United States Court of Appeals
For the First Circuit

No. 18-1462

UNITED STATES,

Plaintiff, Appellee,

v.

STATE OF RHODE ISLAND DEPARTMENT OF CORRECTIONS;
STATE OF RHODE ISLAND,

Defendants, Appellees,

JAYSON BADILLO,

Claimant, Appellant.

Before

Torruella, Lynch, and Thompson,
Circuit Judges.

JUDGMENT

Entered: November 7, 2018

Non-party appellant Jayson Badillo seeks review of the district court's allowance of the parties' joint motion for final approval of a settlement agreement resolving a civil action brought by the United States against Rhode Island and the Rhode Island Department of Corrections (collectively, "Rhode Island") pursuant to Section 707(a) of Title VII of the Civil Rights Act of 1964. See 42 U.S.C. § 2000e-6. The United States contends that we lack jurisdiction to hear the appeal because Badillo is not a party to the district court litigation, did not seek leave to intervene, and does not fall within any of the limited exceptions to the general rule holding that "only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment." Marino v. Ortiz, 484 U.S. 301, 304 (1988) (per curiam). In response, Badillo argues that the United States should be judicially estopped from arguing that he was required to seek leave to intervene in order to appeal, and he maintains that his interest in the settlement suffices to confer standing to appeal.

In the alternative, Badillo requests that he be granted leave to intervene nunc pro tunc. For the reasons that follow, we conclude that we lack jurisdiction to hear Badillo's appeal and deny the request to allow intervention nunc pro tunc.

A. Judicial Estoppel

Badillo first argues that the doctrine of judicial estoppel bars the United States from arguing that Badillo's failure to obtain leave to intervene in the district court warrants dismissal of the appeal because this position "directly contradicts" an earlier representation that any individual Title VII claim by Badillo would now be time-barred. Badillo argues that any attempt to intervene in the district court would have been opposed by the United States on the ground that Badillo no longer had a viable individual claim, or that his motion to intervene was untimely. But the United States is not now arguing that Badillo should have intervened for the purpose of pursuing his own individual Title VII claim; rather, it maintains that Badillo could have and should have intervened in the district court if he wanted to challenge the fairness of the agreement on appeal. As Badillo has not shown that the government took inconsistent positions, there is no basis for judicial estoppel. See InterGen N.V. v. Grina, 344 F.3d 134, 144 (1st Cir. 2003) (explaining that "the doctrine of judicial estoppel prevents a litigant from pressing a claim that is inconsistent with a position taken by that litigant . . . in an earlier phase of the same legal proceeding").

B. Non-party, Non-intervenor Status

Exceptions to the general rule barring appeals by non-parties are limited. See Nat'l Ass'n of Chain Drug Stores v. New England Carpenters Health Benefits Fund, 582 F.3d 30, 41 (1st Cir. 2009); Microsystems Software, Inc. v. Scandinavia Online AB, 226 F.3d 35, 39–40 (1st Cir. 2000). A putative intervenor may appeal from the denial of a motion to intervene, In re Lupron Mktg. & Sales Practices Litig., 677 F.3d 21, 29 (1st Cir. 2012), but "courts are generally 'powerless to extend a right of appeal to a nonparty who abjures intervention.'" Id. (quoting Microsystems Software, Inc., 226 F.3d at 40). In addition, "nonnamed class members . . . who have objected in a timely manner to approval of the settlement at the fairness hearing have the power to bring an appeal without first intervening." Devlin v. Scardelletti, 536 U.S. 1, 14 (2002). However, the fact that a decision "may practically impact a third party is not ordinarily enough for appellant status absent intervention or joinder in the trial court." New England Carpenters Health Benefits Fund, 582 F.3d at 41 (citing Marino, 484 U.S. at 304); see Microsystems Software, Inc., 226 F.3d at 42.

Badillo argues that he falls within the exception created in Devlin for nonnamed class members who have objected to settlement agreements. See Devlin, 536 U.S. at 7-11. Badillo maintains that this action is analogous to a class action in that (1) it is undertaken for the benefit of a group as a whole and the government has a fiduciary obligation to the potential claimants; (2) the members of the group, like the members of a class, are provided an opportunity to object to approval of the settlement; and (3) the fairness of the settlement is judged under the same standard that applies to class action settlements. See Fed. R. Civ. P. 23(e). Because Badillo, as a member of the group identified as having been harmed by the discriminatory practice alleged, has an interest in the settlement and filed a timely objection to the settlement, he argues that he is akin to an unnamed class member and, under Devlin, he should be permitted to appeal without first seeking leave to intervene. This argument has several flaws.

