOC determined that Wilkes' petition was untimely and issued a notice of denial of consideration on June 22,

2006. On August 15, 2006, Wilkes filed a complaint in the United States District Court for the Northern District of Illinois. Wilkes v. Paulson, No. 06-CV-04411. The district court entered judgment dismissing Wilkes' action on January 24, 2007.

Treasury argues that because Wilkes pursued judicial review in district court of both discrimination and non-discrimination issues decided by the Board, this court lacks jurisdiction over his petition for review. Treasury asserts that Wilkes' brief reflects that he seeks review of discrimination issues in this court and that pursuant to this court's decision in Williams v. Dept. of the Army, 715 F.2d 1485 (Fed. Cir. 1983) (en banc), this court lacks jurisdiction to review discrimination issues.

Wilkes contends that pursuant to Chappell v. Chao, 388 F.3d 1373 (11th Cir. 2004), if a petitioner seeks review of a Board decision in both a district court and this court, the district court case would be "overruled" by the filing in this court.

The Eleventh Circuit's decision in Chappell is not on point. In that case, the Eleventh Circuit affirmed the district court's determination that it lacked jurisdiction because this court had already decided the petitioner's case. In contrast, in the present case the district court has already dismissed Wilkes' case.

Pursuant to this court's en banc decision in Williams, a petitioner seeking review of a Board decision involving discrimination issues may either waive the discrimination issues and seek review of non-discrimination issues in this court or seek review of both discrimination and non-discrimination issues in a district court. Bifurcation of the discrimination and non-discrimination issues between a district court and this court is impermissible. Williams at 1491. Thus, we dismiss.

Accordingly,

IT IS ORDERED THAT:

(1) Treasury's motion to waive the requirements of Fed. Cir. R. 27(f) is granted.

(2) Treasury's motion to dismiss is granted.

(3) Each side shall bear its own costs.

FOR THE COURT

April 3, 2007

Date

/s/ Jan Horbaly

Jan Horbaly

Clerk

cc: Raymond H. Wilkes
Steven M. Mager, Esq.

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ISSUED AS A MANDATE: April 3, 2007