UNITED STATES SUPREME COURT

ELIAS MAKERE, FSA, MAAA
(Petitioner)

v.

HON. E. GARY EARLY, ALJ
(Respondent)

On Petition for Writ of Certiorari
to the
Eleventh Circuit Court of Appeals (US)

APPENDIX TO PETITIONER'S PETITION FOR A WRIT OF CERTIORARI

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March 20, 2024

[DO NOT PUBLISH]

In the United States Court of Appeals For the Eleventh Circuit

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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]

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[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.

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[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.

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[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.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA TALLAHASSEE DIVISION

ELIAS MAKERE,

Plaintiff,

v. **Case No. 4:21-cv-96-AW-HTC**

E. GARY EARLY,

Defendant.

_____/

ORDER OF DISMISSAL

Elias Makere alleged discrimination against his former employer. Along the way, he encountered some adverse decisions from Florida Administrative Law Judge E. Gary Early. Makere then filed this pro se § 1983 action against Judge Early, alleging violations of his civil rights. Then, after encountering some adverse decisions here, he attempted to add the district judge and magistrate judge as defendants. He alleged those judges—Judges Walker and Fitzpatrick—had been acting in concert with Judge Early. ECF No. 66 at 3 & n.5. (He also sued those judges in state court.) Those judges recused, ECF Nos. 57, 58, and the case was assigned to me and a new magistrate judge. He then sued that magistrate judge, who also

recused. ECF Nos. 64, 65. At some point he sued me also, although he has not effected service. But that is a different case; I am not a party in this case.[1]

Before turning to the magistrate judge's report and recommendation and Judge Early's motion to dismiss, I will address the issue of recusal.[2]

The federal recusal statute provides that a judge must "disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). Under this provision, a judge must recuse "only if 'an objective, disinterested, lay observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt about the judge's impartiality.'" *United States v. Amedeo*, 487 F.3d 823, 828 (11th Cir. 2007) (quoting *United States v. Patti*, 337 F.3d 1317, 1321 (11th Cir. 2003)).

Ordinarily, I would not preside over an action involving a party who had litigation pending against me personally. This is because, ordinarily, that situation would make a reasonable observer entertain doubt about the judge's impartiality.

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[1] I have recused in *that* case. *Makere v. Fitzpatrick*, No. 4:22-cv-315-RH-ZCB, ECF No. 33 (Sept. 6, 2022). A judge must recuse in any case in which he is a party. 28 U.S.C. § 455(b)(5)(i).

[2] Makere raised recusal in his objection to the report and recommendation. ECF No. 67 at 14. But I would have addressed it either way because the duty to recuse "is an 'affirmative, self-enforcing obligation.'" *Jenkins v. Anton*, 922 F.3d 1257, 1271 (11th Cir. 2019) (quoting *United States v. Kelly*, 888 F.2d 732, 744 (11th Cir. 1989)).

But these are not ordinary circumstances, and in this unusual situation, recusal is not necessary.

Recusal decisions "are extremely fact driven." *In re Moody*, 755 F.3d 891, 895 (11th Cir. 2014). The facts here are that Makere keeps suing judges assigned to his case after a judge makes any ruling not to his liking. It is obvious from Makere's pattern that if I recused, this would simply mean a new judge would have the case, get sued, and be in the precise situation I am now in. Recusing in this circumstance would do no good and would not serve the recusal statute's purpose.

There is no hard-and-fast rule that a judge must recuse when he is sued. *See United States v. Grismore*, 564 F.2d 929, 933 (10th Cir. 1977) ("A judge is not disqualified merely because a litigant sues or threatens to sue him."); *In re Martin-Trigona*, 573 F. Supp. 1237, 1243 (D. Conn. 1983) ("[A] judge is not disqualified under 28 U.S.C. § 455 . . . merely because a litigant sues or threatens to sue him."). Congress could have, of course, made such recusals mandatory, as it did with other categories of cases. *Cf.* 28 U.S.C. § 455(b)(4) (requiring recusal when the judge has a financial interest in a party). But it did not.

This makes ample sense. If a litigant could disqualify any judge by simply suing him in a separate case, litigants could effectively choose their own judges. *Cf. Carter v. West Publ'g. Co.*, 1999 WL 994997, at *2 (Tjoflat, J.) ("Congress required that a judge's impartiality must 'reasonably be questioned' in order for the judge to

recuse, because 'there is the need to prevent parties from . . . manipulating the system for strategic reasons, perhaps to obtain a judge more to their liking.'" (quoting *FDIC v. Sweeney*, 136 F.3d 216, 220 (1st Cir. 1998) (internal quotation marks omitted)).

At bottom, the situation is that Makere serially sues every judge he comes across in this case.[3] Under these unusual circumstances, I conclude that no "objective, fully informed lay observer would entertain significant doubt about the judge's impartiality." *Christo v. Padgett*, 223 F.3d 1324, 1333 (11th Cir. 2000). Therefore, I have no obligation to recuse. And because "[t]here is as much obligation for a judge not to recuse when there is no occasion for him to do so as there is for him to do so when there is," *In re Moody*, 755 F.3d at 895, I must not recuse.

I now turn to the merits, which are straightforward. Judge Early moved to dismiss based on judicial immunity. In her report and recommendation, the magistrate judge thoroughly analyzed the issue and concluded that Judge Early was correct. I have carefully considered the report and recommendation and have considered de novo Makere's objections. I overrule the objections and adopt the report and recommendation.

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[3] Makere has sued the magistrate judge whose report and recommendation is now before me—the magistrate judge whom Makere sued after the previous two magistrate judges recused after themselves being sued. *See Makere v. Fitzpatrick*, No. 4:22-cv-315-RH-ZCB, ECF No. 9 (July 29, 2022).

The motion to dismiss (ECF No. 34) is GRANTED. All other pending motions are denied as moot. The report and recommendation (ECF No. 66) is ADOPTED and INCORPORATED into this order. The clerk will enter a judgment that says, "Plaintiff's claims are dismissed on the merits based on judicial immunity." The clerk will then close the file.

SO ORDERED on September 29, 2022.

s/ *Allen Winsor*
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

ELIAS MAKERE,

Plaintiff,

v. Case No. 4:21cv96-AW-HTC

E. GARY EARLY,
ADMINISTRATIVE LAW JUDGE,

Defendant.
_____/

REPORT AND RECOMMENDATION

Plaintiff, Elias Makere, files this civil action under 42 U.S.C. § 1983 against Defendant E. Gary Early, Administrative Law Judge, claiming Judge Early violated his constitutional rights in relation to an employment discrimination matter against Plaintiff's former employer, Allstate. Judge Early has moved to dismiss the action.[1] Doc. 34. Upon careful consideration of the motion, Plaintiff's responses,[2] and the relevant law, the undersigned recommends the motion be GRANTED because Plaintiff's claims are barred by absolute judicial immunity.

[1] Judge Early also moves to strike certain allegations, which he describes as "scandalous." Given the recommendation of dismissal, the undersigned finds it unnecessary to address that part of the motion.

[2] Plaintiff filed two responses and an affidavit containing essentially the same arguments. *See* Docs. 42, 43, 55.

I. BACKGROUND

Plaintiff initiated this action on February 16, 2021. Doc. 1. It was originally assigned to Chief District Judge Walker and referred to Magistrate Judge Fitzpatrick. On review of the amended complaint, Judge Fitzpatrick issued a report and recommendation, Doc. 11, recommending the case be dismissed *sua sponte* prior to service because Plaintiff's claims against Judge Early are barred by judicial immunity. Judge Walker adopted the report and recommendation, over Plaintiff's objection, and dismissed the action. Doc. 14. Plaintiff appealed the dismissal to the Eleventh Circuit, which vacated the dismissal and remanded the case, finding dismissal to be inappropriate prior to service because Plaintiff was not proceeding *in forma pauperis* and was not provided prior notice of an intent to dismiss.[3] Docs. 28, 32. The court did not address the application of judicial immunity. *Id.*

On remand, Plaintiff filed a second amended complaint,[4] Doc. 26, which included additional allegations of bribery against Judge Early and also, as discussed

[3] *But see, Paez v. Sec'y of Fla. Dep't of Corr.*, 947 F.3d 649, 654 (11th Cir. 2020) (holding *sua sponte* dismissal of habeas petition based on timeliness grounds, even though a waivable defense, was not erroneous where petitioner was provided notice and an opportunity to explain why the petition was timely in response to a magistrate judge's report and recommendation).

[4] Plaintiff also moved to file a third and fourth amended complaint, Docs. 45, 53, which motions were denied. The Court denied Plaintiff's motion to file a third amended complaint because the proposed complaint was 100 pages long and sought to allege claims against numerous other defendants, including Chief Judge Walker, which did not arise out of the same conduct or transaction as the claim against Judge Early. Docs. 50, 62. The Court also denied Plaintiff's motion to file a fourth amended complaint, finding the proposed fourth amended complaint to be a shotgun pleading and containing only conclusory allegations against new defendants that failed to state a claim for which relief could be granted. Doc. 63.

below, allegations of misconduct between Judge Early and Judges Walker and Fitzpatrick.[5] The following facts are taken from Plaintiff's second amended complaint.

Plaintiff filed a complaint against Allstate with the Florida Commission of Human Resources ("FCHR") on June 30, 2017, alleging race and sex discrimination. Doc. 26 at 6. Allstate, contended, however, that it terminated Plaintiff because he failed an actuarial exam. *Id.* The FCHR issued a "no reasonable cause" determination, concluding that there was no "evidence of discrimination" and, instead, that Plaintiff "was terminated for failing his exam and not securing a non-actuarial position." *Id.* at 35. Thereafter, Plaintiff filed a Petition for Relief with the FCHR and the case was transmitted to the Florida Division of Administrative Hearings ("DOAH"). *Id.* at 7. "After a series of irregularities (authority breaches, deposition sit-ins, recusals, etc.), Judge Early became the administrative hearing officer over Plaintiff's case." *Id.*

According to Plaintiff, the facts developed "heavily" in his favor, and he had a "smoking gun for proving that Allstate's reason for terminating Plaintiff's employment was a pretext." *Id.* at 7. At the hearing, other facts were revealed

[5] After the matter was remanded, Plaintiff sued Judges Walker and Fitzpatrick in state court, resulting in their recusals from this action. *See* Docs. 56, 57, 58. Upon their recusals, the matter was assigned to Judge Winsor and referred to Chief Magistrate Judge Frank. After receiving adverse orders from Judge Frank and Winsor, including orders denying motions to amend as futile, Plaintiff sued Judges Winsor and Frank in state court, resulting in Judge Frank's recusal from this action, and the reassignment of this case to the undersigned. Docs. 64, 65.

against Allstate's employment practices that "were cementing," rendering Plaintiff's case a "textbook case for employment discrimination." *Id.* at 8. Plaintiff accuses Judge Early of (1) hiding evidence, (2) committing perjury, and (3) bribing others to further his crimes during the administrative proceedings. Doc. 26 at 16.

During a November 3, 2018 hearing, Judge Early "ordered Plaintiff to cease questioning" "during the moments in which the payment disparity was being revealed." *Id.* at 9. After the hearing, Plaintiff asked Judge Early "for a redress of the cessation order." *Id.* "Two days later, Plaintiff received a copy of the hearing transcript" and "one page" was missing. *Id.* "[T]hat crucial page was one that contained testimony on the payment disparity and Judge Early's cessation order." *Id.* Plaintiff contends Judge Early knew Plaintiff had never requested a hearing transcript before and "prey[ed] on his novice" as a *pro se* litigant. *Id.* Based on these alleged facts, Plaintiff accuses Judge Early of "willfully and knowingly hid[ing] material evidence." *Id.*

Plaintiff also accuses Judge Early of "making a wholesale removal of Plaintiff's sex discrimination charge" when he entered a Recommended Order. *Id.* at 10. Judge Early further made "false" statements including that Plaintiff "never complained of sex discrimination prior to the DOAH proceedings" even though he raised a sex discrimination charge against Allstate. *Id.* at 11. The "force and effect of [Judge Early]'s statement made the FCHR change its tune" and issue its Final

Order adopting Judge Early's ruling. *Id.* Judge Early "knew he was lying" because "prior to authoring his Order, [Judge Early] deliberately acknowledged that the sex discrimination charge was in Plaintiff's originating complaint" and his "lie had its intended effect." *Id.* at 11-13.

Also, Judge Early "enlisted others to help effectuate his illegalities" by "bribing state officials" and "bribing federal officials." Doc. 26 at 13. Florida Statute Section 760.06(4), "empowers the FCHR to accept gifts and bequests to 'help finance its activities.'" *Id.* Plaintiff asked the FCHR whether it could accept a respondent's gifts/bequests during an active case, and "the agency answered with an emphatic yes" stating "there is no applicable case law suggesting that the Commission cannot accept bequests during the investigation of a claim." *Id.* "[U]pon information and belief," Judge Early is one of the "stakeholders" that "gave the FCHR something of value in exchange for violating Plaintiff's constitutional rights." *Id.* at 14.

Finally, Plaintiff alleges Judge Early "gave Magistrate Judge Martin Fitzpatrick something of value in exchange for alienating Plaintiff's 1st Amendment Rights" and Judge Fitzpatrick followed through by *sua sponte* dismissing this case." Judge Early also "bequested Chief Judge Mark Walker with something of value in exchange for violating Plaintiff's 1st Amendment Rights—based on information and

belief." *Id.* Judge Walker "followed through by rubber-stamping" the dismissal, which the Eleventh Circuit ultimately vacated. *Id.*

II. LEGAL STANDARD

When evaluating a motion to dismiss under Rule 12(b)(6), the question is whether the complaint "contain[s] sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678 (citation omitted). However, "[l]abels and conclusions" or "a formulaic recitation of the elements of a cause of action" that amount to "naked assertions" will not suffice. *Id.* (quotations and citation omitted). Moreover, a complaint must "contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory." *Roe v. Aware Woman Ctr. for Choice, Inc.*, 253 F.3d 678, 683 (11th Cir. 2001) (quotations and citations omitted). In considering a motion to dismiss for failure to state a claim, the Court reads Plaintiff's *pro se* allegations in a liberal fashion. *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972).

III. DISCUSSION

Plaintiff sues Judge Early in his individual capacity under 42 U.S.C. § 1983 for violating his First Amendment, Fifth Amendment, Seventh Amendment and Fourteenth Amendment rights. He also sues Judge Early under 42 U.S.C. § 1985. As relief, Plaintiff seeks punitive and compensatory damages, injunctive relief, and a declaratory judgment. *Id.* at 24-25. Judge Early moves for dismissal on several grounds, including judicial immunity. Because the undersigned finds judicial immunity to be a complete bar to this action, the undersigned finds it unnecessary to address the other grounds.

"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." *Sibley v. Lando,* 437 F.3d 1067, 1070 (11th Cir. 2005) (quoting *Bolin v. Story,* 225 F.3d 1234, 1239 (11th Cir. 2000)) (quotation marks omitted). Judicial immunity applies in Section 1983 cases alleging state deprivation of federal constitutional rights, as well as Section 1985 claims. *Dykes v. Hosemann,* 776 F.2d 942, 945 (11th Cir. 1985) (applying doctrine to 1983 claims); *Van Sickle v. Holloway,* 791 F.2d 1431, 1435 (10th Cir.1986) (applying doctrine to 1985 claim). "The doctrine of judicial immunity applies both to actions for damages and suits seeking injunctive and declaratory relief." *Bush v. Washington Mut. Bank,* 177 F.

App'x. 16, 17 (11th Cir. 2006) (citing *Bolin*, 225 F.3d at 1242). The doctrine applies to administrative law judges. *See Butz v. Economou,* 438 U.S. 478, 514 (1978).

In determining whether a judge's act is "judicial" for purposes of immunity, courts consider (1) whether the act is one normally performed by judges, and (2) whether the complaining party was dealing with the judge in his judicial capacity. *Stump v. Sparkman,* 435 U.S. 349, 362 (1978). The Eleventh Circuit has considered the following factors when determining whether an act by a judge is "judicial": (1) was the act complained of a normal judicial function; (2) did the events occur in the judge's chambers or in open court; (3) was the controversy involved a case pending before the judge; and (4) did the confrontation arise immediately out of a visit to the judge in his judicial capacity. *Sibley,* 437 F.3d at 1070. Applying those factors to Plaintiff's allegations, it is clear the acts complained of by Plaintiff were undertaken by Judge Early in his judicial capacity.

