IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-13507-K

WADDELL BYNUM,

Plaintiff - Appellant,

versus

DEKALB COUNTY SANITATION,

Defendant - Appellee.

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

ENTRY OF DISMISSAL: Pursuant to the 11th Cir.R.42-1(b), this appeal is DISMISSED for want of prosecution because the appellant Waddell Bynum has failed to pay the filing and docketing fees to the district court within the time fixed by the rules, effective January 30, 2018.

DAVID J. SMITH
Clerk of Court of the United States Court
of Appeals for the Eleventh Circuit

by: Beth Johnson-Kellmayer, K, Deputy Clerk

FOR THE COURT - BY DIRECTION

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

WADDELL BYNUM, JR.,	
Plaintiff,	**CIVIL ACTION FILE**
v.	**NO. 1:16-CV-4151-MHC**
DEKALB COUNTY SANITATION,	
Defendant.	

ORDER

The matter is before the Court on Magistrate Judge Alan J. Baverman's Final Report and Recommendation [Doc. 2] ("R&R"), which recommends that Plaintiff's claims be dismissed with prejudice on frivolity grounds. The Order for Service of the R&R [Doc. 4] provided notice that, in accordance with 28 U.S.C. § 636(b)(1), the parties were authorized to file objections within fourteen (14) days of the receipt of that Order. Within the time permitted for objections, Plaintiff filed his "Objection to Decision" ("Pl.'s Objs.") [Doc. 5].

In reviewing a Magistrate Judge's R&R, the district court "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1)(2012). "Parties filing objections to a magistrate's report and recommendation must

specifically identify those findings objected to. Frivolous, conclusive, or general objections need not be considered by the district court." United States v. Schultz, 565 F.3d 1353, 1361 (11th Cir. 2009) (quoting Marsden v. Moore, 847 F.2d 1536, 1548 (11th Cir. 1988)) (internal quotation marks omitted). Absent objection, the district court judge "may accept, reject, or modify, in whole or in part, the findings and recommendations made by the magistrate judge," 28 U.S.C. § 636(b)(1), and "need only satisfy itself that there is no clear error on the face of the record" in order to accept the recommendation. FED. R. CIV. P. 72, advisory committee note, 1983 Addition, Subdivision (b). In accordance with 28 U.S.C. § 636(b)(1) and Rule 72 of the Federal Rules of Civil Procedure, the Court has conducted a *de novo* review of those portions of the R&R to which Petitioner objects and has reviewed the remainder of the R&R for plain error. See United States v. Slay, 714 F.2d 1093, 1095 (11th Cir. 1983).

In the R&R, Judge Baverman correctly states that Plaintiff must exhaust his administrative remedies prior to filing an action in this Court claiming employment discrimination under Title VII of the Civil Rights Act, including proof of a right-to-sue letter from the Equal Employment Opportunity Commission ("EEOC"). R&R at 7. Although Plaintiff alleged in his complaint that he filed a charge of discrimination with the EEOC and received a right-to-sue letter, he indicated that

the alleged discrimination took place eighteen years ago, which would be well past the statute of limitations. R&R at 8 (citing Compl. [Doc. 1-1] at 4). Because of the age of Plaintiff's claims, his claims are frivolous and cannot be pleaded in any manner to cause them not to be frivolous. R&R at 8-9.

In his one-page objections, Plaintiff makes somewhat rambling accusations which do not respond to any of the findings or conclusions of the R&R. Plaintiff refers to a workers' compensation proceeding, then discusses that "part of his problems was driking [sic] water through a cut off water lying around allowing bugs are what have you to use the hose for home." Pl.'s Objs. at 1. Plaintiff then refers to starting a retirement fund and mentions a contract that "calls for a payment of about three hundred thousand dollors [sic] plus workers ccomp [sic] and medical bills for injury of unstabilization" and seeks six million dollars "for consultation insults." Id. The bottom line is that Plaintiff does not raise any specific objections to the R&R nor any arguments that would show that his complaint should not be dismissed as being frivolous.

Therefore, after consideration of Plaintiff's objections and a *de novo* review of the record, it is hereby **ORDERED** that Plaintiffs' objections [Doc. 5] are **OVERRULED**.

