[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 13-11464
Non-Argument Calendar

D.C. Docket No. 1:10-cv-01591-CAP

DEON D. JONES,

Plaintiff-Appellant,

versus

LOCKHEED MARTIN CORPORATION,
DR. MARK WOOD,

Defendants-Appellees.

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

(September 12, 2014)

Before TJOFLAT, JORDAN, and ANDERSON, Circuit Judges.

PER CURIAM:

Deon Jones appeals *pro se* from the district court's dismissal of his lawsuit alleging retaliation and discrimination in employment on the basis of race and disability, pursuant to Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e-2(a)(1), 2000e-3(a); 42 U.S.C. § 1981; the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§ 12112(a), 12203(a); the Family and Medical Leave Act of 1993 ("FMLA"), 29 U.S.C. § 2615(a)-(b); and various state laws. The district court dismissed defendant Dr. Mark Wood from the case without prejudice because he was never served. It dismissed Jones's Title VII, § 1981, and FMLA claims against Lockheed Martin Corporation ("Lockheed Martin") for failure to state a claim under Fed.R.Civ.P. 12(b)(6). The court later dismissed the remaining ADA and state-law claims with prejudice under Local Rule 41.3 for Jones's failure to obey a court order to file an amended complaint addressing those surviving claims alone. On appeal, Jones argues that his claims were dismissed in error because he did effectuate service upon Wood and succeeded in stating claims pursuant to the Federal Rules of Civil Procedure and applicable pleading standards. Furthermore, according to Jones, the court exhibited bias against him by dismissing his lawsuit.

We address each of Jones's arguments in turn.

I.

We review for abuse of discretion a district court's dismissal of a complaint without prejudice for failing to timely serve a defendant under Rule 4(m). *Lepone-Dempsey v. Carroll Cnty. Comm'rs*, 476 F.3d 1277, 1280 (11th Cir. 2007). A plaintiff may accomplish service by, *inter alia*, delivering a summons and copy of the complaint "to an agent authorized by appointment or by law to receive service of process." Fed.R.Civ.P. 4(c)(1), (e)(2)(C). An attorney is not an agent authorized to accept service unless or until his client specifically empowers him to accept the summons and complaint. *See Stone v. Bank of Commerce*, 174 U.S. 412, 421, 19 S.Ct. 747, 750-51, 43 L.Ed. 1028 (1899) ("The authority of an attorney commences with his retainer. He cannot [,] while acting generally as an attorney for an estate or a corporation[,] accept service of process which commences the action without any authority so do from his principal."); *id.* (noting that the same rule applies to individuals and citing *Starr v. Hall*, 87 N.C. 381 (1882) ("An attorney cannot, under his general authority, accept service for his client of the original process by which the action is begun."), and *Reed v. Reed*, 19 S.C. 548 (1883)). When service of process is challenged, the plaintiff bears the burden of establishing its validity. *Familia De Boom v. Arosa Mercantil, S.A.*, 629 F.2d 1134, 1139 (5th Cir. 1980), *overruled on other grounds by Ins. Corp. of Ir. v.*

Compagnie Des Bauxites De Guinee, 456 U.S. 694, 102 S.Ct. 2099, 72 L.Ed.2d 492 (1982).

Service must be accomplished within 120 days of the complaint being filed in court. *See* Fed.R.Civ.P. 4(m). Rule 4(m) provides that, "[i]f a defendant is not served within 120 days after the complaint is filed, the court—on motion or on its own after notice to the plaintiff—must dismiss the action without prejudice against that defendant or order that service be made within a specified time." *Id.* The court must extend the time for service upon a showing of "good cause." *Id.* "Good cause exists only when some outside factor[,] such as reliance on faulty advice, rather than inadvertence or negligence, prevented service." *Lepone-Dempsey*, 476 F.3d at 1281 (quotation omitted).

Jones cannot establish that he properly served Wood. Jones filed his case in the district court on May 25, 2010. Thus, Jones had until September 22, 2010, to serve Wood. Fed.R.Civ.P. 4(m). The first time Jones attempted to serve Wood, he gave a copy of the notice and summons to a receptionist at Duane Morris L.L.P. ("Duane Morris") on September 30, 2010. Accordingly, service was untimely. However, a magistrate judge gave Jones a "few day" extension. Thus, while the September 30 service, eight days after the expiration of the 120-day time period, was likely timely, Jones faces an additional hurdle because Wood had not authorized Duane Morris to accept service of process on his behalf. Wood

submitted a sworn declaration and a copy of a letter that a Duane Morris attorney had sent to Jones, establishing that, at the time of the September 30 service, Wood had not even retained Duane Morris for this matter, much less authorized the firm to accept service. Therefore, the September 30 service was improper. Fed.R.Civ.P. 4(e)(2)(C); *see Stone*, 174 U.S. at 421, 19 S.Ct. at 750-51.

Jones attempted to serve Wood a second time sometime between October 27 and November 1, 2010, again taking the summons and complaint to Duane Morris. Even if October 27 fell within the "few day" extension the court granted Jones, service was defective because Duane Morris was still not authorized to accept service on behalf of Wood. While Wood had retained Duane Morris by the time of the second attempted service, a defendant's retainer of a lawyer does not make the lawyer the defendant's authorized agent for service of process. S*ee Stone*, 174 U.S. at 421, 19 S.Ct. at 750-51. Furthermore, because Duane Morris submitted another letter stating that it was not Wood's authorized agent at the time of the second service, Jones has not met his burden of establishing that service was proper. *Familia De Boom*, 629 F.2d at 1139.

Finally, Jones did not attempt to establish good cause for the court to give him another extension of time to perfect service. However, even if he had advanced arguments for another extension, he would have been unsuccessful. He had notice that serving Duane Morris would not accomplish service of Wood, yet

he did not try to directly serve Wood. Nor does the record suggest that anything prevented Jones from personally serving Wood. As such, there was no external impediment to achieving service, meaning Jones did not have good cause for failing to serve Wood. *Lepone-Dempsey*, 476 F.3d at 1281. Nor were there any other factors that warranted an extension. *See Horenkamp v. Van Winkle & Co.*, 402 F.3d 1129, 1132 (11th Cir. 2005) (providing that a court may, in its discretion, extend the time for service even without a showing of good cause).

Therefore, the court did not abuse its discretion by dismissing Wood from the action, because Wood was never properly served and there was no cause to extend the deadline any further. Fed.R.Civ.P. 4(m); *Lepone-Dempsey*, 476 F.3d at 1280.

II.

We review *de novo* a district court's ruling on a Rule 12(b)(6) motion to dismiss. *Edwards v. Prime Inc.*, 602 F.3d 1276, 1291 (11th Cir. 2010). A motion to dismiss should be granted if the plaintiff does not plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 1974, 167 L.Ed.2d 929 (2007). Although the complaint need not provide detailed factual allegations, the basis for relief in the complaint must state "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 555, 127 S.Ct. at 1964-65. The

complaint must possess "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009).

A. FMLA

The FMLA provides that an eligible employee is entitled to a total of 12 workweeks of leave during any 12-month period to allow the employee to address his own health conditions or certain family-related events. 29 U.S.C. § 2612(a)(1).

The only time Jones mentioned the FMLA in his complaint was in the prayer for relief, in which he stated that he desired a "declaratory judgment that Defendants [were] in violation of . . . the Family Medical Leave Act." He provided no factual allegations suggesting that he took FMLA leave or that his termination was in anyway related to FMLA interference or retaliation. *See Twombly*, 550 U.S. at 555, 127 S.Ct. at 1964-65 (stating that labels and conclusions are insufficient); *Strickland v. Water Works & Sewer Bd.*, 239 F.3d 1199, 1206 (11th Cir. 2001) (stating that the FMLA creates two types of claims: interference and retaliation). Accordingly, Jones did not plead facts sufficient to state a claim. *Twombly*, 550 U.S. at 555, 127 S.Ct. at 1964-65.

B. Title VII Race Discrimination

Before filing a Title VII suit, a plaintiff must exhaust his administrative remedies by filing a timely charge of discrimination with the Equal Employment

Opportunity Commission ("EEOC"). *Wilkerson v. Grinnell Corp.*, 270 F.3d 1314, 1317 (11th Cir. 2001). A plaintiff's complaint under Title VII is "limited by the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination." *Gregory v. Ga. Dep't of Human Res.*, 355 F.3d 1277, 1280 (11th Cir. 2004) (quotation omitted).

Jones's lawsuit is based on a 2008 EEOC charge of discrimination and 2010 right-to-sue letter. In the charge, Jones alleged retaliation and discrimination based on disability. Because the charge did not mention race discrimination, Jones did not exhaust his administrative remedies before bringing the claim. *Wilkerson*, 270 F.3d at 1317. Accordingly, his lawsuit could not include allegations of race discrimination under Title VII. *See Gregory*, 355 F.3d at 1280. However, he did exhaust his Title VII retaliation claim, the substance of which will be discussed below.

C. Section 1981 Race Discrimination

Section 1981 protects an individual's right to be free from race discrimination in the "making, performance, modification, and termination of contracts," including employment contracts. 42 U.S.C. § 1981. The legal analysis of claims pursuant to either § 1981 or Title VII is the same. *Standard v. A.B.E.L. Servs., Inc.*, 161 F.3d 1318, 1330 (11th Cir. 1998). To make a *prima facie* case of discrimination, the plaintiff may show that: (1) he is a member of a protected class;

(2) he suffered an adverse employment action; (3) he was treated less favorably than similarly situated individuals outside of his protected class; and (4) he was qualified for the position. *Burke-Fowler v. Orange Cnty.*, 447 F.3d 1319, 1323 (11th Cir. 2006).

Nowhere in the complaint does Jones state his race. While he alleged that he trained a white employee who became his supervisor, and also alleged broadly that Lockheed Martin treated African American employees unfavorably, he never stated that he was a member of that class. Therefore, he failed to allege that he was a member of a protected class and that he was treated differently than similarly-situated individuals outside of the protected class. *Burke-Fowler*, 447 F.3d at 1323. Without those elements of the *prima facie* case, Jones failed to state a claim of race discrimination. *See Edwards*, 602 F.3d at 1300-01 (stating that, to plead a hostile work environment claim, the plaintiff "was required to allege" the elements of a *prima facie* case).

D. Title VII and § 1981 Retaliation

While the text of § 1981 does not contain a retaliation provision, the Supreme Court has held that such claims are cognizable under § 1981. *CBOCS W., Inc. v. Humphries*, 553 U.S. 442, 457, 128 S.Ct. 1951, 1961, 170 L.Ed.2d 864 (2008). To make a *prima facie* case of retaliation, under Title VII and § 1981, the plaintiff may show that: (1) he engaged in a statutorily protected activity; (2) he

suffered an adverse employment action; and (3) he established a causal link between the protected activity and the adverse action. *Bryant v. Jones*, 575 F.3d 1281, 1307-08 (11th Cir. 2009); *see also Standard*, 161 F.3d at 1330. Specifically, a § 1981 claim also "may be based upon retaliatory action taken against an employee for the employee's lawful advocacy of the rights of racial minorities." *Andrews v. Lakeshore Rehab. Hosp.*, 140 F.3d 1405, 1410 (11th Cir. 1998).

To establish the causal connection, the plaintiff must show that the protected activity and the employer's adverse action were "not completely unrelated." *Pennington v. City of Huntsville*, 261 F.3d 1262, 1266 (11th Cir. 2001) (quotation omitted). Also as to causation, the plaintiff must, at a minimum, generally establish that the decision maker was actually aware of the protected expression at the time he took the adverse employment action. *Raney v. Vinson Guard Serv., Inc.*, 120 F.3d 1192, 1197 (11th Cir. 1997). Then, the plaintiff can establish that the adverse action and protected activity were not wholly unrelated by showing a close temporal proximity between the employer's discovery of the protected activity and the adverse action. *Higdon v. Jackson*, 393 F.3d 1211, 1220 (11th Cir. 2004). A three-to-four-month delay is too long, while a one-month gap satisfies the test. *Id.*

Jones failed to allege in his complaint who terminated him. Jones established that he was suspended without pay, and eventually terminated, about

one month after he filed his first EEOC charge in 2005. He also claimed that he spoke out against Lockheed Martin's treatment of African Americans during workers' compensation and court proceedings at around the same time, and that some employees knew about those protected activities. Thus, he likely established the first two elements of his *prima facie* case and showed temporal proximity as to causation. *Bryant*, 575 F.3d at 1307-08; *Higdon*, 393 F.3d at 1220; *see also Andrews*, 140 F.3d at 1405. However, without alleging that the decision maker actually knew of the activities, Jones cannot establish causation. *Raney*, 120 F.3d at 1197. Without that information, Jones's treatment of the causation element was merely a formulaic recitation, and was insufficient to state a claim of retaliation under either Title VII or § 1981. *Twombly*, 550 U.S. at 555, 127 S.Ct. at 1964-65; *see Edwards*, 602 F.3d at 1300-01.

III.

Fed.R.Civ.P. 41(b) provides district courts with the power to dismiss an action for failure to comply with local rules. *Kilgo v. Ricks*, 983 F.2d 189, 192 (11th Cir. 1993). We review such dismissals for abuse of discretion. *Id.* Local Rule 41.3 for the Northern District of Georgia states that the court may dismiss a civil case if the plaintiff "fail[s] or refuse[s] to obey a lawful order of the court in the case." N.D. Ga. L.R. 41.3(A)(2). A dismissal under Local Rule 41.3 operates as a dismissal with prejudice, unless the court specifies otherwise. *Id.* 41.3(B).

Because dismissal with prejudice is a drastic remedy, it is allowable as a last resort "only where there is [1] a clear record of delay or willful contempt and [2] a finding that lesser sanctions would not suffice." *Kilgo*, 983 F.2d at 192 (quotations omitted). While we will occasionally infer that the district court implicitly made a finding that lesser sanctions would not suffice, we have "never suggested that the district court need not make that finding." *Id.* at 193 (quotation omitted). We "rigidly require the district courts to make these findings." *Betty K Agencies, LTD v. M/V Monada*, 432 F.3d 1333, 1339 (11th Cir. 2005). Furthermore, we have only inferred a finding on the second prong when lesser sanctions would have "greatly prejudiced" the defendants. *World Thrust Films v. Int'l Family Entm't*, 41 F.3d 1454, 1456-57 (11th Cir. 1995) (quotations omitted).

Because the district court did not specify whether its dismissal of Jones's ADA and state-law claims was with or without prejudice under Local Rule 41.3, we must construe it as a dismissal with prejudice. N.D. Ga. L.R. 41.3(B). Dismissals with prejudice are subject to the two-prong standard, and the court failed to satisfy the second prong by making the necessary finding that lesser sanctions would have been inadequate. *Kilgo*, 983 F.2d at 192. In its final order, the court stated that it was dismissing Jones's complaint because Jones had failed to follow its order to file an amended complaint by September 28, 2011, addressing only the remaining ADA and state-law claims. The order did not contain an

explicit statement that the court had considered lesser sanctions and found them inadequate. Furthermore, there is nothing in the record that suggests that Lockheed Martin would have been "greatly prejudiced" by the continuation of the lawsuit. *World Thrust Films*, 41 F.3d at 1456-57. We "rigidly require the district courts" to make a finding that a sanction less severe than dismissal would not suffice, and here, we can discern no ground to infer that the district court implicitly considered other sanctions. *Betty K Agencies*, 432 F.3d at 1339; *Kilgo*, 983 F.2d at 193.

Thus, we affirm the dismissal without prejudice of all claims against Wood and the dismissal of Jones's Title VII, § 1981, and FMLA claims against Lockheed Martin under Fed.R.Civ.P. 12(b)(6). However, we vacate and remand the district court's final order so that the court can reinstate Jones's ADA and state-law claims against Lockheed Martin, or make the appropriate findings for dismissal.

AFFIRMED IN PART, VACATED IN PART AND REMANDED.