First, to the extent Badillo argues that the government has a fiduciary duty to potential claimants, he relies on cases that are based on different statutes involving Native American tribes and the federal government's unique role as trustee for native interests. See Fletcher v. United States, 730 F.3d 1206, 1212-13 (10th Cir. 2013); Hopi Tribe v. United States, 55 Fed. Cl. 81, 94 (2002). Those cases are wholly inapposite in the context of a Title VII pattern-or-practice case.

Second, this is not a class action and Badillo is not similarly situated to an unnamed class member. While he has a stake in the outcome of the litigation and was permitted to file objections and participate in the district court process, he was not treated as a party and he is not bound by the approval of the settlement. That key fact renders the exception created in Devlin inapplicable. See Devlin, 536 U.S. at 8, 10-11 ("What is most important to this case is that nonnamed class members are parties to the proceedings in the sense of being bound by the settlement"; having "no ability to opt out of the settlement, . . . appealing the approval of the settlement is [a class member's] only means of protecting himself from being bound by a disposition of his rights he finds unacceptable and that a reviewing court might find legally inadequate"). Here, in contrast, Badillo will only be bound by the settlement if he affirmatively opts in to accept the relief offered. Badillo argues that this distinction is immaterial because the settlement agreement is effectively binding, as it is the only avenue for relief that remains open to him given that any individual Title VII claim would now be time-barred. But these are two separate issues. The order approving the settlement here does not itself provide any individual relief or finally dispose of any right or claim Badillo might have had; thus, the order approving the settlement in this case is not binding in the same way that a class action settlement would be binding. "A mere interest in the outcome of litigation will not suffice to confer standing [to appeal] upon a nonparty." Microsystems Software, Inc., 226 F.3d at 42.

Badillo also cites Binker v. Pennsylvania, 977 F.2d 738, 745 (3d Cir. 1992), in which the Third Circuit recognized a Devlin-like exception outside the class action context, in an ADEA enforcement action. As here, the appellants in Binker had a stake in the outcome of the litigation and participated in the district court proceedings by objecting to a consent decree but did not move to intervene. The Third Circuit found that the equities favored hearing the objectors' appeal notwithstanding their failure to intervene. However, as in Devlin, the appealing objectors in Binker were bound by the consent decree because, by operation of statute, the "EEOC's [ADEA] suit extinguished their individual rights on the date the complaint was filed." 977 F.2d at 747. Here, as discussed, neither the filing of the Title VII action nor the approval of the settlement agreement extinguished Badillo's individual rights. Moreover, unlike the ADEA, Title VII expressly allows for intervention in pattern-or-practice enforcement actions. See 42 U.S.C. § 2000e-2(n)(2)(A). Both Binker and Devlin are therefore distinguishable.

C. Nunc Pro Tunc Intervention

Finally, Badillo requests that he be granted leave to intervene nunc pro tunc if the court determines that his non-party status would bar the appeal. In support of this request, Badillo cites several cases in which intervention was permitted at the appellate level. In Mangual v. Rotger-Sabat, 317 F.3d 45 (1st Cir. 2003) and Linton v. Comm'r of Health and Environment, 30 F.3d 55, 56 (6th Cir. 2001), the appeals court granted leave to intervene where appellants had first unsuccessfully sought to intervene in the district court. In In re Grand Jury Subpoena, 831 F.2d

290, 1987 WL 38665 (4th Cir. Sept. 28, 1987) (unpublished) and Roach v. Churchman, 457 F.2d 1101, 1104-05 (8th Cir. 1972), appellants had been treated as parties in the district court. Neither of these circumstances are present here; Badillo could have filed a motion to intervene in the district court but did not and, although he was provided an opportunity to object to the settlement agreement, he was not treated as a party below. Thus, Badillo has failed to show why intervention should be permitted now. See Brenner v. Williams-Sonoma, Inc., 867 F.3d 294 (1st Cir. 2017) (dismissing appeal for lack of jurisdiction where would-be appellant did not move to intervene in district court); Microsystems Software, Inc., 226 F.3d at 40 (holding that "nonparties who have had the opportunity to seek intervention, but have eschewed that course, lack standing to appeal").

CONCLUSION

As Badillo is not a party, is not bound by the settlement, and did not seek leave to intervene in the district court despite having had an opportunity to do so, we conclude that we lack jurisdiction to hear the appeal. The motion to dismiss is granted.

By the Court:

Maria R. Hamilton, Clerk

cc:
Donald Campbell Lockhart
Bonnie I. Robin-Vergeer
Francesca Lina Procaccini
Rebecca Tedford Partington
Neil F. X. Kelly
Edward G. Mullaney
Mariana Elena Ormonde
Thomas W. Lyons III
Rhiannon Selina Huffman