

JUL 18 2008

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PAUL PESQUEIRA,

Plaintiff - Appellant,

v.

CITY OF LOS ANGELES; LOS ANGELES POLICE DEPARTMENT; WILLIAM J. BRATTON, in his individual and official capacity; JAMES MCDONNELL, in his official and individual capacity; GEORGE GASCON, in his individual and official capacity; SHARON K. PAPA, in her individual and official capacity,

Defendants - Appellees.

No. 06-56051

D.C. No. CV-05-02955-SJO

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
S. James Otero, District Judge, Presiding

Argued and Submitted March 6, 2008
Pasadena, California

Before: GIBSON, ** Senior Circuit Judge, O'SCANNLAIN and GRABER, Circuit Judges.

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Paul Pesqueira appeals from the partial adjudication dismissing his 42 U.S.C. § 1983 claim. A state court denied his Petition for Writ of Mandate, in which Pesqueira claimed that he was summarily demoted under a constitutionally invalid provision of a municipal employment manual. The district court held that *res judicata* barred the § 1983 claim, which included a First Amendment claim not expressly raised in the state court action and declined to exercise supplemental jurisdiction over the state law claims.

Generally, under California law, a judgment resolving a claim for “declaratory and coercive relief, has a preclusive effect.” *Mycogen Corp. v. Monsanto Co.*, 51 P.3d 297, 306 (Cal. 2002). “California’s *res judicata* doctrine is based upon the primary right theory.” *Id.* “In determining the primary right at stake, the significant factor is the harm suffered.” *Takahashi v. Bd. of Trs. of Livingston Union Sch. Dist.*, 783 F.2d 848, 851 (9th Cir. 1986) (internal quotation marks omitted). Generally, in the employment context, the “primary right” is “the contractual right to employment.” *Id.* However, it is unclear from the state proceedings which was the “primary right” at stake here, because Pesquiera asserts a right that may be affected by *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006), and that may or may not be independent of the procedural claim denied by the state court and now clearly barred by *res judicata*.

We remand to permit Pesqueira to identify his “primary right” claim under California law and to show cause why any First Amendment claim related to his demotion was not precluded by the state court judgment.

The district court’s grant of summary judgment is

VACATED & REMANDED.