[DO NOT PUBLISH]

In the

United States Court of Appeals

For the Eleventh Circuit

No. 22-13613

Non-Argument Calendar

ELIAS MAKERE,
FSA MAAA,

Plaintiff-Appellant,

versus

E. GARY EARLY,
Administrative Law Judge,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Florida

D.C. Docket No. 4:21-cv-00096-AW-HTC

Before ROSENBAUM, JILL PRYOR, and BRANCH, Circuit Judges.

PER CURIAM:

Elias Makere, proceeding *pro se*, appeals the district court's dismissal of his second amended civil complaint against Florida administrative law judge Edward Gary Early on the grounds that Early was entitled to absolute judicial immunity. Makere argues that the district court erred for several reasons. On the other hand, Judge Early, through counsel, moves for sanctions against Makere under Federal Rule of Appellate Procedure 38 for pursuing a frivolous appeal. After review, we affirm the dismissal of the complaint and we deny the motion for sanctions.

I. Background

This is the second time this case appears before this Court. Previously, Makere, proceeding *pro se*, filed a civil complaint against Judge Early, which the district court *sua sponte* dismissed on judicial immunity grounds, prior to service on Judge Early and without giving Makere notice of its intent to dismiss. *See Makere v. Early*, No. 21-11901, 2021 WL 6143553, at *1–2 (11th Cir. Dec. 30, 2021). We vacated and remanded, concluding that the district court erred in *sua sponte* dismissing the complaint because (1) the preliminary screening provisions of 28 U.S.C. § 1915(e) did not apply as Makere had paid the filing fee, and (2) a dismissal under Federal Rule of Civil Procedure 12(b)(6) was improper because

Judge Early had not filed an answer and the district court did not give Makere notice of its intent to dismiss and an opportunity to respond. *Id.* at *2. Nevertheless, we noted that "[n]othing . . . preclude[d] the district court from *sua sponte* dismissing the case on remand if it determine[d] that the complaint fail[ed] to state a claim provided that . . . the court provide[d] Makere with notice of its intent to dismiss and an opportunity to respond." *Id.* at *2 n.6.

On remand, Makere filed a second amended complaint raising various claims under 42 U.S.C. § 1983 and a claim for "deprivation of rights" under 42 U.S.C. § 1985. Specifically, Makere alleged that Judge Early, while presiding over Makere's employment discrimination case, committed several unlawful actions, including: hiding evidence from Makere by omitting a page from a transcript Makere requested; committing perjury by making false statements concerning Makere's claims in the court's recommended order; and bribing state and federal officials by allegedly giving the Florida Commission of Human Resources and other magistrate judges "something of value" in exchange for violations of Makere's rights through adverse rulings. In terms of relief, he sought various damages as well as declaratory and injunctive relief.

Judge Early filed a motion to dismiss, arguing in relevant part, that the complaint should be dismissed under Rule 12(b)(6) because he was entitled to judicial immunity. Makere opposed the motion to dismiss.

Meanwhile, Makere moved for leave to file a third amended complaint. He alleged that the two magistrate judges that issued rulings in this federal proceeding and Judge Early's counsel had all performed acts that "evidenced their contributions to Defendant Early's . . . conspiracy," and he needed to amend his complaint to include this new evidence and to add those individuals as co-conspirators. Makere attached to his motion a proposed amended complaint consisting of approximately 101 pages and including 8 new defendants.

A magistrate judge issued a report and recommendation ("R&R"), recommending that Makere's request for leave to amend be denied as futile because (1) the complaint violated the local rules for the Northern District of Florida; (2) it violated Federal Rule of Civil Procedure 8; (3) it sought to improperly join defendants in violation of Federal Rule of Civil Procedure 20; and (4) any amendment would cause unjust delay in light of Judge Early's pending motion to dismiss. The district court adopted the R&R.

However, prior to the district court's ruling on Makere's motion to file a third amended complaint, Makere filed a motion for leave to file a fourth amended complaint. In this motion he sought to add four defendants and complained of actions by other individuals and entities associated with his prior employment discrimination claim in the Florida courts. The district court denied Makere's request, concluding that the proposed amended complaint was an impermissible shotgun pleading and failed to state a claim for relief.

With regard to Judge Early's motion to dismiss, a magistrate judge issued an R&R recommending dismissal of the complaint because Makere's claims were barred by absolute judicial immunity.[1] Makere objected to the R&R. The district court overruled Makere's objections and adopted the R&R. Makere timely appealed.

II. Discussion

Makere makes several arguments on appeal, but only two of them are preserved for review.[2] First, he asserts that the district court erred in dismissing the complaint "without allowing [his]

[1] Both the magistrate judge and the district court noted that, following adverse rulings, Makere has filed suit against various judges that have presided over his cases.

[2] In terms of his unpreserved arguments, Makere argues that the magistrate judge below (1) deprived him of his constitutional right to equal protection by denying his request to file documents electronically (Argument V), and (2) violated his constitutional right to due process and "fundamental fairness" in relation to the docketing of and ruling on Makere's motion to take judicial notice (Argument VI). However, we lack jurisdiction to review these rulings because Makere did not appeal them to the district court. *United States v. Renfro*, 620 F.2d 497, 500 (5th Cir. 1980) (stating that "[a]ppeals from the magistrate's ruling must be to the district court," and that we lack jurisdiction to hear appeals "directly from federal magistrates"); *United States v. Schultz*, 565 F.3d 1353, 1359-62 (11th Cir. 2009) (applying *Renfro* where a magistrate judge issued an order on a non-dispositive issue, a party failed to object to the order, and the same party subsequently appealed from the final judgment); *Smith v. Sch. Bd. of Orange Cnty.*, 487 F.3d 1361, 1365 (11th Cir. 2007) ("We have concluded that, where a party fails to timely challenge a magistrate's nondispositive order before the district court, the party waived his right to appeal those orders in this Court.").

requested amendment[s]" (Argument I). Second, he argues that Judge Early is not entitled to judicial immunity in relation to Makere's claim that Judge Early hid evidence and committed perjury because those are not judicial acts and that the district court erred in dismissing his request for declaratory relief because "no official is immune" from such claims (Arguments III and IV).[3] We disagree for the reasons set forth below.

A. Whether the district court erred in dismissing the complaint without permitting Makere to amend

We review a district court's denial of a motion to file an amended complaint for an abuse of discretion. *Green Leaf Nursery v. E.I. DuPont De Nemours & Co.*, 341 F.3d 1292, 1300 (11th Cir. 2003). Federal Rule of Civil Procedure 15 provides that district courts "should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2). Additionally, "[*p*]*ro se* pleadings are held to a less stringent standard than pleadings drafted by attorneys and will, therefore, be liberally construed." *Hughes v. Lott*, 350 F.3d 1157, 1160 (11th Cir. 2003) (quotations omitted). Where a more carefully drafted complaint might state a claim, the district court abuses its discretion if it does not provide a *pro se* plaintiff at least one opportunity to amend before the court dismisses with prejudice.

[3] Makere also asserts that the district court erred in dismissing his complaint because his case was an issue of first impression, and given that there "there is no case precedent" governing a judge's destruction of evidence or perjury, "there [was] no basis for dismissal." We will consider this argument in conjunction with the argument that Judge Early was not entitled to judicial immunity.

See Woldeab v. DeKalb Cnty. Bd. of Educ., 885 F.3d 1289, 1291–92 (11th Cir. 2018). In deciding whether to grant leave to amend, the court should consider factors such as "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [and] futility of amendment." *Equity Lifestyle Properties, Inc. v. Fla. Mowing & Landscape Serv., Inc.*, 556 F.3d 1232, 1241 (11th Cir. 2009) (alteration in original) (quotations omitted).