As stated above, Plaintiff complains about Judge Early's order directing Plaintiff to cease a certain line of questioning. That order was made during court proceedings and was a normal function of a judge in controlling proceedings before him. *See e.g., Stevens v. Osuna,* 877 F.3d 1293, 1305 (11th Cir. 2017) (judicial functions include maintaining control over the courtroom); *Sibley,* 437 F.3d at 1071 (applying judicial immunity to a plaintiff's challenge to a judge's questions during oral argument). Plaintiff also complains about certain statements or omissions Judge

Early made in his Recommended Order. Judge Early entered that order as part of the administrative proceedings before him and the entry of such an order is clearly a judicial function. *See Wilson v. Bush*, 196 F. App'x. 796, 799 (11th Cir. 2006) ("Entering a judgment or order is a quintessential judicial function and immunity attaches to it. 'This immunity applies even when the judge is accused of acting corruptly.'"). Indeed, Plaintiff's entire interaction with Judge Early arose from Judge Early's role as the administrative law judge in Plaintiff's discrimination matter. *See Stump*, 435 U.S. at 361 (a factor tending to show that a judge acted within his judicial capacity is if "the confrontation arose directly and immediately out of a visit to the judge in his official capacity").

Relying on *Stevens v. Osuna*, Plaintiff attempts to limit the conduct constituting a judicial act to the "power to subpoena witnesses and evidence, to administer oaths, to receive and rule on evidence, to question parties and witnesses, to issue sanctions, to make credibility determinations, and to render decisions." *Stevens*, 877 F.3d at 1302. Plaintiff's reading of *Stevens* is incorrect. That quote from the *Stevens* court was part of the court's discussion of why an immigration judge's role in immigration proceedings is "functionally comparable" to that of other types of judges to whom absolute immunity applies. *Id.* It was not the court's definition of what conduct falls under a judge's "judicial capacity." Rather, after determining that immigration judges should also be afforded absolute immunity, the

Stevens court determined the conduct complained of in that case fell within the scope of the judge's immunity. *Id.* at 1304-05. That conduct included the judge's decision to remove the plaintiff from the courtroom and to close certain proceedings to the public. *Id.* at 1305.

Plaintiff also argues Judge Early was not performing judicial acts, but instead ministerial acts when he "photocop[ied]" the trial transcript and left out a "crucial" page and when he "reduc[ed] the FCHR's determination to writing." Doc. 55 at 21-22. Plaintiff argues by simply reducing the FCHR's determination to writing, Judge Early never exercised subject matter jurisdiction over his claim and thus, could not have been performing a judicial function. *Id.* at 52. However, even if those acts were ministerial, they are nonetheless "'normally performed by a judge,' and, thus, are within the contemplated protection of judicial immunity." *Benedek v. Adams*, 725 F. App'x. 755, 759 (11th Cir. 2018) (unpublished) (rejecting argument "that judicial immunity should not extend to courtroom acts that are purely ministerial") (quoting *Mireles v. Waco*, 502 U.S. 9, 12 (1991)).

Furthermore, Judge Early did not act in clear absence of jurisdiction. An act is done in "clear absence of all jurisdiction," for judicial immunity purposes, if the matter upon which the judge acted is clearly outside the subject matter jurisdiction of the court over which he presides. *See Dykes*, 776 F.2d at 946-48. Jurisdiction "means judicial power to hear and determine a matter, not the manner, method or

corruptness of the exercise of that power." *McGlasker v. Calton,* 397 F. Supp. 525, 530 (M.D. Ala.), *aff'd,* 524 F.2d 1230 (5th Cir. 1975). Here, Judge Early, as an administrative law judge with the DOAH, had subject matter jurisdiction to hear Plaintiff's claims pursuant to Florida Statute § 760.11, which details the procedures for a claimant to file a complaint with the FCHR and to seek a hearing before an administrative law judge after receipt of a "no reasonable cause" determination.