The Court **APPROVES AND ADOPTS** the Final Report and Recommendation [Doc. 2] as the as the Opinion and Order of the Court.

It is hereby **ORDERED** that Plaintiff's Complaint [Doc. 1] is **DISMISSED WITH PREJUDICE** pursuant to 28 U.S.C. § 1915(e).

IT IS SO ORDERED this 14th day of March, 2017.

Mark H. Cohen

MARK H. COHEN
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

WADDELL BYNUM, JR.,	:	
	:	
Plaintiff,	:	
	:	**CIVIL ACTION FILE NO.**
v.	:	**1:16-cv-04151-MHC-AJB**
	:	
DEKALB COUNTY SANITATION,	:	
	:	
Defendant.	:	

UNITED STATES MAGISTRATE JUDGE'S ORDER
AND FINAL REPORT AND RECOMMENDATION

Presently before the Court is Plaintiff Waddell Bynum, Jr.'s application to proceed *in forma pauperis* ("IFP"). [Doc. 1]. For the reasons below, the undersigned **GRANTS** the request to proceed IFP. Upon review of the complaint, however, the undersigned finds that Plaintiff cannot state a plausible claim for relief and therefore **RECOMMENDS** that Plaintiff's claims be **DISMISSED WITH PREJUDICE** on frivolity grounds.

I. Introduction

On November 4, 2016, Plaintiff, proceeding *pro se*, filed an application to proceed IFP. [Doc. 1]. Plaintiff seeks IFP status to file an employment-discrimination action under the Americans with Disabilities Act ("ADA"), as amended,

42 U.S.C. § 12101 *et seq.*, because he alleges that Defendant discriminated against him by placing him alone on a route that required two employees–while permitting his colleague to leave work early–so that he had to perform the work of two employees. [Doc. 1-1 at 7]. He further alleges that Defendant terminated his employment after he sustained an injury that resulted in vertigo. [*Id.*]. The undersigned first discusses the IFP application before determining whether the Court can perform the statutorily mandated review pursuant to 28 U.S.C. § 1915(e)(2)(B).

II. IFP Application

In Plaintiff's IFP application, Plaintiff states that he is unemployed and that his only income consists of disability payments of $804 per month. [Doc. 1 at 1-2]. Plaintiff does not report the amount of cash he has on hand, but he reports having $2,000 in a bank account at Wells Fargo. He indicates that he owns no major assets such as a home or automobile. Plaintiff's handwriting is difficult to read, but he appears to report $807[1] in monthly expenses as follows: $60 for utilities, $400 for food, $60 for clothing, $10 for laundry and dry cleaning, $10 for transportation expenses, $100 for recreation, $17 for homeowner's or renter's insurance, and $40 in credit card

[1] On the same day that he filed the instant lawsuit, Plaintiff filed another lawsuit with an IFP application, noting that his monthly expenses total $741. *See* Case No. 1:16-cv-4150-MHC-AJB.

installment payments. [*Id.* at 4-5].[2] Although he specifies a monthly payment for homeowner's or renter's insurance, he does not specify how much he pays in rent. [*Id.* at 4].

The Court "may authorize the commencement . . . of any suit, action, or proceeding . . . without payment of fees and costs or security therefor, by a person who submits an affidavit that includes a statement of all assets such prisoner[3] possesses that the person is unable to pay such fees or give security therefor." 28 U.S.C. § 1915(a). This section is intended to provide indigent litigants with meaningful access to court. *Adkins v. E.I. duPont de Nemours & Co.*, 335 U.S. 331, 342-43 (1948); *Neitzke v. William*, 490 U.S. 319, 324 (1988); *see also Attwood v. Singletary*, 105 F. 3d 610, 612 (11th Cir. 1997) (Section 1915 is designed to ensure "that indigent persons will have equal access to the judicial system."). Thus, § 1915 authorizes suits without the prepayment of fees and costs for indigent plaintiffs. *Demon v. Hernandez*, 504 U.S. 25, 27 (1992). It bears emphasizing that § 1915 creates no absolute right to proceed in civil

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[2] Although Plaintiff lists his total monthly expenses as $807, the sum of his listed expenses is actually $697. [Doc. 1 at 4-5].

[3] Although Congress used the word "prisoner" here, Section 1915 applies to non-prisoner indigent litigants as well as prisoners. *Martinez v. Kristi Kleaners, Inc.*, 364 F.3d 1305, 1306 n.1 (11th Cir. 2004).

actions without payment of costs. Instead, the statute conveys only a privilege to proceed to those litigants unable to pay costs without undue hardship. *Startti v. United States*, 415 F.2d 1115, 1116 (5th Cir. 1969).[4] Moreover, while the privilege of proceeding *in forma pauperis* does not require a litigant to demonstrate absolute destitution, it is also clear that "something more than mere statement and an affidavit that a man is 'poor' should be required before a claimant is allowed to proceed in forma pauperis." *Levy v. Federated Dep't Stores*, 607 F. Supp. 32, 35 (S.D. Fla. 1984) (quoting *Evensky v. Wright*, 45 F.R.D. 506, 507-08 (N.D. Miss. 1968)). The affidavit required by the statute must show an inability to prepay fees and costs without foregoing the basic necessities of life. *Adkins*, 335 U.S. at 339; *Zuan v. Dobbin*, 628 F.2d 990, 992 (7th Cir. 1980).

Given that Plaintiff's income consists entirely of disability benefits and is nearly equivalent to his modest monthly expenses, the Court concludes that Plaintiff cannot pay the costs and expenses of bringing his civil action. Accordingly, the Court **GRANTS** Plaintiff's application to proceed IFP.

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[4] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

III. Frivolity Review

Because the Court has determined that Plaintiff may proceed IFP, the Court must perform a review pursuant to 28 U.S.C. § 1915(e). Under 28 U.S.C. § 1915(e), a court must "*sua sponte* dismiss [an indigent non-prisoner's] complaint or any portion thereof which is frivolous, malicious, fails to state a claim, or seeks damages from defendants who are immune." *Robert v. Garrett*, No. 3:07-cv-625, 2007 WL 2320064, at *1 (M.D. Ala. Aug. 10, 2007); *see also* 28 U.S.C. § 1915(e)(2)(B)(i)-(iii). A *pro se* complaint is liberally construed. *Douglas v. Yates*, 535 F.3d 1316, 1320 (11th Cir. 2008). Nevertheless, a claim is frivolous under § 1915(e)(2)(B)(i) "if it is 'without arguable merit either in law or fact.' " *Napier v. Preslicka*, 314 F.3d 528, 531 (11th Cir. 2002) (quoting *Bilal v. Driver*, 251 F.3d 1346, 1349 (11th Cir. 2001)). A plaintiff does not state a claim under § 1915(e)(2)(B)(ii) "when the facts as pleaded do not state a claim for relief that is 'plausible on its face.' " *Thompson v. Fernandez Rundle*, 393 Fed. Appx. 675, 678 (11th Cir. Aug. 20, 2010) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). Moreover, § 1915 "accords judges not only the authority to dismiss a claim based on an indisputably meritless legal theory, but also the unusual power to pierce the veil of the complaint's factual allegations and dismiss those claims

whose factual contentions are clearly baseless." *Bilal*, 251 F.3d at 1349 (quoting *Neitzke*, 490 U.S. at 327).

The Court's power to dismiss a claim for frivolity differs and in some ways supercedes the power to dismiss for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure. *Miller v. Donald*, 541 F.3d 1091, 1100 (11th Cir. 2008) (citing *Neitzke*, 490 U.S. at 327); *see also Cofield v. Ala. Pub. Serv. Comm'n*, 936 F.2d 512, 515 (11th Cir. 1991) (recognizing that frivolity review is different from a Rule 12(b)(6) motion to dismiss because judge performing frivolity examination is not required to assume the truth of the allegations). "Thus, wildly implausible allegations in the complaint should not be taken to be true, but the court ought not penalize the [*pro se*] litigant for linguistic imprecision in the more plausible allegations." *Miller*, 541 F.3d at 1100. However, "[i]n those cases in which the statute of limitations had expired prior to filing, a dismissal for frivolity is warranted and the court need not wait for the limitations issue to be raised in a defensive pleading if the issue is apparent on the face of the complaint." *Garza v. Hudson*, 436 Fed. Appx. 924, 925 (11th Cir. Aug. 3, 2011) (citing *Clark v. Ga. Pardons & Paroles Bd.*, 915 F.2d 636, 640-41 n.2 (11th Cir. 1990)).

Before Plaintiff can file an employment discrimination suit under Title VII of the Civil Rights Act of 1964 ("Title VII"), as amended, 42 U.S.C. § 2000e *et seq.*, or under the ADA,[5] he must exhaust all administrative prerequisites, including receiving statutory notice of his right to sue from the Equal Employment Opportunity Commission ("EEOC"). *See Burnett v. City of Jacksonville, Fla.*, 376 Fed. Appx. 905, 906 (11th Cir. Apr. 27, 2010) (citing 42 U.S.C. § 2000e-5(f)(1)); 42 U.S.C. § 12117(a) (incorporating the administrative requirements applicable to claims asserted under Title VII).

Plaintiff asserts that he filed a charge of discrimination against Defendant with the EEOC and received a right-to-sue letter. [Doc. 1-1 at 5]. A party asserting a claim under Title VII or the ADA must do so within ninety days of receiving a notice of right to sue on the claim from the EEOC. *See* 42 U.S.C. § 2000e-5(f)(1) ("within ninety days after the giving of [notice of right to sue on a Title VII claim] a civil action may be brought against the respondent named in the charge"); *Zillyette v. Capital One Fin.*

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[5] In his Complaint, Plaintiff only checks the box stating that he is filing a lawsuit based on an alleged violation of the ADA. [Doc. 1-1 at 2.]. However, he later asserts that Defendant discriminated against him based on his race or color and religion. [*Id.* at 6]. Because racial and religious discrimination are not actionable under the ADA, the Court presumes that, if given the opportunity to replead his claims, Plaintiff would allege any race discrimination claims under Title VII or 42 U.S.C. § 1981, and any religious discrimination claims under Title VII.

Corp., 179 F.3d 1337, 1339 (11th Cir. 1999) ("It is settled law that, under the ADA, plaintiffs must comply with the same procedural requirements to sue as exist under Title VII," including the ninety-day filing limit) (citing 42 U.S.C. § 12117(a)). Plaintiff does not state whether the right-to-sue letter was issued within the last ninety days, which would make this lawsuit timely filed.

Plaintiff, however, does note that the alleged discrimination took place in May 1989. [Doc. 1-1 at 4]. The statute of limitations for a claim for an alleged violation of the ADA, Title VII, and § 1981 actions is set by the limitations period for personal injury torts under state law. *Wallace v. Kato*, 549 U.S. 384, 387 (2007). In Georgia, that limitations period is at most four years. *Everett v. Cobb Cty. Sch. Dist.*, 138 F.3d 1407, 1409-10 (11th Cir. 1998); *Grimes v. Bd. of Regents of Univ. Sys. of Ga.*, 650 Fed. Appx. 647, 651 (11th Cir. May 24, 2016) (explaining that the statute of limitations for claims asserted under 42 U.S.C. § 1981 is, at most, four years); *see also* O.C.G.A. § 9-3-33.

When a plaintiff proceeds *pro se*, the Court is to give the plaintiff a chance to amend the complaint before dismissing the action with prejudice if a more carefully drafted complaint might state a claim. *See Langlois v. Traveler's Ins. Co.*, 401 Fed. Appx. 425, 427 (11th Cir. Oct. 22, 2010). Clearly, because the conduct giving

rise to Plaintiff's claims took place so long ago, he cannot plead a non-frivolous claim no matter how carefully his complaint may be drafted. It is therefore **RECOMMENDED** that the complaint be **DISMISSED WITH PREJUDICE**.

IV. Conclusion

For the reasons set forth above, the Court **GRANTS** Plaintiff's application to proceed IFP. [Doc. 1]. However, because Plaintiff has not—and cannot—plead a non-frivolous claim, the undersigned **RECOMMENDS** that the complaint be **DISMISSED WITH PREJUDICE**.

The Clerk is **DIRECTED** to **TERMINATE** reference to the undersigned.

IT IS SO ORDERED, RECOMMENDED, and DIRECTED, this the 23rd day of February, 2017.

ALAN J. BAVERMAN
UNITED STATES MAGISTRATE JUDGE

Additional material from this filing is available in the Clerk's Office.