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

ELIAS MAKERE, FSA, MAAA,

Plaintiff,

vs.

Case No. 4:21cv96-MW-MAF

HON. E. GARY EARLY, ALJ,

Defendant.

_____ /

SECOND REPORT AND RECOMMENDATION¹

In a separate Order entered this day, the prior Report and Recommendation was vacated. The pro se Plaintiff has filed an amended civil rights complaint pursuant to 42 U.S.C. § 1983. ECF No. 6 at 1. Although Plaintiff was required to submit his amended complaint "on the form used in this Court," see ECF No. 4 at 2, he did not do so. The Local Rules of this Court provide that a pro se litigant must file a civil rights complaint on an approved form which will be provided "without charge from

¹ The first Report and Recommendation, ECF No. 5, recommended that this case be dismissed for failure to prosecute. *Id.* Thereafter, Plaintiff belatedly filed an amended complaint and paid the filing fee. In light thereof, the original Report and Recommendation was vacated.

the Clerk” of this Court. N.D. Fla. Loc. R. 5.7(A). The Rule also states that the “Court need not - and ordinarily will not - consider a petition, motion, or complaint that is not filed on the proper form.” *Id.* Notwithstanding that deficiency, Plaintiff’s amended civil rights complaint, ECF No. 6, has been reviewed to determine if service should be directed.

Plaintiff brings this lawsuit against the Honorable E. Gary Early, an Administrative Law Judge with the Florida Division of Administrative Hearings [DOAH]. ECF No. 6 at 4-5. Plaintiff alleged that in late June 2017, he filed a complaint against his former employer (Allstate Insurance Company) with the Florida Commission on Human Relations [FCHR], alleging employment discrimination. *Id.* at 6. He states that the FCHR² concluded that “race and sex were the basis of Plaintiff’s complaint.” *Id.* The case was transmitted to DOAH, and Plaintiff alleges that “[a]fter a series of irregularities (authority breaches, deposition sit-ins, recusals, etc.), Defendant became the administrative hearing officer over Plaintiff’s case.” *Id.*

² An attachment to Plaintiff’s amended complaint reveals 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.” ECF No. 6 at 25 (Ex. D).

Plaintiff contends that the facts developed in his case were “heavily” in his favor and that he had a “smoking gun” to show Allstate’s reason for terminating Plaintiff’s employment was a pretext.” *Id.* at 7. He further alleges that he presented facts which showed “a textbook case of employment discrimination.” *Id.*

However, Plaintiff alleges that during a hearing on November 3, 2018, Defendant Early suppressed evidence and “ordered Plaintiff to cease questioning.” ECF No. 6 at 7. Plaintiff says that after the hearing, he asked “for a redress of the cessation order.” *Id.* at 8. Presumably, the request was denied. Plaintiff then contends that a hearing transcript was missing a “crucial page,” which Plaintiff asserts demonstrates that “Defendant willfully and knowingly hid evidence.” *Id.*

On April 19, 2019, Defendant Early then entered a Recommended Order [“RO”] which “excluded Plaintiff’s sex discrimination charge.” *Id.* at 8. Plaintiff contends the Defendant also made “false” statements throughout the RO, *id.* at 9, which Plaintiff alleges were known to be false because Plaintiff did raise a sex discrimination charge against Allstate. *Id.*

at 9-10.³ On June 27, 2019, the FCHR issued its Final Order and adopted Defendant's ruling. *Id.* at 9. Plaintiff contends that "the force and effect of Defendant's statement made the FCHR change its tune." *Id.* at 9.

Plaintiff alleges that Defendant hid evidence, committed perjury, and in so doing, "denied Plaintiff access to the state's court system" in violation of the First Amendment. ECF No. 6 at 10-11. Further, Plaintiff contends that Defendant violated his right to due process, *id.* at 11, and his right to equal protection. *Id.* at 12. Finally, Plaintiff alleges that Defendant violated the Supremacy Clause and committed perjury, and he argues that judicial immunity is not applicable in this case. *Id.* at 12-13. As relief, Plaintiff seeks punitive and compensatory damages, injunctive relief, and a declaratory judgment. *Id.* at 15.

Well established law provides "absolute immunity" to a judge who is acting within his or her judicial capacity, and such "immunity is not reserved for Article III judges only." Stevens v. Osuna, 877 F.3d 1293, 1301 (11th Cir. 2017). "Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed

³ Plaintiff alleged that Defendant's statements "were a known lie (a big lie - in fact)." ECF No. 6 at 10.

within their judicial jurisdiction.” Cleavinger v. Saxner, 474 U.S. 193, 199, 106 S. Ct. 496, 88 L. Ed. 2d 507 (1985) (quoted in Stevens, 877 F.3d at 1301). “The immunity applies even when the judge’s conduct ‘was in error, was done maliciously, or was in excess of his authority” Stump v. Sparkman, 435 U.S. 349, 356-57, 98 S. Ct. 1099, 55 L. Ed. 2d 331 (1978) (quoted in Stevens, 877 F.3d at 1301).

In Stump v. Sparkman, the Supreme Court set “forth a two-part test for determining when a judge is entitled to immunity from money damages liability when sued under Section 1983.” Simmons v. Conger, 86 F.3d 1080, 1084 (11th Cir. 1996) (citing Stump, 435 U.S. 349, 98 S. Ct. 1099, 55 L. Ed. 2d 331 (1978)). Step one of the test considers “whether the judge dealt with the plaintiff in a judicial capacity” and step two looks at “whether the judge acted in the ‘clear absence of all jurisdiction.’” Simmons, 86 F.3d at 1084-1085 (quoting Stump, 435 U.S. at 362, 98 S. Ct. at 1107). Plaintiff’s allegations make clear that Defendant Early was acting in his capacity as an Administrative Law Judge in a case assigned to him. He was not acting in the absence of jurisdiction because DOAH has subject matter jurisdiction over employment discrimination cases.

There is no allegation that Judge Early dealt with Plaintiff in a purely private capacity. Thus, Plaintiff's claims against the Defendant is barred by absolute judicial immunity.

Plaintiff has argued that the Defendant is not entitled to judicial immunity because "he is an administrative judge." ECF No. 6 at 13. That argument is incorrect. Absolute judicial immunity has been extended to state court judges, Pierson v. Ray, 386 U.S. 547, 554, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967), federal administrative law judges and federal hearing examiners, Butz v. Economou, 438 U.S. 478, 514, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978), federal immigration judges, Stevens, 877 F.3d at 1302, and to justices of the peace. Turner v. Raynes, 611 F.2d 92, 96-97 (5th Cir. 1980). Relying on analysis of the Supreme Court in Cleavinger v. Saxner, 474 U.S. 193, 202, 106 S. Ct. 496, 501, 88 L. Ed. 2d 507 (1985), the Eleventh Circuit Court of Appeals has held that a state ALJ is "functionally comparable to that of a trial judge or a federal ALJ" and, thus, entitled to absolute immunity from suit. Smith v. Shook, 237 F.3d 1322, 1325 (11th Cir. 2001) (concluding that "absolute immunity is necessary for

state ALJ's to ensure that they can perform their functions without harassment or intimidation").

The Court's explanation as to the reasons for absolute immunity are particularly instructive and applicable in this case: "absolute immunity is intended 'for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences.'" Pierson v. Ray, 386 U.S. 547, 554, 87 S. Ct. 1213, 18 L. Ed. 2d 288 (1967) (quoted in Stevens, 877 F.3d at 1301). "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. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation.'" 877 F.3d at 1301 (quotation omitted); see also Forrester v. White, 484 U.S. 219, 226-27, 108 S. Ct. 538, 98 L. Ed. 2d 555 (1988) ("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.” (citation omitted)). Here, Plaintiff is seeking to sue the Defendant because of rulings made in Plaintiff’s prior litigation. However, a party is entitled to litigate a claim on the merits only once, in a single lawsuit. If the party is dissatisfied with the judge’s handling of the lawsuit, the party may appeal. “But when the case is over, it is over.” Silva v. Swift, No. 4:19cv286-RH-MJF, 2020 WL 3287884, at *1 (N.D. Fla. June 18, 2020). The losing party is not entitled to bring a new lawsuit complaining of the first judge’s handling of the first lawsuit. That is precisely “what the plaintiff is improperly attempting to do here.” Silva, 2020 WL 3287884, at *1. For the reasons explained above, Plaintiff’s case cannot go forward.

Furthermore, Plaintiff is advised that “absolute immunity is not merely a defense to liability: it is an immunity from suit and from ‘the other burdens of litigation’ that ‘is effectively lost if a case is erroneously permitted to go to trial.’” Mitchell v. Forsyth, 472 U.S. 511, 526, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985) (cited in Stevens, 877 F.3d at 1304). Thus, it matters not that Plaintiff also seeks declaratory and injunctive relief. This case must be dismissed because the Defendant is entitled to absolute judicial immunity.

RECOMMENDATION

In light of the foregoing, it is respectfully **RECOMMENDED** that Plaintiff's amended complaint, ECF No. 6, be **DISMISSED** because the Defendant is entitled to absolute judicial immunity.

IN CHAMBERS at Tallahassee, Florida, on April 9, 2021.

S/ Martin A. Fitzpatrick
MARTIN A. FITZPATRICK
UNITED STATES MAGISTRATE JUDGE

NOTICE TO THE PARTIES

Within fourteen (14) days after being served with a copy of this Report and Recommendation, a party may serve and file specific written objections to these proposed findings and recommendations. Fed. R. Civ. P. 72(b)(2). A copy of the objections shall be served upon all other parties. A party may respond to another party's objections within fourteen (14) days after being served with a copy thereof. Fed. R. Civ. P. 72(b)(2). Any different deadline that may appear on the electronic docket is for the Court's internal use only and does not control. If a party fails to object to the Magistrate Judge's findings or recommendations as to any particular claim or issue contained in this Report and Recommendation, that party 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.

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