Because Judge Early did not act in clear absence of jurisdiction, judicial immunity applies even if Judge Early acted in excess of that jurisdiction. *See e.g., McGlasker,* 397 F. Supp. at 531 (holding that judge's conduct in bargaining with defendant to dismiss proceedings against him if he would pay his debts and leave county, constituted at worst no more than acts in excess of jurisdiction rather than acts done without jurisdiction, and thus doctrine of judicial immunity applied to bar such defendant's suit against judge). It applies even if Judge Early made an error. *Stevens,* 877 F.3d at 1305 ("If judicial immunity means anything, it means that a judge will not be deprived of immunity because the action he took was in error or was in excess of his authority.").

Finally, Plaintiff argues Judge Early is not entitled to judicial immunity because he engaged in wrongful conduct, including perjury, bribery, conspiracy, and destruction of evidence. Courts, however, have consistently found such allegations to be insufficient to subject a judge to suit. *See e.g., Pierson v. Ray,* 386 U.S. 547,

554 (1967) ("[I]mmunity applies even when the judge is accused of acting maliciously and corruptly"); *see also Dennis v. Sparks,* 449 U.S. 24, 2, (1980) (holding that judges have absolute immunity from suit, even where a plaintiff claims that they have conspired to corrupt their office); *Ashelman v. Pope,* 793 F.2d 1072, 1078 (9th Cir. 1986) (en banc) (a conspiracy between judge and prosecutor to predetermine the outcome of a judicial proceeding does not pierce the immunity extended to judges and prosecutors); *Stump,* 435 U.S. at 356-57 (immunity applies even when the judge's conduct "was in error, was done maliciously ....").[6] "[E]ven a judge who is approached as a judge by a party [and conspires with such party] to violate [another party's federal constitutional rights] is properly immune from a damage suit brought under section 1983." *Dykes,* 776 F.2d at 946 (quoting *Harper v. Merckle,* 638 F.3d 848, 856 n.9 (5th Cir. Unit B 1981)) (citations omitted).

Moreover, Plaintiff's allegations of bribery, which are made "upon information and belief," are purely conclusory and, thus, cannot be accepted as true. *See Oxford Asset Mgmt., Ltd. v. Jaharis,* 297 F.3d. 1182, 1188 (11th Cir. 2002) (stating the court need not accept as true "conclusory allegations, unwarranted deductions of facts or legal conclusions masquerading as facts"). Plaintiff does not

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[6] *See also, Gozzi v. County of Monterey,* 2014 WL 6988632, at *7 (N.D. Cal. Dec. 10, 2014) ("even if the Judicial Defendants had acted corruptly and received bribes, as Plaintiff appears to allege, they would still be immune from Plaintiff's § 1983 claim"); *Rote v. Comm. on Jud. Conduct and Disability of Jud. Conf. of U.S.,* 2021 WL 6197041, at *9 (D. Or. Dec. 30, 2021) (finding plaintiff's allegations of conspiracy and bribery against Judge Herndon did not foreclose judicial immunity).

provide any facts to support such claims, he merely contends Judge Early gave something of value to the FCHR and to Judges Fitzpatrick and Walker. Doc. 26 at 14-15. Such bald allegations are insufficient to defeat absolute judicial immunity. *See Casavelli v. Johanson*, 2020 WL 7643170, at *5 (D. Ariz. Dec. 23, 2020) (finding judges were immune from bribery claim and, even if judicial immunity did not apply, the claims were conclusory because plaintiff simply argued "upon information and belief" and alleged no facts to support the claim); *Rote*, 2021 WL 6197041, at *16 (finding conclusory allegations "upon information and belief . . . do[] not overcome judicial immunity because Plaintiff has not alleged sufficient facts to establish plausibility"). If, "on mere allegations of conspiracy or prior agreement, [judges] could be hauled into court and made to defend their judicial acts, [it would cause] the precise result judicial immunity was designed to avoid." *Ashelman*, 793 F.2d at 1077.