Here, Makere filed two amended complaints, which the court permitted. Once Makere filed those amended complaints, nothing compelled the district court to continue to offer Makere additional opportunities to further amend his complaint. *See Jackson v. Bank of Am., N.A.*, 898 F.3d 1348, 1358–59 (11th Cir. 2018). Furthermore, as the district court explained, the proposed third and fourth amended complaints suffered from various defects and permitting amendment would have caused undue delay and prejudice. Accordingly, we conclude that the district court did not abuse its discretion in denying Makere's requests for leave to amend.

B. Whether the district court erred in dismissing the second amended complaint on the basis of judicial immunity

We review a district court's grant of judicial immunity and grant of a Rule 12(b)(6) motion to dismiss for failure to state a claim *de novo*. *Hill v. White*, 321 F.3d 1334, 1335 (11th Cir. 2003); *Smith v. Shook*, 237 F.3d 1322, 1325 (11th Cir. 2001). In so doing, we accept

the complaint's allegations as true and construe them in a light most favorable to the plaintiff. *Hill*, 321 F.3d at 1335.

"Judges are entitled to absolute judicial immunity from damages for those acts taken while they are acting in their judicial capacity unless they acted in the clear absence of all jurisdiction." *Bolin v. Story*, 225 F.3d 1234, 1239 (11th Cir. 2000) (quotations omitted). Importantly, "[l]ike other forms of official immunity, judicial immunity is an immunity from suit, not just from ultimate assessment of damages." *Mireles v. Waco*, 502 U.S. 9, 11 (1991). Judicial immunity is absolute—it "applies even when the judge's acts are in error, malicious, or were in excess of his or her jurisdiction." *Bolin*, 225 F.3d at 1239. And it is well-established that this immunity applies to state administrative law judges like Judge Early. *See Smith*, 237 F.3d at 1325. As we have explained,

> [w]hether a judge's actions were made while acting in his judicial capacity depends on whether: (1) the act complained of constituted a normal judicial function; (2) the events occurred in the judge's chambers or in open court; (3) the controversy involved a case pending before the judge; and (4) the confrontation arose immediately out of a visit to the judge in his judicial capacity.

Sibley v. Lando, 437 F.3d 1067, 1070 (11th Cir. 2005).

Additionally, the immunity generally extends to claims for declaratory and injunctive relief. Under § 1983, such relief is available only if the judicial officer violated a declaratory decree or declaratory relief is otherwise unavailable and there is an "absence

of an adequate remedy at law." *See* 42 U.S.C. § 1983; *Bolin*, 225 F.3d at 1242; *Sibley*, 437 F.3d at 1073. A state appellate process is an adequate remedy at law. *Sibley*, 437 F.3d at 1073–74.

Here, Makere argues that the district court erred in granting Judge Early's motion to dismiss on Makere's requests for declaratory relief and his claims that Judge Early (1) hid evidence from Makere by omitting a page from a transcript Makere requested, and (2) committed perjury by misstating or otherwise omitting Makere's claims in Judge Early's order concerning Makere's employment discrimination case.[4] However, these allegations of misconduct relate to actions that clearly fall within Judge Early's judicial role and judicial immunity applies. *Sibley*, 437 F.3d at 1070. More importantly, this immunity applies even if, as Makere argues, "the judge's acts are in error, malicious, or were in excess of his or her jurisdiction." *Bolin*, 225 F.3d at 1239.

[4] Relatedly, Makere argues that the R&R on the motion to dismiss below was "based on a false premise" because the magistrate judge mischaracterized his allegations against Judge Early (Argument II). Specifically, in the R&R, the magistrate judge stated that Makere "complains about Judge Early's order directing [him] to cease a certain line of questioning." Makere asserts that this was a "false premise" because he complained of Judge Early hiding evidence not the cessation order. When the R&R is considered in its entirety, there was no error. The allegation that Judge Early hid evidence was related to Makere's request for a transcript in the context of his request "for a redress of the cessation order." Judge Early provided Makere with a transcript, but it was allegedly missing a page, and it is this missing page that Makere accuses Judge Early of hiding from him. The magistrate judge detailed this information in the R&R. Thus, it is clear that the magistrate judge understood and properly considered the crux of Makere's claim. Accordingly, there was no error.

Furthermore, declaratory and injunctive relief were improper, because there is no suggestion that Judge Early violated a declaratory decree, and because Makere had an adequate remedy at law through the state appeals process. *See Bolin*, 225 F.3d at 1242; *Sibley*, 437 F.3d at 1074. Accordingly, the district court properly concluded that Judge Early had absolute judicial immunity from Makere's claims for damages, declaratory, and injunctive relief.

Accordingly, for the reasons set forth above, we affirm the district court's dismissal, and we turn to the Appellee's motion for sanctions.

III. Motion for Sanctions

Judge Early's counsel moves for sanctions under Rule 38 of the Federal Rules of Appellate Procedure against Makere on the ground that the appeal was frivolous and not taken in good faith. Makere did not respond to the motion. After review, we deny the motion for sanctions at this time.

Rule 38 provides that "[i]f a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee." Fed. R. App. P. 38. "Rule 38 sanctions have been imposed against appellants who raise clearly frivolous claims in the face of established law and clear facts." *Farese v. Scherer*, 342 F.3d 1223, 1232 (11th Cir. 2003) (quotations omitted); *see also Parker v. Am. Traffic Solutions, Inc.*, 835 F.3d 1363, 1371 (11th Cir. 2016) ("For

purposes of Rule 38, a claim is clearly frivolous if it is utterly devoid of merit." (quotations omitted)).

However, generally, where, as here, the appellant is *pro se*, we have declined requests to impose sanctions under Rule 38. *See Woods v. I.R.S.*, 3 F.3d 403, 404 (11th Cir. 1993); *Hyslep v. United States*, 765 F.2d 1083, 1084–85 (11th Cir. 1985). Nevertheless, we have made exceptions and imposed sanctions against *pro se* appellants who were explicitly warned by the district court that their claims were frivolous. *See, e.g.*, *United States v. Morse*, 532 F.3d 1130, 1132–33 (11th Cir. 2008) (imposing sanctions on a *pro se* appellant who had been warned in the district court that his claims were "utterly without merit"); *Pollard v. Comm'r*, 816 F.2d 603, 604–05 (11th Cir. 1987) (imposing sanctions on *pro se* appellant who brought claims that were determined to be frivolous in a previous suit, and for which appellant had been sanctioned); *King v. United States*, 789 F.2d 883, 884 (11th Cir.1986) (imposing sanctions on a *pro se* litigant where the district court had pointed out to the litigant that his claim was directly foreclosed by an unambiguous statute and prior precedent and where identical arguments as those made by the Appellant had been repeatedly declared frivolous by this Court); *Ricket v. United States*, 773 F.2d 1214, 1216 (11th Cir. 1985) (imposing sanctions on *pro se* appellant where "[t]he legal theories advanced by [the appellant] had been rejected uniformly [by the courts] as frivolous" and where the district court had warned the appellant that his suit was frivolous).

Although this appeal is frivolous, none of the special circumstances for awarding sanctions against a *pro se* party exist in this case at this time. There is no indication that Makere is an attorney and he was not previously warned that sanctions would be imposed for frivolous litigation. Thus, because of Makere's *pro se* status, we exercise the discretion afforded us by Rule 38 and decline to impose sanctions at this time. *See Woods*, 3 F.3d at 404 ("There can be no doubt that this is a frivolous appeal and we would not hesitate to order sanctions if appellant had been represented by counsel. However, since this suit was filed *pro se*, we conclude that sanctions would be inappropriate."). However, we caution Makere that any future challenges based on this same set of facts will be deemed frivolous and subject to sanctions.

AFFIRMED. MOTION FOR SANCTIONS DENIED.