UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
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Re: Case No. 17-6408, *Larry Bailey v. USA, et al*
Originating Case No. : 6:17-cv-00090

Dear Mr. Bailey and Counsel:

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Robin L. Johnson
Case Manager
Direct Dial No. 513-564-7039

cc: Mr. Robert R. Carr

Enclosure

Mandate to issue

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 17-6408

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LARRY R. BAILEY,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA, et al.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

O R D E R

Before: MOORE, GIBBONS, and McKEAGUE, Circuit Judges.

Larry R. Bailey, a pro se Kentucky plaintiff, appeals the district court's judgment dismissing his complaint against the Secretary of Agriculture and other individual defendants under the Federal Lands Recreation Enhancement Act (FLREA), 16 U.S.C. § 6802, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

Congress has ordered that admission to the country's national forests shall be free. *See* 16 U.S.C. § 6802(e)(2); *Scherer v. U.S. Forest Serv.*, 653 F.3d 1241, 1242 (10th Cir. 2011). But the Act authorizes the Secretary to charge a standard amenity recreation fee for using federal recreational lands and waters if, among other things, the area contains all of the following: designated developed parking; a permanent toilet facility; a permanent trash receptacle; an interpretive sign, exhibit, or kiosk; picnic tables; and security services. *See* 16 U.S.C. § 6802(f)(4). The Secretary is authorized to charge an expanded amenity recreation fee for

"highly developed boat launches," which have "specialized facilities or services such as mechanical or hydraulic boat lifts or facilities, multi-lane paved ramps, paved parking, restrooms and other improvements such as boarding floats, loading ramps, or fish cleaning stations." *Id.* § 6802(g)(2)(B). "[T]he Secretary may charge an expanded amenity recreation fee, either in addition to a standard amenity fee or by itself . . . ." *Id.* § 6802(g)(2).

Bailey possesses an annual recreation pass for the Daniel Boone National Forest in Kentucky that entitles him to access the Marsh Branch Boat Ramp (Marsh Branch). The security light at Marsh Branch was broken, and despite the many complaints that Bailey made to the Forest Service about the light, it remained broken for over a year. Bailey claimed that the area became dangerous at night without the light—once he was approached in the parking lot by two menacing individuals, and there was an increased risk of injury from falls and wild animals.

Frustrated with the Forest Service's lack of action on his complaints about the broken light, Bailey filed suit pro se in the district court against the Secretary and other federal agents under the FLREA. Bailey claimed that the light fixture was a "security service" under the Act that he was entitled to have because the Secretary charged him an amenity fee to access Marsh Branch. Bailey asked the district court for an injunction requiring the Forest Service to repair the light at Marsh Branch and also to place some picnic tables there. Bailey did not seek any monetary relief, such as a refund of the amenity fee that he paid. About two weeks after Bailey filed suit, the Forest Service repaired the light but maintained it had no legal obligation to do so.[1] The Forest Service has not provided picnic tables.[2]

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[1] The fact that the Forest Service repaired the broken light does not render Bailey's suit moot. A broken light is one of those issues that is "capable of repetition, yet evading review." *Kerr ex rel. Kerr v. Comm'r of Soc. Sec.*, 874 F.3d 926, 932 (6th Cir. 2017); *see also Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000). Common sense and our lived experience inform us that lightbulbs break. And here the Forest Service claims it has no duty to replace the broken lightbulb when it breaks. Thus, there is a "reasonable expectation" that the lightbulb will break again and Bailey will seek to have the Forest Service replace it. *Kerr*, 874 F.3d at 932.

[2] The dissent argues that Bailey lacks standing to pursue injunctive relief with respect to the picnic tables because he failed to satisfy the injury-in-fact requirement. As a pro se litigant, Bailey's pleadings must be "held to less stringent standards than formal pleadings drafted by lawyers and should . . . be liberally construed." *Kraus v. Taylor*, 715 F.3d 589, 597 (6th Cir. 2013) (omission in original) (internal quotation marks omitted). In his complaint, Bailey states that a picnic table is a required amenity when charging the standard amenity recreation fee, that he has paid the standard amenity recreation fee, and that he requests the district court enjoin the U.S. Forest

The district court concluded that Marsh Branch was a "highly developed boat launch" as a matter of law, based on Bailey's concession that the area contained multi-lane paved ramps, paved parking, boarding floats, and a boat ramp. The district court concluded therefore that the defendants were entitled to dismissal of Bailey's complaint because the statute controlling highly developed boat launches, § 6802(g)(2)(B), does not require the Secretary to provide the standard amenities listed in § 6802(f). The district court concluded that it did not have jurisdiction to consider a claim that Bailey raised for the first time in his briefing that there was an implied contract for the Secretary to provide the listed amenities. The district court dismissed Bailey's complaint and denied his motion for reconsideration. Bailey appealed.

