UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DAVID SCHIED, an individual

Plaintiff,

vs.

Case No. 2:15-cv-11840
Hon. Avern Cohn
Magistrate Judge Michael Hluchaniuk

KAREN KHALIL; CATHLEEN DUNN; JOSEPH BOMMARITO; JAMES TURNER; DAVID HOLT; JONATHAN STRONG; POLICE OFFICER BUTLER; JOHN SCHIPANI; REDFORD TOWNSHIP POLICE DEPARTMENT; REDFORD TOWNSHIP 17TH DISTRICT COURT; TRACEY SCHULTZ-KOBYLARZ; CHARTER TOWNSHIP OF REDFORD; CHARTER COUNTY OF WAYNE, MICHIGAN MUNICIPAL RISK MANAGEMENT AUTHORITY; THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA; AMERICAN INTERNATIONAL GROUP, INC; DOES 1-10.

Defendants.

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MMRMA'S RESPONSE TO DOCKET #79, PLAINTIFF'S OBJECTIONS TO THE ORDERS OF THE MAGISTRATE JUDGE

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NOW COMES Defendant MICHIGAN MUNICIPAL RISK MANAGEMENT AUTHORITY ("MMRMA"), by and through its attorneys, Mellon Pries P.C., and for its Response to **Docket #79**, Plaintiff's Objections to the Orders of the Magistrate Judge, states as follows:

I. Plaintiff's Continued, Unsubstantiated Attacks on the Abilities of Hon. Avern Cohn.

Plaintiff contends that the Magistrate Judge imposed time constraints in the middle of a period during which Plaintiff notified the Court he would be out of the State. (**Dkt. #79**, Pg ID 6411). This is untrue. No brief is due during the 30-day stay. He claims Judge Hluchaniuk's actions were arbitrary and capricious, and "executed under the questionable supervision of 90-year old judge Avern Cohn." (***Id.*** at Pg ID 6411). This is not the first time that Plaintiff has raised unfounded accusations regarding the age of Hon. Avern Cohn. In **Docket #75**, Pg ID 6367, Plaintiff alleged that Hon. Avern Cohn may be corrupt, and, that due to Judge Cohn's age, His Honor will be unable to review the filings in this case within the current, unspecified time frame. ("This scope will undoubtedly be amplified by the Court's particularly questionable reasoning of the assigning of a judge in 90+years of age - one who may be so engrained into this 'corrupt judicial system' that his objectivity can legitimately be questioned - to review this instant case of domestic terrorism involving the 'players' and 'actors' of this judge's own 'peer group of other judges (including numerous who [sic] have passed through the 'revolving door'

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from being U.S. Attorneys as the 'prosecutors' of such types of racketeering, corruption, and terrorism. Therefore, a large chunk of time should be needed by this judge to actually read, comprehend familiarize himself with these filings, or to assign a more qualified judge to do so.") (emphasis added).

Plaintiff even titled his prior argument, "Argument in Favor of Allowing Time for 90-Year-Old Federal Judge to Properly Review Filings and Properly Respond to the Above-Referenced Thousands of pages of Filing[.]" (**Dkt. #75**, Pg ID 6366). Plaintiff suggested that due to Hon. Avern Cohn's age, he somehow may need more time to review the proceedings, or perhaps "to assign a more qualified judge to do so." (***Id.*** at Pg ID 6367). Next, Plaintiff alleged that Hon. Avern Cohn may be "so engrained [sic] into this corrupt judicial system" so as to lack objectivity (***Id.***).

Plaintiff offers no evidence, and Counsel for MMRMA knows of no reason, why Judge Cohn's age is of any relevance. In fact, Hon. Wesley E. Brown formerly of the U.S. District Court for the District of Kansas continued to hear cases at the age of 103, and Oliver Wendell Holmes, Jr., served on the U.S. Supreme Court until he was nearly 91 years of age. Plaintiff's accusations regarding Judge Cohn's objectivity are also unfounded, as Counsel for MMRMA is aware of no legitimate reason to question the integrity of a respected jurist.

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II. Plaintiff's Objection is Untimely.

Pursuant to Fed. R. Civ. P. 72(a):

> When a pretrial matter not dispositive of a party's claim or defense is referred to a magistrate judge to hear and decide, the magistrate judge must promptly conduct the required proceedings and, when appropriate, issue a written order stating the decision. A party may serve and file objections to the order within 14 days after being served with a copy.

(emphasis added). The Order in question was entered on 09/30/2015. (**Dkt. #78**). Plaintiff's objection was postmarked October 14, 2015. (**Dkt. #79**, Pg ID 6429). Plaintiff's objection was not received until October 19, 2015, as evidenced by the stamp of this Court's Flint Office. (***Id.***). While the Sixth Circuit recognizes the "mailbox rule" for prisoners, *Brand v Motley*, 526 F3d 921, 925 (6th Cir 2008), such a rule is not in place, generally, for all *pro se* litigants. In fact, the Sixth Circuit has rejected the rule in other circumstances, including taxpayer suits, appeals of immigration decisions, and regarding filing appeals for bankruptcy court decisions. *Laird v Northon Healthcare*, 442 Fed Appx 194, 199 n3 (6th Cir 2011) (**Exhibit A**). Therefore, the objection is untimely. Additionally, pursuant to L.R. 72.1(d), "A person serving objections permitted by Fed. R. Civ. P. 72 must serve them on the magistrate judge and all parties and other persons entitled to be heard on the matter." (emphasis added). Plaintiff did not serve MMRMA on or before

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October 14, 2015, but, rather, waited for this Court to docket the filing and send notice of e-filing.

III. The Supremacy Clause is not Implicated.

Plaintiff's argument is apparently that the U.S. Constitution trumps local court rules. (**Dkt. #75**, Pg ID 6414). Plaintiff apparently contends that by imposing page limitations, which he utterly ignored and for which his documents were stricken, the Court Rules somehow abridge a substantive right. (***Id.*** at Pg ID 6415-16). "A judge may regulate practice in any manner consistent with federal law, rules adopted under 28 U.S.C. §§ 2072 and 2075, and the district's local rules." Fed. R. Civ. P. 83(b). Page limitations are quintessentially procedural rules, and 28 U.S.C. § 2072 permits such procedural regulations. *E.g.*, *Timmerman v. U.S. Bank, N.A.*, 483 F.3d 1106, 1112 (10th Cir. 2007) (upholding a 20-page limitation on briefs). In reality, the objection appears to be based on Plaintiff's refusal to respond within the page limitations provided, and not on page limitations being an actual violation of the U.S. Constitution. As MMRMA was able to make its argument within the page limitation, Plaintiff should not be heard to argue that he cannot respond within the same limitations.

Further the Court's rule-making power is specifically authorized by an act of Congress, 28 U.S.C. § 2017, and therefore, the rules are supreme to any contrary authority pursuant to the Supremacy Clause. No provision of the U.S.

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Constitution, itself, or any federal statute is violated by imposing procedural briefing limitations 1.) on all parties, and 2.) where the brief to which Plaintiff would be responding was contained within the page limits. Plaintiff cites no authority stating that Due Process precludes a court from imposing page limitations on litigant briefing.

Plaintiff also continues to believe that criminal procedure applies to this civil case, and seeks a grand jury or special master. (**Dkt. #79**, Pg ID 6418). Plaintiff has been repeatedly warned by numerous courts about seeking criminal redress in a civil lawsuit. *Schied v. Snyder*, No. 10-1176, slip op. at 3 (6th Cir. January 19, 2011) (**Exhibit B**, 3); *Schied v. Rezmierski*, unpublished opinion per curiam of the Michigan Court of Appeals, issued January 22, 2013 (Docket No 303715) (**Exhibit C**, p. 3 n. 2).

III. Plaintiff's Due Process Objection is Duplicative of His Supremacy Clause Objection.

Plaintiff, having just made an objection based on the Supremacy Clause, which rested on the Due Process clause of the United States Constitution being supreme to a court rule, then makes a redundant Due Process objection. (**Dkt. #75**, Pg ID 6418). Plaintiff objects that providing only 14 days to object to an order, when the Court knows that Mr. Schied would be out of town during that time violates due process. (***Id.***). Fed. R. Civ. P. 72 which establishes the time to object, applies equally to all litigants. Due Process is not implicated, as Plaintiff was well

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aware of the published Federal Rules of Civil Procedure, and should have planned accordingly. "The basic elements of procedural due process are notice and opportunity to be heard." *Arch of Kentucky, Inc v Director, Office of Workers' Compensation Programs*, 556 F3d 472, 478 (2009). Plaintiff had notice of the objection requirements of Fed. R. Civ. P. 72, and had opportunity to present his objections, and has, in fact presented those objections. Therefore, this objection is baseless, as due process has been satisfied.

Furthermore the ability to object to a magistrate's determination on a non-dispositive matter fails to implicate life, liberty or property, and, therefore, is not even the subject of Due Process. Again, Plaintiff attempts to interject criminal law into this civil matter, accusing Magistrate Hluchaniuk of a criminal offense. (**Dkt. #79**, Pg ID 6491). Again, Plaintiff has been repeatedly warned by numerous courts regarding interjection of criminal claims in a civil lawsuit. (**Exhibit B**, 3; **Exhibit C**, p. 3 n. 2).

IV. Plaintiff's Thirteenth Amendment Objection is Baseless and Offensive.

Plaintiff then asserts that somehow, the prohibition on slavery of the Thirteenth Amendment has been violated because his brief has been limited to 25 pages. (**Dkt. #75**, Pg ID 6419). Equating briefing page limitations with slavery is as baseless as it is offensive.

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Again, Plaintiff attempts to interject irrelevant matters, claiming that the striking of his documents is an attempt to thwart people from reporting "government RICO crimes and domestic terrorism." (***Id.*** at Pg ID 6419). Plaintiff has not brought a civil RICO suit, and is precluded from bringing any criminal actions, as he is not a person charged with authority to bring such actions. Plaintiff also asserts the striking of his pleadings is criminal obstruction of justice on the part of Magistrate Judge Hluchaniuk. (***Id.*** at Pg ID 6420). Once again, Plaintiff has been repeatedly warned by numerous courts not to seek criminal redress in a civil suit. (**Exhibit B**, 3; **Exhibit C**, p. 3 n. 2).

The gist of Plaintiff's argument is that only a criminal court through a conviction can compel an individual to act in any particular manner. (**Dkt. #79**, Pg ID 6420). The United States Supreme Court has addressed the Court's inherent powers, such as contempt, and noted, using terms Plaintiff has frequently attempted to use, "These are sui generis ... and exertions of the power inherent in all courts to enforce obedience, something they must possess in order properly to perform their functions." *Myers v. U.S.*, 264 U.S. 95, 103 (1924). The Court's inherent authority, "empower[s] the court to command obedience to the judiciary and to deter and punish those who abuse the judicial process." *Red Carpet Studios Div. of Source Advantage, Ltd. v. Sater*, 465 F.3d 642, 645 (6th Cir. 2006).

Furthermore, the United States Supreme Court has acknowledged:

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> "Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates." *Anderson v. Dunn*, 6 Wheat. 204, 227, 5 L.Ed. 242 (1821); see also *Ex parte Robinson*, 19 Wall. 505, 510, 22 L.Ed. 205 (1874). These powers are "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Link v. Wabash R. Co.*, 370 U.S. 626, 630-631, 82 S.Ct. 1386, 1388-1389, 8 L.Ed.2d 734 (1962).

Chambers v NASCO, Inc, 501 US 32, 43 (1991). This U.S. Supreme Court has also noted that docket management is included in "the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. North Am. Co.*, 299 U.S. 248, 254 (1936).

Additionally, Plaintiff's argument that only a criminal court may compel a litigant to act overlooks the numerous ways in which a civil court has long been recognized to have such authority, such as through issuance of an injunction, or as Plaintiff has incorrectly sought on numerous occasions, through a writ. Plaintiff's claim that compelling compliance is akin to involuntary servitude is without a basis in the law, and contrary to decisions of the Sixth Circuit Court of Appeals and the United States Supreme Court.

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V. Plaintiff's Consent was not Required to Assign the Case to a Magistrate Judge.

Finally, Plaintiff objects to the orders because they were entered by a Magistrate Judge, to whom he did not consent. (**Dkt. #79**, Pg ID 6423). Plaintiff has made this argument before, and does not seem to understand that his consent is not required to assign a case to a Magistrate Judge.

This argument confuses the authority granted by subsections (b)(1) and (c)(1) of 28 U.S.C. §636. The United States Supreme Court has noted the difference between consensual referrals under subsection (c)(1) and nonconsensual referral under subsection (b)(1). *Roell v. Withrow*, 538 U.S. 580, 585 (2005) (noting that with consent, the Magistrate Judge's findings are dispositive, unlike a nonconsensual referral, which results in the District Court Judge retaining ultimate authority to accept or reject conclusions). The U.S. Court of Appeals for the Sixth Circuit has also recognized that referral under the two subsections of 28 U.S.C. §636 is separate and distinct:

> If the parties consent to a reference under § 636(c)(1) and the district court so designates, a magistrate judge may exercise plenary jurisdiction. *Bennett*, 976 F.2d at 999, n. 9. On the other hand, a reference under § 636(b) is limited to nondispositive pretrial matters or recommendations on dispositive motions.

Vitols v. Citizens Banking Co., 984 F.2d 168, 169 (6th Cir. 1993).

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Referrals under (b)(1) are limited to pretrial matters, other than certain dispositive motions, which are may only be the subject of recommendations; referrals under (c)(1) can include trial and dispositive matters. The former requires no consent, while the latter does. Other federal courts have noted this distinction and have rejected the very consent argument advanced by Plaintiff. "We first note that, notwithstanding Mr. Lammle's objections, the district court's authority under § 636(b)(1)(A) to designate a magistrate judge to hear and determine pretrial matters is not contingent on his consent." *Lammle v. Ball Aerospace & Tech. Corp.*, 589 Fed. Appx. 846, 848 (10th Cir. 2014) (**Exhibit D**). In discussing a referral under subsection (b), it has been held, "For this type of referral, [n]o consent of the parties is required because the magistrate judge is not issuing a final decision on the motion, but rather is recommending a decision to the district judge to which the plaintiff will have the opportunity to object if he disagrees with the determination." *Griffin v. Doe*, 71 F.Supp.3d 306, 311 (N.D. N.Y. 2014). "Pursuant to 28 U.S.C. § 636(b)(1)(B), the district court may, without the parties' consent, assign matters to a magistrate judge for a report and recommendation." *Westcott v. I.R.S.*, 335 Fed. Appx. 410, 412 (5th Cir. 2009) (**Exhibit E**). "Without consent of the parties, the Court may refer any pretrial matter dispositive of a claim to a magistrate judge for a report and recommendation." *Napier v. Cinemark, USA, Inc.*, 635 F.Supp.2d 1248, 1249 (N.D. Okla. 2009). "Because United States

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Magistrate Judges are not Article III judges, they may enter judgment only when the parties have consented to have a Magistrate Judge hear their case. However, a District Court may, in its sole discretion, refer pending matters to a Magistrate Judge for a recommendation." *Salud Para El Pueblo v. Dept. of Health of the Com. of P.R.*, 959 F.Supp. 83, 85 (D. P.R. 1997).

In fact, the Western District of Michigan has just considered, and rejected as meritless, this very same argument:

> 28 U.S.C. § 636 sets forth the jurisdiction and powers of United States magistrate judges. *Roland v. Johnson*, 856 F.2d 764, 768–69 (6th Cir.1988). Section 636(c)(1), which provides that "upon the consent of the parties, a ... United States magistrate judge may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case," is inapplicable to Plaintiff's case. Rather, the Court's referral in this case was made pursuant to § 636(b)(1)(A) and (B), which authorizes the magistrate judge to rule on non-dispositive pretrial motions and make recommendations on dispositive motions. Hence, in this case, the Magistrate Judge only recommended dismissal; she did not, in fact, enter a judgment to dismiss the case. Consent from the parties is not required for a Court to refer a matter to a magistrate judge under § 636(b)(1), and Plaintiff's argument lacks merit for this reason.

Gillman v. I.R.S., No. 1:14-cv-301, 2015 WL 2345521, at *1 (W.D. Mich. Mar. 25, 2015) (**Exhibit F**) (emphasis added).

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CONCLUSION

WHEREFORE, for all these reasons, and for those in the accompanying brief, MMRMA requests this Honorable Court overrule Plaintiff's objections.

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DATED: October 26, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on October 26, 2015, I electronically filed the preceding **MMRMA'S RESPONSE TO DOCKET #79, PLAINTIFF'S OBJECTIONS TO THE ORDERS OF THE MAGISTRATE JUDGE** using the ECF system, which will electronically serve all counsel of record. I have further mailed a copy of **MMRMA'S RESPONSE TO DOCKET #79, PLAINTIFF'S OBJECTIONS TO THE ORDERS OF THE MAGISTRATE JUDGE** to Plaintiff via United States Post Office, First Class Mail at the following address:

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
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DAVID SCHIED, an individual

Plaintiff,

vs.

Case No. 2:15-cv-11840
Hon. Avern Cohn
Magistrate Judge Michael Hluchaniuk

KAREN KHALIL; CATHLEEN DUNN; JOSEPH BOMMARITO; JAMES TURNER; DAVID HOLT; JONATHAN STRONG; POLICE OFFICER BUTLER; JOHN SCHIPANI; REDFORD TOWNSHIP POLICE DEPARTMENT; REDFORD TOWNSHIP 17TH DISTRICT COURT; TRACEY SCHULTZ-KOBYLARZ; CHARTER TOWNSHIP OF REDFORD; CHARTER COUNTY OF WAYNE, MICHIGAN MUNICIPAL RISK MANAGEMENT AUTHORITY; THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA; AMERICAN INTERNATIONAL GROUP, INC; DOES 1-10.

Defendants.

INDEX OF EXHIBITS

Exhibit	Description
A	*Laird v Northon Healthcare*, 442 Fed Appx 194 (6th Cir 2011)
B	*Schied v. Snyder*, No. 10-1176, slip op. (6th Cir. January 19, 2011)
C	*Schied v Rezmierski*, unpublished opinion per curiam of the Michigan Court of Appeals, issued January 22, 2013 (Docket No 303715)
D	*Lammle v. Ball Aerospace & Tech. Corp.*, 589 Fed. Appx. 846 (10th Cir. 2014)
E	*Westcott v. I.R.S.*, 335 Fed. Appx. 410 (5th Cir. 2009)
F	*Gillman v. I.R.S.*, No. 1:14-cv-301, 2015 WL 2345521 (W.D. Mich. Mar. 25, 2015)

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EXHIBIT A

442 Fed.Appx. 194
This case was not selected for publication in the Federal Reporter.
Not for Publication in West's Federal Reporter
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Sixth Circuit Rule 28. (Find CTA6 Rule 28)
United States Court of Appeals, Sixth Circuit.

Mary Anne LAIRD, Plaintiff–Appellant,
v.
NORTON HEALTHCARE, INC., Hartford Life & Accident Insurance Co.; Hartford–Comprehensive Employee Benefits Service Co., Defendants–Appellees.

No. 10–5205. | Oct. 6, 2011.

Synopsis

Background: Former employee brought action under Employee Retirement Income Security Act (ERISA), against employer and administrator of short- and long-term benefits plans, arising out of denial of such benefits. Defendants moved for summary judgment. The United States District Court for the Western District of Kentucky, 2010 WL 411546, granted motion. Employee appealed.

Holdings: The Court of Appeals, Solomon Oliver, Jr., Chief District Judge, sitting by designation, held that:

[1] even if common law mailbox rule applied in employee's ERISA action, employee's affidavit, stating that she had drafted and mailed letter, was insufficient to show that employee affixed sufficient postage or actually deposited the letter in the mail;

[2] futility exception to ERISA's administrative exhaustion requirement did not apply; and

[3] administrator was not equitably estopped from denying plan participant's claim.

Affirmed.

West Headnotes (3)

[1] **Evidence**
Mailing, and delivery of mail matter

Even if common law mailbox rule applied in employee's ERISA action, employee's affidavit, stating that she had drafted and mailed letter, was insufficient to show that employee affixed sufficient postage or actually deposited the letter in the mail. Employee Retirement Income Security Act of 1974, § 2, 29 U.S.C.A. § 1001.

2 Cases that cite this headnote

[2] **Labor and Employment**
Excuse; futility

Employee's available administrative avenues for relief from denial of short-and long-term disability benefits under ERISA plan were not so obviously dead ends that they were not worth pursuing at all, as required for futility exception to apply to ERISA's administrative exhaustion requirement. Employee Retirement Income Security Act of 1974, § 2, 29 U.S.C.A. § 1001.

4 Cases that cite this headnote

[3] **Labor and Employment**
Estoppel of plan to deny eligibility or coverage

ERISA plan administrator was not equitably estopped from denying plan participant's claim for long-term disability based on participant's reliance on another employee's suggestion not to apply for long-term disability until she was approved for short-term disability, where such employee was not employed by plan administrator. Employee Retirement Income Security Act of 1974, § 2, 29 U.S.C.A. § 1001.

4 Cases that cite this headnote

*195 On Appeal from the United States District Court for the Western District of Kentucky.

BEFORE: GIBBONS and WHITE, Circuit Judges; and OLIVER, Chief District Judge. *

* The Honorable Solomon Oliver, Jr., Chief Judge of the United States District Court for the Northern District of Ohio, sitting by designation.

OPINION

SOLOMON OLIVER, JR., Chief District Judge.

1 Plaintiff–Appellant, Mary Anne Laird ("Laird") appeals the district court's granting of summary judgment in favor of Defendants–Appellees Norton Healthcare ("Norton"), Hartford–Comprehensive Employee Benefits Services Company ("Hartford–CEBSCO"), and Hartford Life and Accident Insurance Company ("Hartford Life") (collectively, "Defendants"). For the following reasons, we **AFFIRM the judgment of the district court.

I. FACTUAL AND PROCEDURAL HISTORY

This case arises from a dispute over short-term and long-term disability benefits under insurance polices governed by the Employee Retirement Income Security Act of 1974 ("ERISA"). 29 U.S.C. §§ 1001–1461 (2006). Laird was employed by Norton and, as an employee of Norton was issued two disability benefits plans: a short-term disability plan ("STD Plan") and a long-term disability plan ("LTD Plan"). The STD Plan was insured by Norton and administered by Hartford–CEBSCO. The LTD Plan was both insured and administered by Hartford Life. While employed by Norton, Laird became *196 ill and sought payment of short-term disability benefits from Norton and Hartford–CEBSCO and payment of long-term benefits from Hartford Life. On August 18, 2008, Laird filed a Complaint in the Jefferson Circuit Court. Defendants timely removed the action to the district court. On February 9, 2009, Hartford Life and Hartford–CEBSCO filed their respective Motions to Dismiss, and Norton filed its Motion for Summary Judgment. On January 29, 2010, the district court rendered its opinion, granting Defendants' Motions. [1] On February 26, 2010, Laird filed her Notice of Appeal.

1 The district court analyzed Defendants' Motions under the summary judgment standard despite Defendants Hartford Life and Hartford–CEBSCO filing motions to dismiss. Neither Laird nor Defendants contest the district court's conversion of Hartford Life and Hartford–CEBSCO's Motions to Dismiss into Motions for Summary Judgment.

A. Short–Term Disability Benefits Claim

On July 3, 2003, Laird injured her neck at work and applied for short-term disability benefits. Hartford–CEBSCO denied Laird's application for short-term disability benefits because her injury was sustained at work and thus was exempt from the STD Plan's coverage. Laird has conceded that the denial of her short-term disability benefits claim based on her neck injury was appropriate. Later that same year, Laird suffered a series of strokes that left her unable to work after November 26, 2003. Laird again applied for short-term disability benefits, which Hartford–CEBSCO denied on April 20, 2004. In denying her claim, Hartford–CEBSCO determined that Laird did not present sufficient evidence to show that she was "totally disabled" as required by the STD Plan.

In her Complaint, Laird alleges that, on July 2, 2004, she appealed Hartford–CEBSCO's decision denying her short-term disability benefits by certified mail. Laird attached to her Complaint as "Exhibit B" an appeal letter dated July 2, 2004. Hartford–CEBSCO contends that it never received the July 2, 2004 appeal letter, and that the only correspondence it received from Laird regarding the denial of her claim were two telephone calls inquiring about the denied claim, and three letters from attorneys representing Laird on this matter, the first of which was sent on June 30, 2006. [2] The last letter, sent by Laird's attorney on April 30, 2007, included a copy of the July 2, 2004 letter. Hartford–CEBSCO alleges that the April 30, 2007 letter was the first time Laird notified it of her desire to appeal the denial of her claim. Under the STD Plan, Laird had to submit a written appeal within 180 days of the denial of her claim. Hartford–CEBSCO denied Laird's appeal because it was not submitted within 180 days of the denial of her claim as required by the STD Plan.

2 The first letter, dated June 30, 2006, was addressed to "Hartford" to inform the insurance company that the Law Offices of Driscoll & Associates had been contacted to investigate a possible appeal of Laird's claim. Driscoll & Associates requested a copy of Laird's claims file. The second letter, dated August 11, 2006, was addressed to Hartford Life to inform the company that Wallingford Law, PSC, would be representing Laird for both her short-term and long-term disability benefits claims. Wallingford Law, PSC, requested several documents including copies of the STD and LTD Plans. The third letter, dated April 30, 2007, was addressed to "The Hartford" to inform the company that Segal, Lindsay, & Janes PLLC, would be representing Laird on her claims. The law firm indicated that Laird had appealed her adverse decision on July 2, 2004 and had not received a response to the appeal. The firm attached her appeal letter to its letter.

***197** ****2** The district court granted summary judgment in favor of Defendants on Laird's short-term disability benefits claim. It determined that Laird did not file her appeal within 180 days of the denial of her claim as required by the STD Plan. The court rejected Laird's argument that, under the common law mailbox rule, she was entitled to a rebuttable presumption that she sent her appeal letter on July 2, 2004. The court found that Laird could not maintain her claim against Defendants because Laird had failed to exhaust the administrative remedies prior to bringing this action. *See Coomer v. Bethesda Hosp., Inc.,* 370 F.3d 499, 504 (6th Cir.2004).

B. Long–Term Disability Benefits Claim

In her Complaint, Laird alleges that, on April 29, 2008, she applied for long-term disability benefits by certified mail. Laird further alleges that Hartford Life failed to respond to her application within the required sixty-day deadline and thus constructively denied her claim. Hartford Life contends that Laird's application for long-term disability benefits is untimely and that Laird failed to exhaust her administrative remedies. Under the LTD Plan, a claimant's long-term disability benefits become payable 180 days after the claimant is disabled. A claimant must also file "proof of loss" within 90 days after the 180–day period for which benefits become payable. "Proof of loss" is documentation of information relevant to a claim for disability benefits and includes the date, the cause, and the prognosis of the disability. The LTD Plan allows up to a year extension of the 90–day deadline for submission of "proof of loss." Thus, a claimant must file a complete application, including "proof of loss," within 270 days of the claimant's onset of disability, unless the claimant receives an extension.

The district court determined that Laird did not timely file her "proof of loss" and thus failed to exhaust the LTD Plan's administrative remedies. Laird stated in her affidavit that she mailed her long-term disability benefits application on April 26, 2008, and that Hartford Life received the application three days later on April 29, 2008. Although Hartford Life initially argued that Laird did not submit an application for long-term disability benefits, in its reply in support of its motion to dismiss, Hartford Life assumed that it had received the application on the date specified by Laird. Within her Complaint, Laird pled that the onset of her disability was July 4, 2003. Thereafter, she requested that the district court use two other dates as the onset of her disability: November 26, 2003, and April 19, 2004. The district court determined that Laird was untimely under each of the above onset dates. The court calculated that, even under the later date of April 19, 2004, Laird was required to submit her "proof of loss" by January 14, 2005, 270 days after the April 19 onset. The date Laird maintains she submitted her long-term disability benefits application, April 26, 2008, is well past the January 14, 2005 deadline. Further, Laird's application would still be untimely if she had received a year-long extension under the LTD Plan. The court found that the extension would have expanded Laird's "proof of loss" deadline to January 14, 2006, two years past the deadline.

****3** In response, Laird argued that filing her long-term disability benefits claim would have been futile because Hartford–CEBSCO had already denied her short-term disability benefits claim. Laird further asserted that Hartford Life is equitably estopped from denying her claim because she relied on a statement made by Norton's suburban benefits coordinator, Kim Satterly ("Satterly"), not to apply for long- ***198** term disability benefits because her short-term disability benefits had been denied. The court determined that Laird did not meet the futility exception for an ERISA claim and had not fulfilled the elements for equitable estoppel. The district court granted the Motion for Summary Judgment in favor of Defendants because Laird's long-term disability benefits claim was untimely, and she was not entitled to relief under the futility exception or equitable estoppel.

II. STANDARD OF REVIEW

We review a district court's granting of summary judgment *de novo. Price v. Bd. of Trs. of the Ind. Laborer's Pension Fund,* 632 F.3d 288, 291 (6th Cir.2011). Summary judgment should be granted "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56.

III. LAW AND ANALYSIS

ERISA requires that every employee benefit plan give "a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim." 29 U.S.C. § 1133. This Circuit has determined that "the administrative scheme of ERISA requires a participant to exhaust his or her administrative remedies prior to commencing suit in federal court." *Coomer,* 370 F.3d at 504 (quoting *Miller v. Metro. Life Ins. Co.,* 925 F.2d 979, 986 (6th Cir.1991)).

Laird argues on appeal that the trial court erred in finding that she failed to exhaust her administrative remedies under the STD and LTD Plans because: (1) she is entitled to the rebuttable presumption of the common law mailbox rule that she mailed her appeal letter for her short-term disability benefits claim on July 2, 2004, within the STD Plan's deadline for appeals; (2) filing a claim for long-term disability benefits would have been futile because her short-term disability benefits claim was denied; and (3) she is entitled to relief under the doctrine of equitable estoppel for her long-term disability benefits application against Hartford Life for comments made by Satterly, a Norton employee, who dissuaded her from timely submitting her application.

A. Issue 1: Common Law Mailbox Rule

The common law mailbox rule applies when there is a question regarding whether a document was received by the addressee. The "proper and timely mailing of a document raises a rebuttable presumption that [the document] is received by the addressee." *Carroll v. Comm'r,* 71 F.3d 1228, 1232 (6th Cir.1995) (quoting *Anderson v. United States,* 966 F.2d 487, 491 (9th Cir.1992)). This Circuit has determined that this rebuttable presumption arises upon proof that the document was "properly addressed, had sufficient postage, and was deposited in the mail." *In re: Yoder Co.,* 758 F.2d 1114, 1118 (6th Cir.1985). Sufficient proof that the letter was mailed includes signed receipts from certified mail and documentation of mailing contained in a party's business records. *Custer v. Murphy Oil USA, Inc.,* 503 F.3d 415, 420 (5th Cir.2007). Once the party provides sufficient proof to raise the mailbox rule presumption, this presumption may be rebutted by testimony of non-receipt of the document. *Yoder,* 758 F.2d at 1118. ("Testimony of non-receipt, standing alone, would be sufficient to support a finding of non-receipt.")

**4 [1] This Circuit has not determined whether the common law mailbox rule applies *199 to ERISA cases.[3] We find that even if the rule was extended to ERISA cases[4], Laird has not proffered sufficient evidence to raise a presumption of receipt under the rule. *Yoder,* 758 F.2d at 1118.

3 This Circuit has rejected the application of the mailbox rule in taxpayer suits pursuant to 26 U.S.C. § 7502, *Miller v. United States,* 784 F.2d 728, 730–31 (6th Cir.1986), appeals of immigration decisions, *Vasquez Salazar v. Mukasey,* 514 F.3d 643, 645 (6th Cir.2008), and in regard to the filing date for appeals of bankruptcy court decisions. *See In re LBL Sports Center, Inc.,* 684 F.2d 410, 413 (6th Cir.1982). This Circuit has applied the prison mailbox rule in the context of *pro se* prisoner cases. *See Brand v. Motley,* 526 F.3d 921, 925 (6th Cir.2008) (citing *Richard v. Ray,* 290 F.3d 810, 812–13 (6th Cir.2002) (per curiam) (extending *Houston v. Lack,* 487 U.S. 266, 108 S.Ct. 2379, 101 L.Ed.2d 245 (1988))) (Under the " 'prison mailbox rule,' a pro se prisoner's complaint is deemed filed when it is handed over to prison officials for mailing to the court.").

4 At least one court of appeals has held that the common law mailbox rule applies in ERISA cases when the employee benefits plan is silent on how to determine when an application is received by the Administrator. *Schikore v. BankAmerica Supplemental Ret. Plan,* 269 F.3d 956, 961–62 (9th Cir.2001). The *Schikore* court stated that, in applying the common law mailbox rule, the claimant has the initial burden of showing the application was timely mailed and can meet this burden by presenting a sworn declaration that the application was timely mailed. *Id.* at 961.

Hartford–CEBSCO denied Laird's claim on April 13, 2004. Laird had 180 days thereafter, or until October 17, 2004, to

submit her appeal. The district court reviewed the evidence which consisted of an appeal letter dated "July 2, 2004," that was attached to Laird's Complaint and Laird's affidavit. In her affidavit, Laird described her conduct involving the appeal letter and stated, in pertinent part:

> That on or about July 2, 2004 I prepared and typed on my computer a draft letter of appeal regarding my short term disability claims.... Later that same day, I retyped the draft letter and added the correct address of [Appellee] Hartford–CEBSCO.... This letter was appended to the Complaint as Plaintiff's Exhibit 'B' and was mailed to the address shown thereon.

The district court determined that the statements within the affidavit were not sufficient to show that Laird mailed the letter on July 2, 2004. We agree. As the court held in *Yoder,* for the presumption of receipt to arise under the common law mailbox rule, a party must present evidence that the letter was "properly addressed, had sufficient postage, and was deposited in the mail." 758 F.2d at 1118. There is nothing within Laird's affidavit that states she affixed sufficient postage or, more critically, when she deposited the letter in the mail.[5] *Rosenthal v. Walker,* 111 U.S. 185, 193, 4 S.Ct. 382, 28 L.Ed. 395 (1884) (Under the common law mailbox rule, it "is well settled that 'if a letter properly directed is proved to have been either put into the post office or delivered to the postman, it is presumed, from the known course of business in the post-office department, that it reached its destination at the regular time, and was received by the person to whom it was addressed.' "). Laird's exhibit and affidavit does not support such a conclusion.

5 Hartford–CEBSCO does not contest that the address within the letter attached as Exhibit B to Laird's Complaint, "The Hartford, 3800 American Blvd. West, Bloomington, MN 55431," is the proper address for the company.

Further, the district court determined that, in addition to Laird's affidavit not indicating the date on which she mailed the appeal, she did not present any "third-party evidence" to support her affidavit. There is case law suggesting that a party ***200** who seeks to invoke the mailbox rule presumption needs to support with corroborating evidence a sworn statement that the document was mailed. *See Sorrentino v. I.R.S.,* 383 F.3d 1187, 1189 (10th Cir.2004) (party was not entitled to the mailbox rule presumption when the only evidence presented was the party's uncorroborated self-serving testimony of mailing). *But see, Schikore,* 269 F.3d at 961(determining that the appellant's sworn declaration that she mailed a document on a date was credible evidence sufficient to invoke the mailbox rule). This Circuit has not determined whether corroborating evidence is required to support a party's statement that she properly mailed a document. However, if corroborating evidence is required, it is clear that there is no such evidence in this case. In light of the fact that Laird's affidavit and exhibit do not have the specificity required by the mailbox rule, there is no need to address this issue. The district court did not err in granting the Motion for Summary Judgment in favor of Hartford–CEBSCO and Norton on this basis.

B. Issue 2: Futility Exception to Exhaustion Requirement

****5** It is within a court's discretion to determine whether ERISA's administrative exhaustion requirement applies to the case before it. *Fallick v. Nationwide Mut. Ins. Co.,* 162 F.3d 410, 419 (6th Cir.1998). "[A] court is obliged to exercise its discretion to excuse nonexhaustion where resorting to the plan's administrative procedure would simply be futile or the remedy inadequate." *Id.* ERISA's administrative exhaustion requirement has been excused when: (1) the "Plaintiffs' suit [is] directed to the legality of [the plan], not to a mere interpretation of it," *Dozier v. Sun Life Assur. Co. of Can.,* 466 F.3d 532, 535 (6th Cir.2006) (quoting *Costantino v. TRW, Inc.,* 13 F.3d 969, 975 (6th Cir.1994)); and (2) "when the defendant 'lacks the authority to institute the [decision] sought by [the] [p]laintiffs,' " *Id.* (quoting *Hill v. Blue Cross & Blue Shield of Mich.,* 409 F.3d 710, 719 (6th Cir.2005)). A plaintiff raising the futility exception must show "a clear and positive indication," *Fallick,* 162 F.3d at 419, that "it is certain that his claim will be denied." *Id.* (quoting *Lindemann v. Mobil Oil Corp.,* 79 F.3d 647, 650 (7th Cir.1996)). "Where ... a plaintiff has exhausted one claim but not another, he may demonstrate futility by showing that the two claims are so identical that the denial of one demonstrates with certainty that the other will also be denied." *Dozier,* 466 F.3d at 535 (quoting *Cilano v. Alstom Transp. Inc.,* No. 04–CV–6322 CJS, 2005 WL 139172, at *2 (W.D.N.Y. Jan.18, 2005)). A plaintiff arguing futility based on the fact that a previous claim has been denied must first show that he has exhausted the administrative remedies of the denied claim. *Id.* (citing *Lindemann,* 79 F.3d at 650). Assuming denial of the first

claim, courts have applied the futility exception where the same administrator would have made the final determination on both claims, *see Dozier,* 466 F.3d at 535; where the "denial of the easier-to-obtain claim precluded eligibility for the more difficult-to-prove claim," *id.;* or where the denial of one claim prohibits a claimant from receiving another claim's benefits, *Cilano,* 2005 WL 139172, at *2.

[2] The district court determined that Laird did not qualify for the futility exception. Noting that Laird's case was not analogous to the contexts where the futility exception applies, the district court found that Laird's "available administrative avenues for relief were not so obviously dead ends that they were not worth pursuing at all for several years." The court saw no reason why Hartford–CEBSCO's denial of her short-term disability ***201** benefits claim would influence Hartford Life's determination of her long-term disability benefits claim because both insurance companies are "separate entities with different employees in charge of making coverage decisions."

On appeal, Laird argues that it would be futile for her to apply for long-term disability benefits because this determination would be based on the same definition of "disability" that was used to deny her short-term disability benefits application because she did not offer sufficient evidence to show "total disability." We disagree. In order to show futility based on the denial of a separate claim, Laird would be required to exhaust her short-term benefits claim, the first claim she applied for, which she has not done. *See Dozier,* 466 F.3d at 535 (citing to *Lindemann,* 79 F.3d at 650). Further, Laird's case is not factually similar to the cases where the futility exception has been applied based on the similarity between claims. In Laird's case, different administrators had responsibility for determining benefit eligibility for the STD and LTD Plans. Further, Laird has not presented evidence that would tend to demonstrate that, in her case, short-term disability benefits were more difficult to obtain than long-term disability benefits, and as such, that the denial of her short-term disability benefits claim would preclude her from obtaining long-term disability benefits. There is simply no evidence to show that the denial of her short-term disability benefits claim would have prohibited her from obtaining her long-term disability benefits. As a result, Laird has not shown, with certainty, that the Plans' shared "disability" definition would have resulted in Hartford Life denying her claim. For the foregoing reasons, the district court did not err in granting the motion for summary judgment in favor of Hartford Life.

C. Issue 3: Equitable Estoppel

****6** A party raising a claim for equitable estoppel must show:

> (1) conduct or language amounting to a representation of material fact; (2) the party to be estopped must be aware of the true facts; (3) the party to be estopped must intend that the representation be acted on, or the party asserting the estoppel must reasonably believe that the party to be estopped so intends; (4) the party asserting the estoppel must be unaware of the true facts; and (5) the party asserting the estoppel must reasonably or justifiably rely on the representation to his detriment.

Marks v. Newcourt Credit Group, Inc., 342 F.3d 444, 456 (6th Cir.2003) (quoting *Sprague v. Gen. Motors Corp.,* 133 F.3d 388, 403 (6th Cir.1998)(en banc)). However, "[p]rinciples of estoppel [ ] cannot be applied to vary the terms of unambiguous [ERISA] plan documents; estoppel can only be invoked in the context of ambiguous plan provisions." *Smiljanich v. GMC,* 302 Fed.Appx. 443, 448 (6th Cir.2008). This is because a party's reliance on a representation inconsistent with a plan document's clear and unambiguous terms "seldom, if ever, be reasonable or justifiable." *Sprague,* 133 F.3d at 404. Further, "to allow estoppel to override the clear terms of plan documents would be to enforce something other than the plan documents themselves." *Id.*

The district court determined that Hartford Life was not equitably estopped from denying Laird's claim because Laird relied on a suggestion, made by Satterly, a Norton employee, not to apply for long-term disability until she was approved for short-term disability. Further, the court found that Laird did not offer any evidence showing that Hartford Life directed or influenced Satterly to make the suggestion to Laird.

***202** [3] On appeal, Laird argues that, although Satterly is a Norton employee, Norton employees "provide the plan" and give "the appearance that they have authority to speak and to give information and advice about the disability plans furnished by Nortons." She further contends that, until she had applied for short-term disability benefits, she "had no idea who the plan administrators were or where they were," and

that Satterly's advice made sense, and she relied on Satterly's statements to her detriment.

Laird argues, essentially, that Satterly's representation should be attributed to Norton because Norton gives employees like Satterly "the appearance that they have authority" to advise her on these matters. The district court did not address whether Laird's claim for equitable estoppel applied to Norton, as the sponsor of the long-term benefits plan, but only discussed this claim against Hartford Life. Both Hartford Life and Norton argue that Norton is not a proper party to Laird's long-term disability benefits claim because only Hartford Life administered and insured the long-term benefits plan. "Unless an employer is shown to control administration of a plan, it is not a proper party defendant in an action concerning benefits." *Daniel v. Eaton Corp.*, 839 F.2d 263, 266 (6th Cir.1988). [6] Laird has not offered any evidence to show that Norton was in "control" of the administration of the LTD Plan in order to make Norton a proper party to her long-term benefits claim. Thus, we will only consider Hartford Life's actions for Laird's claim for equitable estoppel. Laird's estoppel claim arising from Satterly's comment cannot be used against Hartford Life. Satterly is not an employee of Hartford Life, and Laird has not shown any connection between Satterly's comments and Hartford Life's potential administration of her long-term benefits claim.

6 A portion of the *Daniel* decision has been disapproved in *Brown v. Ampco–Pittsburgh Corp.*, 876 F.2d 546, 549 (6th Cir.1989). Yet, the *Brown* decision does not affect the legal proposition used in this case.

**7 Further, Laird's estoppel claim is barred because Hartford Life's LTD Plan is unambiguous about when benefits become payable to employees covered by the Plan. Here, Laird's benefits became payable when she "became disabled" and "remained disabled beyond the Elimination Period," [7] if she was "under the Regular Care of a Physician," and if she had "submit[ted] Proof of Loss" to satisfy the administrator. No provision in the Plan provides that an award of long-term disability benefits depends on a claimant's short-term disability benefits determination. Indeed, the STD and LTD Plans have separate manuals that set forth the requirements for each type of benefit. In order for this claim to survive summary judgment, Laird needs to show that there exists some genuine issue of material fact regarding Hartford Life's representations to her about an *ambiguous* provision in the LTD Plan. *See Smiljanich,* 302 Fed.Appx. at 448. (emphasis added). Laird has not proffered any evidence to meet this burden. Therefore, the district court did not err in granting the motion for summary judgment in favor of Hartford Life.

7 The "Elimination Period" is the 180–day period after a claimant becomes disabled.

IV. CONCLUSION

For the foregoing reasons, we **AFFIRM** the judgment of the district court.

All Citations

442 Fed.Appx. 194, 2011 WL 4597539, 52 Employee Benefits Cas. 1670

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EXHIBIT B

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 10-1176

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DAVID SCHIED on behalf of Student A,	)	
	)	
Plaintiff-Appellant,	)	
	)	ON APPEAL FROM THE UNITED
v.	)	STATES DISTRICT COURT FOR
	)	THE EASTERN DISTRICT OF
SCOTT SNYDER, et al.,	)	MICHIGAN
	)	
Defendants-Appellees.	)	

ORDER

Before: KEITH, CLAY, and KETHLEDGE, Circuit Judges.

David Schied, a Michigan citizen, moves for sanctions and a writ of mandamus and appeals pro se a district court order dismissing a complaint he filed. This case has been referred to a panel of the court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Schied, who has recently filed a number of actions in both the Michigan state and federal courts, filed this complaint in forma pauperis, purportedly on behalf of his minor son, against a number of defendants. Schied alleged that defendant Snyder, the principal at his son's school, had suspended his son a number of times in retaliation for Schied's involvement of Snyder in some of Schied's other litigation. Schied's attempts to appeal these suspensions and seek an Individual Education Program for his son under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 et seq., were not resolved satisfactorily to Schied. He sued Snyder and the various local, state, and federal officials to whom he complained, alleging that the defendants had engaged in a vast criminal conspiracy to violate his son's rights. The complaint was 223 pages in length, with an additional 88 attachments. The various defendants filed motions to dismiss for failure to state

a claim and motions to strike the complaint pursuant to Federal Rule of Civil Procedure 8. Schied filed responses to these motions, as well as motions of his own. The district court granted the defendants' motions to dismiss the complaint for failure to state a claim and to strike the complaint for failure to comply with Rule 8, and denied Schied's motions.

Schied has filed an 87-page brief on appeal, as well as his motion for sanctions and a writ of mandamus, with 213 pages of exhibits. Some of the defendants request in their briefs that Schied be sanctioned as a vexatious litigant.

We review the dismissal of a complaint for failure to state a claim under both 28 U.S.C. § 1915(e)(2) and Federal Rule of Civil Procedure 12(b)(6) de novo. *Gunasekera v. Irwin*, 551 F.3d 461, 465-66 (6th Cir. 2009); *Grinter v. Knight*, 532 F.3d 567, 571-72 (6th Cir. 2008). Dismissal for failure to state a claim is proper where the factual allegations in the complaint do not state a claim to relief that is plausible on its face. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A complaint must contain more than allegations and legal conclusions. *Eidson v. Tenn. Dep't of Children's Servs.*, 510 F.3d 631, 634 (6th Cir. 2007). In this case, de novo review shows that the complaint's factual allegations are insufficient to plausibly support the legal conclusions asserted by Schied.

As Schied has been informed by several courts that have addressed his complaints, private citizens have no authority to initiate criminal prosecutions. *Lopez v. Robinson*, 914 F.2d 486, 494 (4th Cir. 1990); *Cok v. Cosentino*, 876 F.2d 1, 2 (1st Cir. 1989). Therefore, Schied's main claim for relief is clearly without merit.

Moreover, the district court did not abuse its discretion in determining that the complaint in this case violated Rule 8, requiring a short and plain statement of a claim. *Nafziger v. McDermott Int'l, Inc.*, 467 F.3d 514, 519 (6th Cir. 2006). The complaint, over 200 pages in length, and several hundreds of additional pages of exhibits, nowhere explained with sufficient clarity why Schied's dissatisfaction with the resolution of his grievances would lead to the conclusion that defendants were criminally or civilly liable.

Several of the defendants have requested that Schied be sanctioned as a vexatious litigant. We have the authority to prospectively deny Schied in forma pauperis status as a sanction for filing repeated frivolous appeals. *Maxberry v. SEC*, 879 F.2d 222, 224 (6th Cir. 1989). In addition, one who files repeated frivolous complaints may be prohibited from filing further actions unless a magistrate judge certifies that any proposed complaint is not frivolous. *Ortman v. Thomas*, 99 F.3d 807, 811 (6th Cir. 1996). Schied is hereby warned that filing of further appeals claiming a right to criminally prosecute others for perceived transgressions will result in sanctions.

Finally, Schied's lengthy motion for sanctions and a writ of mandamus, in which he cites no authority for either type of relief, but merely restates the legal conclusions set forth in his previous pleadings, is denied.

For all of the above reasons, the district court's order dismissing this complaint is affirmed. Rule 34(j)(2)(C), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

Clerk

EXHIBIT C

STATE OF MICHIGAN

COURT OF APPEALS

DAVID SCHIED,

Plaintiff-Appellant,

v

LEONARD REZMIERSKI, DAVID BOLITHO, KATY DOERR-PARKER, NORTHVILLE PUBLIC SCHOOLS BOARD OF EDUCATION, LARRY CRIDER, ROBERT DONALDSON, WARREN EVANS, JAMES D. GONZALES, JAMES HINES, MARIA MILLER, BENNY N. NAPOLEON, WAYNE COUNTY PROSECUTOR'S OFFICE, WAYNE COUNTY SHERIFF'S DEPARTMENT, KYM WORTHY, JANE DOE, and JOHN DOE,

Defendants-Appellees,

and

JANE DOE and JOHN DOE,

Defendants.

UNPUBLISHED
January 22, 2013

No. 303715
Wayne Circuit Court
LC No. 09-030727-NO

Before: BORRELLO, P.J., and TALBOT and WILDER, JJ.

PER CURIAM.

Plaintiff, acting in propria persona, appeals as of right, challenging the dismissal of his claims against (1) defendants Northville Public Schools Board of Education ("NPS") and three of its administrators, Leonard Rezmierski, David Bolitho, and Katy Doerr-Parker (collectively referred to as the "NPS defendants"), (2) the Wayne County Sheriff's Department, its former Sheriff Warren Evans, its present Sheriff Benny N. Napoleon, and two Sheriff's Department employees, Larry Crider and James Hines, and (3) the Wayne County Prosecutor's Office, Wayne County Prosecutor Kym Worthy, and assistant prosecutors Robert Donaldson, James Gonzales, and Maria Miller. The court dismissed plaintiff's claims against the NPS defendant on summary disposition pursuant to MCR 2.116(C)(7) on the basis of res judicata, and dismissed plaintiff's claims against the remaining defendants (referred to collectively as the "Wayne

County defendants") on summary disposition pursuant to MCR 2.116(C)(7) on the basis of governmental immunity. For the reasons set forth in this opinion, we affirm.

This action is one of a series of several state and federal lawsuits that plaintiff has filed arising from NPS's disclosure of an expunction order from the state of Texas. Plaintiff provided the expunction order after a criminal background check of plaintiff for purposes of employment with NPS, revealed that plaintiff had been convicted of aggravated robbery in Texas in 1977. Plaintiff provided the copy of the expunction order to NPS to document that the 1977 conviction had been expunged. NPS retained a copy of the expunction order in plaintiff's personnel file and disclosed it when another school district requested a copy of plaintiff's employment records after plaintiff executed a release authorizing the disclosure of his records. Since that time, plaintiff has brought several lawsuits against NPS and various other government officials.

In 2006, plaintiff brought an action against NPS in the Wayne Circuit Court in LC No. 06-633604-NO. Plaintiff sought an injunctive order requiring NPS to remove all information regarding the Texas conviction, pardon, and expunction from his employment records, and prohibiting NPS from keeping, maintaining, or sharing this information. The trial court concluded that no legal authority prohibited NPS from disclosing the expunction order, and that no relief was available to plaintiff for the disclosure. Accordingly, the court granted NPS's motion for summary disposition and dismissed plaintiff's claims.

In 2007, plaintiff brought another action against the state of Michigan, the Michigan Attorney General, several state departments, defendant NPS, defendants Bolitho, Doerr-Parker, Rezmierski, and other governmental defendants in the Ingham Circuit Court in LC No. 2007-001256. The trial court dismissed that action and that decision was affirmed on appeal. *Schied v State of Michigan*, unpublished memorandum opinion of the Court of Appeals, issued May 19, 2009 (Docket No. 282804).

In 2008, plaintiff filed a lawsuit in federal court against various government defendants from the United States Attorney's Office, the federal judiciary, the FBI, and the states of Texas and Michigan. The complaint contained numerous counts related to plaintiff's claims that the various defendants had conspired to deny him his rights. The court granted summary judgment for all parties on grounds of governmental immunity and failure to state valid claim.

Plaintiff filed another federal lawsuit in 2008 against various government officials, including Leonard Rezmierski, a defendant in this case, again stating various claims arising from the allegedly wrongful disclosure of the expunction order. The federal court, noting that the case was plaintiff's fourth lawsuit in connection with the disclosure of his Texas criminal record in his personnel file, granted summary judgment for defendant Rezmierski on the grounds of res judicata and collateral estoppel.[1]

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[1] Plaintiff has brought other lawsuits in state and federal court tangentially related to the disclosure of the expunction order, including a lawsuit against NPS based on allegations that NPS retaliated against plaintiff by violating plaintiff's son's rights as a student.

Plaintiff filed the present action in 2009. Plaintiff reiterates his allegations from prior lawsuits that the NPS defendants violated his rights and committed criminal acts by disclosing the expunction order. Plaintiff's claims against the Wayne County defendants are premised on plaintiff's attempts to initiate criminal proceedings against the NPS defendants.[2] Plaintiff alleges that the Wayne County Sheriff's Department and the Wayne County Prosecutor's Office have rebuffed his requests for a criminal investigation and criminal prosecution of the NPS defendants' conduct related to the disclosure of the expunction order, and refused plaintiff's demands to convene a grand jury.

Plaintiff's motion to disqualify the trial judge because she and her husband resided in Northville, her husband has a law practice in Northville, and both were involved in community activities there, was denied.[3] The trial court subsequently granted summary disposition in favor of each Wayne County defendant on the basis of government immunity. Thereafter, the court granted the NPS defendants' motion for summary disposition on grounds of res judicata and collateral estoppel.

The problem presented to this Court by this appeal lies mainly in our effort to ascertain the arguments put forth by plaintiff. To state that his briefs and documents are not in compliance with the rules of this Court is an understatement. Rather than setting forth clear and concise arguments, plaintiff has submitted to this Court hundreds of pages of meandering and frivolous assertions. However, in an attempt to discern plaintiff's arguments to whatever extent that is possible, we have re-stated plaintiff's claims in a manner from which we can arrive at a ruling on each of his perceived claims.

I. DISQUALIFICATION OF TRIAL COURT

As he has done in virtually all other matters he has brought before federal and state courts, plaintiff argues that the trial judge was biased and prejudiced against him and, therefore,

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[2] Plaintiff brought such a claim *after* being warned by the Sixth Circuit: "Schied is hereby warned that filing of further appeals claiming a right to criminally prosecute others for perceived transgressions will result in sanctions." *Schied v Snyder*, unpublished opinion of the Sixth Circuit Court of Appeals, filed January 19, 2011, slip op at 3 (Docket No. 10-1176).

[3] Claiming bias of the judge or tribunal assigned to hear his cases is another of plaintiff's repeated tactics. In *Schied v Daughtrey*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued March 25, 2009 (Docket No. 08-14944), the court, quoting *Shakespeare v Wilson*, 40 FRD 500, 502 (SD Cal 1966), stated that plaintiff fit the *Shakespeare* court's categorization of an angry and frustrated litigant who would "lash out at judges, attorneys, witnesses, court functionaries, newspapers and anyone else in convenient range, terming all of them corruptly evil and charging them with perjury and conspiracy in a last desperate effort to re-litigate the issues on which they have once lost and hoping to secure sizeable damages to boot." *Schied v Daughtrey*, slip op at 21.

erred by denying his motion for disqualification. "In reviewing a motion to disqualify a judge, this Court reviews the trial court's findings of fact for an abuse of discretion and the court's application of those facts to the relevant law de novo." *Olson v Olson*, 256 Mich App 619, 638; 671 NW2d 64 (2003).

MCR 2.003(C)(1)(a) provides grounds to disqualify a judge when the "judge is biased or prejudiced for or against a party or attorney." The party challenging a judge on the basis of prejudice "must overcome a heavy presumption of judicial impartiality." *Cain v Dep't of Corrections*, 451 Mich 470, 497; 548 NW2d 210 (1996). Bias or prejudice is defined as "'an attitude or state of mind that belies an aversion or hostility of a kind or degree that a fair-minded person could not entirely set aside when judging certain persons or causes.'" *Id.* at 495 n 29, quoting *United States v Conforte*, 624 F2d 869, 881 (CA 9, 1980). "Disqualification on the basis of bias or prejudice cannot be established merely by repeated rulings against a litigant, even if the rulings are erroneous." *In re MKK*, 286 Mich App 546, 566; 781 NW2d 132 (2009). Remarks that are critical of or hostile toward a party are generally not sufficient to establish bias. *Id.* The bias must be both "personal and extrajudicial," such that "the challenged bias must have its origin in events or sources of information gleaned outside the judicial proceeding." *Cain*, 451 Mich at 495.

In *In re Contempt of Henry*, 282 Mich App 656, 679; 765 NW2d 44 (2009), this Court reiterated the standards for overcoming the presumption of judicial impartiality, stating:

> Generally, a trial judge is not disqualified absent a showing of actual bias or prejudice. *Gates v Gates*, 256 Mich App 420, 440; 664 NW2d 231 (2003). The mere fact that a judge ruled against a litigant, even if the rulings are later determined to be erroneous, is not sufficient to require disqualification or reassignment. *Ypsilanti Fire Marshal v Kircher (On Reconsideration)*, 273 Mich App 496, 554; 730 NW2d 481 (2007). "[J]udicial rulings, in and of themselves, almost never constitute a valid basis for a motion alleging bias, unless the judicial opinion displays a '"deep-seated favoritism or antagonism that would make fair judgment impossible'" and overcomes a heavy presumption of judicial impartiality." *Armstrong v Ypsilanti Charter Twp*, 248 Mich App 573, 597; 640 NW2d 321 (2001) (citations omitted).

Here, plaintiff failed to any bias or prejudice. Plaintiff's argument consists mainly of his expression of outrage that he still has not obtained the relief he believes he deserves for the disclosure of the expunction order. To the extent that plaintiff even presents a cogent argument, he has not established grounds for disqualification. Plaintiff relies on the fact that the trial judge lives in Northville, where her husband also has a law practice, and that both are involved in community activities in Northville. These allegations involve circumstances that are personal and extrajudicial, hence, they do not support plaintiff's claim of bias. The mere fact that a judge has ties to the same community where a defendant is located does not establish actual bias or prejudice.

Plaintiff's contention that the trial judge, like all other judges previously involved in plaintiff's various lawsuits, is motivated to side with the government defendants and rule in their favor in blatant disregard of the facts and applicable law is not supported by any objective facts.

The affidavits from the "court-watchers" describe ordinary courtroom procedures and do not provide factual support for plaintiff's claims of biased persecution. The mere fact that the judge's judicial rulings were adverse to plaintiff also does not establish bias. *In re MKK*, 288 Mich App at 566; *In re Contempt of Henry*, 282 Mich App at 679. Plaintiff has been unsuccessful in his efforts to disqualify prior judges who ruled against him, and he has not demonstrated that the judge's rulings in this case, apart from being adverse to plaintiff, display a "'deep-seated favoritism or antagonism that would make fair judgment impossible.'" *Id.* Accordingly, plaintiff's motion for disqualification was devoid of merit and therefore properly denied.

II. GRANT OF SUMMARY DISPOSITION

A. Plaintiff's complaint is barred by res judicata and collateral estoppels.

Plaintiff also argues that the trial court erred in granting summary disposition in favor of the NPS defendant and the Wayne County defendants. The trial court granted summary disposition in favor of the parties on the basis of res judicata and governmental immunity, both of which are bases for summary disposition under MCR 2.116(C)(7). *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 417; 733 NW2d 755 (2007) (res judicata); *Herman v Detroit*, 261 Mich App 141, 143; 680 NW2d 71 (2004) (governmental immunity). This Court reviews de novo a trial court's decision on a motion for summary disposition. *Washington*, 478 Mich at 417. The application of a legal doctrine, such as res judicata or collateral estoppel, is also subject to de novo review. *Id.* The applicability of governmental immunity is a question of law that is also reviewed de novo on appeal. *Herman*, 261 Mich App at 143.

In reviewing a ruling pursuant to subrule (C)(7), this Court "consider[s] all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict them." *Fane v Detroit Library Comm*, 465 Mich 68, 74; 631 NW2d 678 (2001). "If the facts are not in dispute and reasonable minds could not differ concerning the legal effect of those facts, whether a claim is barred by immunity is a question for the court to decide as a matter of law." *Poppen v Tovey*, 256 Mich App 351, 354; 664 NW2d 269 (2003)

The trial court determined that the NPS defendants were entitled to summary disposition on the basis of res judicata and collateral estoppel. The doctrine of res judicata bars a subsequent action between the same parties when the first action was decided on its merits, the second action was or could have been resolved in the first action, and both actions involve the same parties or their privies. *TBCI, PC v State Farm Mut Auto Ins Co*, 289 Mich App 39, 43; 795 NW2d 229 (2010). The doctrine of collateral estoppel precludes a party from subsequently asserting a claim when "(1) a question of fact essential to the judgment was actually litigated and determined by a valid and final judgment, (2) the same parties had a full and fair opportunity to litigate the issue, and (3) there was mutuality of estoppel." *Estes v Titus*, 481 Mich 573, 585; 751 NW2d 493 (2008). "Mutuality of estoppel requires that in order for a party to estop an adversary from relitigating an issue that party must have been a party, or in privy to a party, in the previous action." *Monat v State Farm Ins Co*, 469 Mich 679, 683; 677 NW2d 843 (2004) (citation and internal quotations omitted). However, "the lack of mutuality of estoppel should not preclude the use of collateral estoppel when it is asserted defensively to prevent a party from relitigating

an issue that such party has already had a full and fair opportunity to litigate in a prior suit." *Id.* at 691-692.

Here, plaintiff has brought prior actions against the NPS defendants or their privies arising from the same factual circumstances as this 2009 action, the allegedly tortious or as plaintiff couches it, "criminal disclosure" of the expunction order. Plaintiff brought an action against NPS in 2006 in Wayne Circuit Court No. 06-633604-NO, which ended in the trial court's order of summary disposition in favor of NPS. In 2007, plaintiff brought an action against NPS and defendants Bolitho, Doerr-Parker, and Rezmierski, which similarly ended in summary disposition for defendants. In 2008, plaintiff filed a lawsuit in federal court in which Rezmierski was named as a defendant. That case also ended in summary judgment for all defendants. The essential facts pertaining to plaintiff's claims in these other cases are identical to those raised in this action. The NPS and each individual NPS defendant was a defendant in at least one of these prior actions. The prior actions were decided on the merits, and plaintiff had the opportunity to assert any legal theory in support of his claim for relief. These circumstances satisfy the requirements of res judicata and collateral estoppel. *Estes*, 481 Mich at 585; *TBCI*, 289 Mich App at 43. Plaintiff asserts that disclosure of the expunction order to another recipient in response to a request under the Freedom of Information Act constitutes a new violation of his rights, but the 2006 action seeking an injunction resolved on the merits the issue whether NPS was prohibited from disclosing the document. Accordingly, the trial court properly granted summary disposition to the NPS defendants under MCR 2.116(C)(7), on the basis of res judicata and collateral estoppel.

B. Plaintiff's complaint is barred by governmental immunity.

The trial court granted summary disposition for Wayne County defendants on grounds of governmental immunity. Plaintiff's claims against the Wayne County defendants arise from their failure to investigate plaintiff's criminal complaints against the NPS defendants. The trial court granted summary disposition for the Wayne County defendants on grounds of governmental immunity. The governmental immunity statute, MCL 691.1407 provides, in pertinent part:

> (1) Except as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function. Except as otherwise provided in this act, this act does not modify or restrict the immunity of the state from tort liability as it existed before July 1, 1965, which immunity is affirmed.
>
> (2) Except as otherwise provided in this section, and without regard to the discretionary or ministerial nature of the conduct in question, each officer and employee of a governmental agency, each volunteer acting on behalf of a governmental agency, and each member of a board, council, commission, or statutorily created task force of a governmental agency is immune from tort liability for an injury to a person or damage to property caused by the officer, employee, or member while in the course of employment or service or caused by the volunteer while acting on behalf of a governmental agency if all of the following are met:

(a) The officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority.

(b) The governmental agency is engaged in the exercise or discharge of a governmental function.

(c) The officer's, employee's, member's, or volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage.

(3) Subsection (2) does not alter the law of intentional torts as it existed before July 7, 1986.

* * *

(5) A judge, a legislator, and the elective or highest appointive executive official of all levels of government are immune from tort liability for injuries to persons or damages to property if he or she is acting within the scope of his or her judicial, legislative, or executive authority.

* * *

(7) As used in this section:

(a) "Gross negligence" means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.

Thus, MCL 691.1407(1) broadly exempts government agencies from tort liability if the agency is engaged in the discharge of a governmental function. A "governmental function" is an activity expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law. MCL 691.1401(f); *Maskery v Univ of Mich Bd of Regents*, 468 Mich 609, 613-614; 664 NW2d 165 (2003). This definition is to be broadly applied. *Id.* It only requires that there be some constitutional, statutory, or other legal basis for the activity in which the agency was engaged. The definition of governmental function necessarily means that activities unauthorized by law are not immune. *Richardson v Jackson Co*, 432 Mich 377, 381; 443 NW2d 105 (1989); *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 620; 363 NW2d 641 (1984). The determination whether an activity involves a governmental function must focus on the general activity, not the specific conduct involved at the time of the tort. *Tate v City of Grand Rapids*, 256 Mich App 656, 661; 671 NW2d 84 (2003).

The claims against the Wayne County Prosecutor's Office and the Wayne County Sheriff's Department involve the exercise or discharge of those agencies' governmental functions of investigating and prosecuting allegations of criminal conduct. Accordingly, those agencies are immune under MCL 691.1407(1). Defendants Wayne County Prosecutor Worthy, current Wayne County Sheriff Napoleon, and former Wayne County Sheriff Evans, as the elective executive officials of their respective levels of government, are each entitled to absolute immunity because their alleged conduct relates to the investigation or prosecution of the NPS defendants, and thus is within the scope of their executive authority. MCL 691.1407(5); *Bischoff*

v Calhoun Co Prosecutor, 173 Mich App 802, 806; 434 NW2d 249 (1988). See also, *Grahovac v Munising Twp*, 263 Mich App 589, 595; 689 NW2d 498 (2004).

With respect to assistant prosecutors Donaldson, Gonzales, and Miller, Michigan recognizes quasi-judicial immunity for prosecutors. *Id.* "Where a prosecutor's actions are within the scope of his prosecutorial functions and duties, his acts are quasi-judicial in nature and he has absolute immunity regarding the performance of those functions and duties." *Payton v Wayne Co*, 137 Mich App 361, 370-371; 357 NW2d 700 (1984) (citations and internal quotations omitted). This Court in *Payton* recognized that Michigan law upholds the policy of "protecting the prosecutor's independence of judgment from harassment due to the constant threat of potential litigation." *Id.* at 371. The assistant prosecutors' actions in reviewing plaintiff's reports of criminal conduct in this case clearly come within their quasi-judicial functions. Plaintiff's claims against them are therefore barred by governmental immunity.

Finally, sheriff's department employees Crider and Hines are entitled to immunity unless they acted outside the scope of their authority, or their conduct amounted to gross negligence. MCL 691.1407(2). It was within the scope of Crider's and Hines's authority to decide whether to pursue criminal charges against the NPS defendants, and there are no allegations or facts indicating that either engaged in conduct that could be considered gross negligence, i.e., "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(7)(a). Accordingly, they too are entitled to governmental immunity.

III. CRIMINAL ALLEGATIONS

Plaintiff also challenges the trial court's dismissal of his various claims asserting that he is a crime victim entitled to relief through the criminal justice system. We agree that dismissal of those claims was warranted under MCR 2.116(C)(5) (party asserting a claim lacks the legal capacity to sue) and (8) (failure to state claim a claim for relief). It is well-settled law that "in American jurisprudence at least, a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution or another." *Linda RS v Richard D*, 410 US 614, 619; 93 S Ct 1146; 35 L Ed 2d 536 (1973). Thus, a private citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution. *Id.* See also *People v Herrick*, 216 Mich App 594, 600-601; 550 NW2d 541 (1996) (citing *Linda RS* for the proposition that a statute authorizing citizens to seek an arrest warrant does not "grant a corresponding right to have charges filed and prosecuted pursuant to the warrant"). As previously stated and cited, plaintiff is aware of this well-settled tenet of American jurisprudence. Accordingly, we hold that plaintiff lacks standing to compel the initiation of a criminal investigation or prosecution against any defendant, and incorporate in our ruling the same warning given to plaintiff by the Sixth Circuit.

Affirmed. Defendants having prevailed are entitled to costs. MCR 7.219.

/s/ Stephen L. Borrello
/s/ Michael J. Talbot
/s/ Kurtis T. Wilder

EXHIBIT D

589 Fed.Appx. 846
This case was not selected for publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007.
See also U.S.Ct. of App. 10th Cir. Rule 32.1.
United States Court of Appeals, Tenth Circuit.

Alan C. LAMMLE, Plaintiff–Appellant,
v.
BALL AEROSPACE & TECHNOLOGIES CORPORATION, Defendant–Appellee.

No. 13–1458. | Sept. 30, 2014.

Synopsis

Background: Terminated employee brought pro se action against employer alleging, among other things, age and disability discrimination and intentional infliction of emotional distress. The United States District Court for the District of Colorado, 2013 WL 4718928, dismissed the complaint. Employee appealed.

Holdings: The Court of Appeals, Baldock, Circuit Judge, held that:

[1] employee waived any challenge on appeal to merits of trial court's dismissal;

[2] district court's authority to designate a magistrate judge to determine pretrial matters was not contingent upon employee's consent;

[3] unfavorable judicial rulings were insufficient to warrant recusal of magistrate judge;

[4] employee was not entitled to appointed counsel;

[5] employee was not entitled to transcript at government expense; and

[6] denial of employee's motion for administrative closure was not an abuse of discretion.

Affirmed.

See also, 2013 WL 179200 and 2013 WL 1900563.

West Headnotes (7)

[1] **Federal Courts**
Failure to mention or inadequacy of treatment of error in appellate briefs

Terminated employee who brought pro se action against employer waived any challenge on appeal to the merits of the district court's dismissal of his complaint by failing to develop any argument on appeal relating to substantive claims. F.R.A.P.Rule 28(a)(8)(A), 28 U.S.C.A.

Cases that cite this headnote

[2] **Federal Civil Procedure**
Proceedings

Terminated employee who brought pro se action against employer was not excused from following the strict requirements of the Federal Rules of Civil Procedure in order to properly contest a summary judgment motion. Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

Cases that cite this headnote

[3] **United States Magistrate Judges**
Reference, Designation, or Delegation

United States Magistrate Judges
Consent

Federal district court's authority to designate magistrate judge to hear and determine pretrial matters in employment action was not contingent on plaintiff's consent. 28 U.S.C.A. § 636(b)(1)(A).

Cases that cite this headnote

[4] **United States Magistrate Judges**
Bias; recusal

Unfavorable judicial rulings and ordinary efforts at courtroom administration were insufficient to

warrant recusal of magistrate judge appointed to determine pretrial matters in employment action. 28 U.S.C.A. § 636(b)(1)(A).

Cases that cite this headnote

[5] **Federal Civil Procedure**
Appointment of counsel

Terminated employee who neither requested nor was granted in forma pauperis status in action against former employer was not entitled to appointed counsel.

Cases that cite this headnote

[6] **Federal Civil Procedure**
Stenographic costs

Terminated employee who brought pro se action against employer was not entitled to a transcript at government expense. 28 U.S.C.A. § 753(f).

Cases that cite this headnote

[7] **Action**
Stay of Proceedings

Denial of terminated employee's motion for administrative closure of action brought against employer was not an abuse of discretion, even though employee had not been able to locate replacement counsel and was proceeding pro se, since employee had shown himself to be capable of adequately presenting his claims. U.S.Dist.Ct.Rules D.Colo, Rule 41.2.

Cases that cite this headnote

Attorneys and Law Firms

*847 Alan C. Lammle, Parker, CO, pro se.

Matthew M. Morrison, Kelly Koepp Robinson, Sherman & Howard, Denver, CO, for Defendant–Appellee.

Before HARTZ, BALDOCK, and BACHARACH, Circuit Judges.

ORDER AND JUDGMENT *

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R.App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R.App. P. 32.1 and 10th Cir. R. 32.1.

BOBBY R. BALDOCK, Circuit Judge.

Alan C. Lammle, appearing pro se, appeals the district court's dismissal of his complaint against his former employer, Ball Aerospace & Technologies Corporation (Ball), challenging several of the court's procedural rulings. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

BACKGROUND.

Ball terminated Mr. Lammle's employment as a computer technician in its Information Management department in December 2010. Mr. Lammle had taken two extended leaves of absence due to illness prior to his termination. Through counsel (who is his wife), he filed a complaint against Ball which, as later amended, alleged breach of contract; disability discrimination; age discrimination; intentional infliction of emotional distress; retaliation; and unlawful termination. The court assigned a magistrate judge to handle pretrial matters as authorized by 28 U.S.C. § 636(b)(1)(A). Mr. Lammle substituted counsel. The district court granted Ball's motion to dismiss Mr. Lammle's claims for retaliation and wrongful termination under Rules 12(b)(1) and (6) of the Federal Rules of Civil Procedure, noting Mr. Lammle had not filed objections to the magistrate judge's report and recommendation to grant the motion. Mr. Lammle voluntarily dismissed his breach of contract claim and his substitute counsel withdrew.

Now proceeding pro se, in short order Mr. Lammle filed more than a dozen motions, memoranda, and objections repeatedly requesting extensions of time; appointment of an attorney; a stay or administrative closure of the case until a attorney was appointed; withdrawal of the § 636(b)(1)(A)

magistrate judge referral; and recusal of the magistrate judge. The magistrate judge extended deadlines and directed the court clerk to make a good faith attempt to locate a volunteer counsel for Mr. Lammle, but informed Mr. Lammle that he remained responsible for prosecuting his case unless and until an attorney agreed to represent him. Both the magistrate judge and district court denied his requests for the magistrate judge's recusal and to stay the proceedings, and the district court denied his requests to withdraw its § 636(b)(1)(A) referral.

Ball moved for summary judgment as to the remaining claims for age and disability ***848** discrimination and intentional infliction of emotional distress. Mr. Lammle moved for an extension of time to respond, which was granted. He then filed additional motions for administrative closure of the case; withdrawal of the § 636(b)(1)(A) magistrate judge referral; free transcripts of the prior court hearings; and extensions of time. The magistrate judge granted extensions of time, but denied the other requests. Unsatisfied with the magistrate judge's rulings, Mr. Lammle repeatedly filed emergency motions with the district court requesting administrative closure and free transcripts, which were denied. He failed to appear at a status conference or his scheduled second deposition. Nine months after Ball filed its motion for summary judgment, Mr. Lammle still had not filed a response to the summary judgment motion, despite being given several extensions of time. The district court then granted summary judgment on the remaining claims based on the undisputed facts in Ball's motion for summary judgment. It also denied Mr. Lammle's motion for reconsideration.

ANALYSIS.

[1] Mr. Lammle has waived any challenge on appeal to the merits of the district court's Rule 12(b)(6) and summary judgment dismissals of his complaint because he failed to develop any argument on appeal relating to these substantive claims. His 21–page brief contains two sentences relating to the merits of his complaint, stating only that he wants his case to be tried before a jury. Aplt. Br. at 19, 21. "[M]ere conclusory allegations with no citations to the record or any legal authority for support" are inadequate to preserve an issue for review. *Garrett v. Selby Connor Maddux & Janer,* 425 F.3d 836, 841 (10th Cir.2005) (holding that a party, including a pro se litigant, waives an inadequately briefed issue). Appellants are required by Fed. R.App. P. 28(a)(8)(A) to include in their brief arguments with citations to supporting legal authority and the record. Although we liberally construe the filings of pro se appellants, we insist that they follow the same rules of procedure that govern other litigants, and we may not "assume the role of advocate" and manufacture arguments for them. *Yang v. Archuleta,* 525 F.3d 925, 927 n. 1 (10th Cir.2008) (internal quotation marks omitted).

[2] As a procedural matter, Mr. Lammle contends he was unaware that summary judgment was at issue. Aplt. Br. at 16. This claim is without merit and is belied by the fact that he repeatedly asked for and was given extensions of time by the district court to respond to the motion for summary judgment, but each time his response was due, he filed a motion for administrative closure, which was denied. Pro se litigants are not excused from following the strict requirements of Rule 56 in order to properly contest a summary judgment motion. *See Abdulhaseeb v. Calbone,* 600 F.3d 1301, 1310 (10th Cir.2010).

[3] [4] Mr. Lammle's appeal challenges the district court's procedural rulings. He argues that the magistrate judge should have been recused; his case should have been administratively closed; a pro bono attorney should have been appointed to represent him; and he should have been provided transcripts free of charge. We first note that, notwithstanding Mr. Lammle's objections, the district court's authority under § 636(b)(1)(A) to designate a magistrate judge to hear and determine pretrial matters is not contingent on his consent. With respect to his recusal claim, Mr. Lammle alleges that the magistrate judge refused to let him speak during a status conference, refused to read documents he submitted, delayed ruling on his ***849** motions, and is generally biased against pro se plaintiffs. Unfavorable judicial rulings and ordinary efforts at courtroom administration are insufficient grounds for recusal. *United States v. Erickson,* 561 F.3d 1150, 1169 (10th Cir.2009) (describing standards for recusal). We find no evidence in the record of any factual grounds or conduct by the magistrate judge that would have led a reasonable jurist to question the judge's neutrality; the district court did not err in denying Mr. Lammle's recusal motions. *See id.*

[5] [6] Further, the district court did not err in not appointing counsel for Mr. Lammle. Mr. Lammle neither requested nor was granted *in forma pauperis* status in the district court,[1] and there was no constitutional or statutory obligation for the court to appoint him counsel. *See Castner v. Colo. Springs Cablevision,* 979 F.2d 1417, 1420 (10th Cir.1992) ("[A] plaintiff asserting an employment discrimination claim has no constitutional or statutory right to appointed counsel."). The district court directed the clerk

to seek a voluntary attorney for Mr. Lammle, and we discern no abuse of discretion in not appointing counsel. *See id.* at 1422–23 (appointment of counsel is reviewed for abuse of discretion). Nor did the district court err in denying his motion for free transcripts. Mr. Lammle's pro se status in a civil proceeding does not qualify him for a transcript at government expense under 28 U.S.C. § 753(f), which governs such requests.

1 After the dismissal of his complaint, Mr. Lammle requested to proceed in forma pauperis on appeal, which the district court denied based on its finding that an appeal could not be taken in good faith.

[7] Finally, Mr. Lammle challenges the district court's denial of his motion for administrative closure. The district court's local rules permit the court to administratively close a civil action, D.C. Colo. L. Civ. R. 41.2, which removes a case from the court's active docket. The decision to deny administrative closure is reviewed for an abuse of discretion. *Vahora v. Holder,* 626 F.3d 907, 919 (7th Cir.2010); *see also Pet Milk Co. v. Ritter,* 323 F.2d 586, 588 (10th Cir.1963) (court's decision to stay proceedings pending before it is within its broad discretion). Here, the district court ruled Mr. Lammle had not shown good cause to warrant administrative closure. It concluded he was capable of adequately presenting his claims without assistance from counsel, noting he had been aggressively litigating his case, previously had the assistance of two attorneys, including his wife, and had not explained what efforts, if any, he had made to locate replacement counsel. The district court's denial was not an abuse of its discretion.

Mr. Lammle's motions for appointment of counsel and leave to proceed *in forma pauperis* are denied. The judgment of the district court is affirmed.

All Citations

589 Fed.Appx. 846

End of Document

EXHIBIT E

335 Fed.Appx. 410
This case was not selected for
publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial decisions
issued on or after Jan. 1, 2007. See also
U.S.Ct. of App. 5th Cir. Rules 28.7 and 47.5.
United States Court of Appeals,
Fifth Circuit.

Perry B. WESTCOTT, Plaintiff–Appellant
v.
INTERNAL REVENUE
SERVICE, Defendant–Appellee.

No. 08–41065 | Summary
Calendar. | June 22, 2009.

Synopsis

Background: Taxpayer brought action against Internal Revenue Service (IRS), seeking order requiring IRS to assist him in preparing federal income tax returns for previously unfiled years, as well as an abatement of his tax liabilities for those years. IRS moved to dismiss for lack of subject-matter and personal jurisdiction, and failure to state a claim upon which relief could be granted. The United States District Court for the Eastern District of Texas, Richard A. Schell, J., 2008 WL 4344110, adopted the report and recommendation of Don D. Bush, United States Magistrate Judge, 2008 WL 3852709, and granted motion. Taxpayer appealed.

Holdings: The Court of Appeals held that:

[1] IRS was not required to assist taxpayer in preparing tax returns, and

[2] district court was authorized to assign matters to magistrate judge.

Affirmed.

West Headnotes (2)

[1] Internal Revenue
Returns and Reports

Internal Revenue Service (IRS) was not required to assist taxpayer in preparing income tax returns for previously unfiled years. 26 U.S.C.A. § 6020(a).

Cases that cite this headnote

[2] United States Magistrate Judges
Reference, Designation, or Delegation

United States Magistrate Judges
Consent

District Court was authorized, without the parties' consent, to assign matters to a magistrate judge for a report and recommendation.

Cases that cite this headnote

Attorneys and Law Firms

*411 Perry B. Westcott, Howe, TX, pro se.

Randolph Lyons Hutter, U.S. Department of Justice, Washington, DC, Moha Pradhan Yepuri, U.S. Department of Justice, Dallas, TX, for Defendant–Appellee.

Appeal from the United States District Court for the Eastern District of Texas, USDC No. 4:07–CV–438.

Before HIGGINBOTHAM, BARKSDALE, and HAYNES, Circuit Judges.

Opinion

PER CURIAM: *

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

**1 Perry B. Westcott, proceeding *pro se,* challenges the district court's dismissing, for both lack of jurisdiction and failure to state a claim, his claim against the Internal Revenue Service (IRS). (His motion for appointment of counsel is DENIED.)

Westcott filed this action in September 2007, seeking an order requiring the IRS to assist Westcott, pursuant to 26 U.S.C.

§ 6020(a), in preparing his 1998–2004 federal income tax returns and an abatement of his federal income tax liabilities for those years. In November 2007, Westcott moved for default judgment pursuant to Federal Rule of Civil Procedure 55, based on the IRS' failure to file an answer within 60 days after the action was filed. The IRS filed its answer in December 2007.

In February 2008, the magistrate judge recommended that Westcott's default-judgment motion be denied because it was substantively and procedurally defective, and because the IRS appeared in the action by filing its answer. Over Westcott's objections, the district court adopted the report and recommendation and denied a default judgment.

In April 2008, the IRS moved to dismiss for lack of both subject-matter and personal jurisdiction, and failure to state a claim upon which relief could be granted. The magistrate judge's report and recommendation agreed that the action should be dismissed because: 26 U.S.C. § 6020 did not confer subject-matter jurisdiction on district courts to order the IRS to provide assistance in tax-return preparation when it declines to do so; and Westcott's action was barred by the doctrine of sovereign immunity and the Anti–Injunction Act, 26 U.S.C. § 7421(a). In September 2008, over Westcott's objections, the district court adopted the report and recommendation, granted the motion to dismiss, and denied Westcott's motions for leave to proceed *in forma pauperis* and for appointment of counsel to assist with this appeal.

Dismissals for lack of subject-matter jurisdiction and for failure to state a claim are reviewed *de novo. E.g., McAllister v. FDIC,* 87 F.3d 762, 765 (5th Cir.1996) (subject-matter jurisdiction); *Causey v. Sewell Cadillac–Chevrolet, Inc.,* 394 F.3d 285, 288 (5th Cir.2004) (failure to state a claim). Denials of motions for default judgment and appointment of counsel are reviewed for abuse of discretion. *E.g., Settlement Funding, LLC v. Transamerica Occidental Life Ins. Co.,* 555 F.3d 422, 424 (5th Cir.2009) (default judgment); *Salmon v. Corpus Christi Indep. Sch.* ***412** *Dist.,* 911 F.2d 1165, 1166 (5th Cir.1990) (appointment of counsel).

Westcott claims, *inter alia,* that the district court erred in dismissing for lack of jurisdiction and for failure to state a claim because under 26 U.S.C. § 6020(a), the IRS is required to assist taxpayers in tax-return preparation. Essentially for the reasons stated in the magistrate judge's reports and recommendations, adopted by the district court, we affirm.

[1] Among other things, although 26 U.S.C. § 6020(a) *allows* the IRS to prepare a tax return in the event a taxpayer fails to file, the statute's plain language does not *require* the IRS to do so. *See also United States v. Stafford,* 983 F.2d 25, 27 (5th Cir.1993) (providing that, although 26 U.S.C. § 6020(b) authorizes the IRS to file a return for a taxpayer, it "does not require such a filing, nor does it relieve the taxpayer of the duty to file").

****2** **[2]** Westcott's claim that the magistrate judge's reports and recommendations are "not binding and illegal" because Westcott never consented to a trial by consent pursuant to Federal Rule of Civil Procedure 73(a) is likewise without merit. Pursuant to 28 U.S.C. § 636(b)(1)(B), the district court may, without the parties' consent, assign matters to a magistrate judge for a report and recommendation. *See also, e.g., Newsome v. EEOC,* 301 F.3d 227, 230 (5th Cir.2002). Finally, Westcott's conclusory allegations of due-process violations are insufficiently briefed, and are, therefore, deemed abandoned. *E.g., Cinel v. Connick,* 15 F.3d 1338, 1345 (5th Cir.1994).

AFFIRMED.

All Citations

335 Fed.Appx. 410, 2009 WL 1744008, 104 A.F.T.R.2d 2009-5027, 2009-2 USTC P 50,587

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EXHIBIT F

2015 WL 2345521
United States District Court,
W.D. Michigan,
Southern Division.

Robert Charles GILMAN, Plaintiff,
v.
INTERNAL REVENUE SERVICE, Defendant.

No. 1:14–CV–301. | Signed March 25, 2015.

Attorneys and Law Firms

Robert Charles Gilman, Crystal, MI, pro se.

Gabrielle Hirz, U.S. Department of Justice, Tax Division, Washington, DC, W. Francesca Ferguson, U.S. Attorney, Grand Rapids, MI, for Defendant.

OPINION AND ORDER

JANET T. NEFF, District Judge.

***1** Plaintiff, proceeding *pro se,* initiated this action against the "Internal Revenue Service, Ogden, Utah" on March 24, 2014 (Dkt 1). On March 28, 2014, pursuant to 28 U.S.C. § 636 and W.D. Mich. LCivR 72, this Court referred the matter to the Magistrate Judge "for handling of all matters under § 636(a) and § 636(b)(1)(A) and for submission of recommendations on dispositive motions under § 636(b)(1)(B)" (Dkt 2). Defendant subsequently filed a Motion to Dismiss (Dkt 9). The Magistrate Judge ordered Plaintiff to show cause why Defendant's Motion to Dismiss should not be granted (Dkt 12), and Plaintiff responded with a "Correction of Fraudulent Claim" (Dkt 13). The Magistrate Judge issued a Report and Recommendation (R & R, Dkt 14), recommending that this Court dismiss Plaintiff's Complaint for failure to prosecute and failure to comply with the Court's Orders. The matter is presently before the Court on Plaintiff's objections to the Report and Recommendation (Dkt 15), to which Defendant filed a response (Dkt 16). In accordance with 28 U.S.C. § 636(b)(1) and FED. R. CIV. P. 72(b)(3), the Court has performed de novo consideration of those portions of the Report and Recommendation to which objections have been made. The Court denies the objections and issues this Opinion and Order.

First, Plaintiff seems to argue that the Magistrate Judge's participation in this matter is improper because he did not consent to her handling of his case. Specifically, Plaintiff states, "Claimant has no documentation that informs Claimant of Claimants' Right to consent nor inform Claimant is 'free to withhold consent without adverse substantive consequences' " (Objs., Dkt 15 at 4) (internal citations omitted).

28 U.S.C. § 636 sets forth the jurisdiction and powers of United States magistrate judges. *Roland v. Johnson,* 856 F.2d 764, 768–69 (6th Cir.1988).Section 636(c)(1), which provides that "upon the consent of the parties, a ... United States magistrate judge may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case," is inapplicable to Plaintiff's case. Rather, the Court's referral in this case was made pursuant to § 636(b)(1)(A) and (B), which authorizes the magistrate judge to rule on non-dispositive pretrial motions and make recommendations on dispositive motions. Hence, in this case, the Magistrate Judge only *recommended* dismissal; she did not, in fact, enter a judgment to dismiss the case. Consent from the parties is not required for a Court to refer a matter to a magistrate judge under § 636(b)(1), and Plaintiff's argument lacks merit for this reason.

Second, Plaintiff states that "another flaw Claimant will point out at this time is the lack of an original signature at the close of the document...." (Objs. Dkt 15 at 4). Plaintiff presumably refers to the Report and Recommendation, which the Magistrate Judge signed with an electronic signature. However, under the applicable Local Rule, "[t]he electronic filing of an opinion, order, judgment or other document by a judge (or authorized member of the judge's staff) by use of the judge's login and password shall be deemed the filing of a signed original document for all purposes."W.D.Mich.LCivR 5.7(e)(iv). Therefore, Plaintiff's argument is without merit.

***2** In his last substantive objection, Plaintiff objects to dismissal of his claim on failure to prosecute grounds where, according to Plaintiff, he was late in filing a response because "the U.S. Attorney has not provide[d] Claimant with any documentation to validate the assignment of this action to the U.S. Attorney ..." (Objs., Dkt 15 at 5). Plaintiff reasons that the U.S. Attorney must provide such documents because "Congress ... appoints this counsel to represent the IRS" (*id.*).

As Defendant indicates (Df.'s Resp., Dkt 16 at 1), Plaintiff incorrectly named Defendant in this lawsuit as the "Internal

Revenue Service, Ogden, Utah," when, in fact, Plaintiff is suing the United States of America. Per federal law, the United States attorneys are responsible for the prosecution and defense of civil cases in which the United States is a party. *See*28 U.S.C. § 547. Plaintiff's objection therefore identifies no error that would support rejecting the Report and Recommendation.

In the remainder of his document, Plaintiff merely restates the allegations contained in his Complaint, expresses his disagreement with the result reached by the Magistrate Judge, and presents an unfounded request to enter a default judgment against Defendant. These "objections" are unresponsive to the Magistrate Judge's Report and Recommendation and will not be considered by the Court. *See* W.D. Mich. LCivR 72.3(b) (requiring an objecting party to "specifically identify the portions of the proposed findings, recommendations or report to which objections are made and the basis for such objections").

Rather, for the foregoing reasons, this Court adopts the Magistrate Judge's Report and Recommendation as the Opinion of this Court. A Judgment will be entered consistent with this Opinion and Order. *See*FED. R. CIV. P. 58. Therefore:

IT IS HEREBY ORDERED that the Objections (Dkt 15) are DENIED, and the Report and Recommendation (Dkt 14) is APPROVED and ADOPTED as the Opinion of the Court.

IT IS FURTHER ORDERED that this matter is DISMISSED with prejudice for failure to prosecute and failure to comply with the Court's Orders.

All Citations

Slip Copy, 2015 WL 2345521, 2015-1 USTC P 50,246

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