Plaintiff attempts to distinguish the cases relied upon by Judge Early (some of which are cited herein), such as *Pierson, Sibley, Bolin, Cleavinger, Mordkofsky*, but in doing so wrongly recasts those cases. For example, Plaintiff argues the court applied judicial immunity in *Pierson* because the plaintiffs did not allege specific acts "from the judge," Doc. 42, and ignores the court's 2-paragraph discussion finding judicial immunity applicable in a 1983 case, regardless of allegations of maliciousness or corruptness. *Pierson*, 386 U.S. at 553-54. Similarly, Plaintiff

contends the plaintiff in *Sibley* did not allege the defendant judges committed any illegal acts and ignores that the court dismissed the claims against the judges based on judicial immunity even though one of the allegations was that a state appellate judge used "fabricated" evidence in the opinion. *See Sibley*, 437 F.3d at 1071.

Plaintiff recasts the court's decision in *Bolin*, as being based on a determination the plaintiff had other remedies. That is not a correct characterization. *Bolin* involved a criminal defendant who sued "most of the active and Senior judges" of the Eleventh Circuit, as well as court staff, clerks and prosecutors. *See Bolin*, 225 F.3d at 1236-37. The issue in *Bolin* was whether judicial immunity applied to injunctive relief as well as monetary relief. *See Id.* at 1239-42. The court determined it did and in *dicta* stated that even if it did not, Plaintiff was not entitled to declaratory relief because of the availability of other remedies. *Id.* Thus, the court affirmed the dismissal of all claims against the judges based on judicial immunity.

Plaintiff recasts *Cleavinger* as rescinding judicial immunity. Doc. 42 at 17. That is also incorrect. The *Cleavinger* court declined to extend judicial immunity to prison disciplinary committee members. *Cleavinger v. Saxner*, 474 U.S. 193, 206 (1985). In its discussion, the *Cleavinger* court made clear "[f]ew doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction," and that immunity applies to administrative law judges, whose roles are "'functionally comparable' to

that of a judge." *Id* at 200. Finally, Plaintiff argues *Mordkofksy* was reversed on appeal and ignores why the court did so. The court in *Mordkofsky* reversed the district court's *sua sponte* dismissal because judicial immunity is an affirmative defense and is not jurisdictional. *Mordkofsky v. Calabresi,* 159 F. App'x. 938, 939 (11th Cir. 2005). The court noted, however, that given the settled principles underlying judicial immunity, the district court should, on remand, consider sanctions because a remand will expend additional judicial and governmental resources. *Id.* Unlike *Mordkofsky,* however, Judge Early has raised the defense of judicial immunity in his motion to dismiss. Thus, there is no waiver concern.

Although Plaintiff may be unhappy with the results of the administrative hearing, suing Judge Early is not where his redress lies. Plaintiff does not allege Judge Early acted in the absence of jurisdiction. Plaintiff's allegations against Judge Early relate to normal judicial functions ordinarily performed by a judge. As the Supreme Court has recognized, "[a judge's] errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption." *Pierson,* 386 U.S. at 554. "If judges were personally liable for erroneous decisions, the resulting avalanche of suits, most of them frivolous but vexatious, would provide powerful incentives for judges to avoid rendering decisions likely to provoke such suits. The resulting timidity would be hard to detect or control, and it would manifestly detract from independent and

impartial adjudication." *Forrester v. White*, 484 U.S. 219, 226-27 (1988). The undersigned therefore recommends Judge Early's motion to dismiss be GRANTED without an additional opportunity to amend.

Accordingly, it is respectfully RECOMMENDED:

1. That Judge Early's Motion to Dismiss, Doc. 34, Plaintiff's second amended complaint be GRANTED.

2. That all pending motions in this case be terminated, including the motion to transfer, Doc. 54, and second motion to access the CM/ECF, Doc. 61.

3. That the clerk be directed to close this file.

Done in Pensacola, Florida, this 13th day of July, 2022.

/s/ Hope Thai Cannon

HOPE THAI CANNON
UNITED STATES MAGISTRATE JUDGE

NOTICE TO THE PARTIES

Objections to these proposed findings and recommendations must be filed within fourteen (14) days of the date of the Report and Recommendation. Any different deadline that may appear on the electronic docket is for the court's internal use only and does not control. An objecting party must serve a copy of its objections upon all other parties. A party who fails to object to the magistrate judge's findings or recommendations contained in a report and recommendation waives the right to challenge on appeal the district court's order based on the unobjected-to factual and legal conclusions. *See* 11th Cir. Rule 3-1; 28 U.S.C. § 636.