The district court erred in granting the defendants' motion to dismiss because it is not possible to determine the type of fee that users of Marsh Branch are paying from the complaint itself or from "matters of public record, orders, items appearing in the record of the case, [or] exhibits attached to the complaint." *Amini v. Oberlin Coll.*, 259 F.3d 493, 502 (6th Cir. 2001) (emphasis omitted) (quoting *Nieman v. NLO, Inc.*, 108 F.3d 1546, 1554 (6th Cir. 1997)). The fact that Marsh Branch has some of the features of a highly developed boat launch is not conclusive proof that the Secretary is charging users only an expanded amenity fee. It is equally possible that the fee for Marsh Branch is both a standard amenity recreation fee and an expanded amenity recreation fee. *See* 16 U.S.C. § 6802(g)(2). And the physical pass attached to the complaint itself provides no elucidation either: It announces only that it is a "recreation fee pass." Furthermore, in their motion to dismiss, the defendants point to no statute, regulation, or

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Service to provide the two deficient amenities: the security services and picnic tables. The implicit connection between these discrete points is that Bailey has suffered a "concrete and particularized" injury-in-fact from the lack of the picnic table, as well as the security light. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). Bailey does not explicitly plead that he would sit at the picnic tables if some were provided, but by seeking injunctive relief, rather than monetary damages, he expresses a clear preference for the provision of the actual tables. Remanding this case so that Bailey can amend his complaint to add the explicit statement that he would utilize the picnic table for which he has allegedly paid, but cannot use because the U.S. Forest Service has not provided one, elevates form pleading over the substance of Bailey's pro se complaint. Construing Bailey's complaint liberally, as we must do, we conclude that he has standing to seek an injunction with respect to the picnic tables (as well as the broken security light). *See Boswell v. Mayer*, 169 F.3d 384, 387 (6th Cir. 1999) ("[Plaintiff's] status as pro se litigant affords relief from the standing problem, however. Pro se plaintiffs enjoy the benefit of a liberal construction of their pleadings and filings. Such an approach suggests that [Plaintiff] stated a claim on which he has standing to sue.").

other document entitled to judicial notice that categorizes Marsh Branch as a standard fee, expanded fee, or a standard plus expanded fee area. Thus, drawing all reasonable inferences in Bailey's favor, *Keys v. Humana, Inc.*, 684 F.3d 605, 608 (6th Cir. 2012), Bailey's claim that Marsh Branch must provide the minimum amenities required by the charge of a standard amenity recreation fee is plausible.

On remand to the district court, the parties should be provided an opportunity to develop evidence about the designation of Marsh Branch. If the evidence adduced demonstrates that Bailey paid a standard plus expanded amenity fee, then the defendants are required to provide the six standard amenities enumerated in 16 U.S.C. § 6802(f)(4)(D). Conversely, the evidence may demonstrate that the Forest Service charges only an expanded amenity fee for Marsh Branch and therefore is not required to provide standard amenities. Currently, the record is silent as to what Bailey was charged for his pass. And, if this case proceeds to the summary-judgment stage, Bailey's factual allegations about his possession of a pass for Marsh Branch, his use of the facility, the occasions on which he observed that the security light was inoperative, the instances on which he attempted to use the picnic tables but was unable to do so because of their absence, and his attempts to have the purported problems fixed would need to be in the form of a sworn affidavit, and not an unverified complaint, or supported by other admissible exhibits.

Accordingly, we **REVERSE** the district court's dismissal of Bailey's complaint and **REMAND** for further proceedings consistent with this order.

McKeague, Circuit Judge, dissenting. Larry Bailey lacks standing to continue to pursue the only injunctive relief that he requests—an order requiring the Forest Service to "place picnic tables" and "repair the security light" at the Marsh Branch Boat Ramp. Because the majority sees it differently, I respectfully dissent.

Regarding the picnic tables, Bailey pled *no* facts supporting an injury in fact for which picnic tables would redress. "To satisfy the injury in fact requirement, [Bailey] must point to some harm other than" something akin to "'a bare procedural violation.'" *Hagy v. Demers & Adams*, 882 F.3d 616, 621 (6th Cir. 2018) (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1550

(2016)). While Bailey pled facts that gave him standing to seek a security light at the time he filed his complaint, he did not do so for the picnic tables. His complaint does not even so much as suggest that he would use a picnic table if one were provided.

Regarding the light, the Forest Service replaced it, rendering Bailey's requested relief moot. The majority nevertheless reasons that an exception applies—"the fact that the Forest Service repaired the broken light does not render Bailey's suit moot" because "[a] broken light is one of those issues that 'is capable of repetition, yet evading review.'" Maj. Op. at 2 n.1 (quoting *Kerr ex rel. Kerr v. Comm'r of Soc. Sec.*, 874 F.3d 926, 932 (6th Cir. 2017)). I disagree. "For the exception to apply . . . there must be a *reasonable* expectation," *Kerr for Kerr*, 971 F.3d at 932 (emphasis added), that (1) the light will break *and* that (2) the Forest Service will refuse to fix it for such a time to constitute an outright denial of "security services" under the statute, triggering another suit between the same parties. Even assuming this *particular light* constitutes a *required* "*service*" under the FLREA—a questionable proposition, to say the least—I do not think an expectation that the Forest Service will refuse to repair a light it just replaced is "reasonable." True to form, a governmental agency was slow to fix something; but the Forest Service has provided a "new" light that remains "in good working order." In my view, drawing this case out any further is unnecessary.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk