FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRADFORD D. LUND, *Plaintiff-Appellant*, v. DAVID J. COWAN, The Honorable, Los Angeles County Superior Court; LOS ANGELES COUNTY SUPERIOR COURT, for the State of California, *Defendants-Appellees.*	No. 20-55764 D.C. No. 2:20-CV-01894-SVW-JC OPINION

Appeal from the United States District Court
for the Central District of California
Stephen V. Wilson, District Judge, Presiding

Argued and Submitted May 14, 2021
Pasadena, California

Filed July 15, 2021

Before: Ryan D. Nelson and Kenneth K. Lee, Circuit Judges, and Sidney H. Stein[*], District Judge.

Opinion by Judge Lee

[*] The Honorable Sidney H. Stein, United States District Judge for the Southern District of New York, sitting by designation.

SUMMARY[**]

Civil Rights

The panel affirmed the district court's dismissal of a complaint alleging that Los Angeles Superior Court Judge David Cowan violated plaintiff's due process rights under 42 U.S.C. § 1983 by appointing a guardian without notice or a hearing; and violated the Americans with Disabilities Act by commenting (apparently with questionable factual basis) that plaintiff had Down syndrome.

Plaintiff Bradford Lund is the grandson of Walt Disney. He has been embroiled in a long-running dispute with family members and trustees and has yet to claim a fortune estimated to be worth $200 million. In 2019, during settlement hearing, Judge Cowan remarked: "Do I want to give 200 million dollars, effectively, to someone who may suffer, on some level, from Down syndrome? The answer is no." Judge Cowan rejected the proposed settlement and appointed a guardian ad litem over Lund without holding a hearing.

The panel affirmed the district court's dismissal on the basis that most of Lund's claims were now moot because Judge Cowan removed the guardian ad litem and relinquished this case to another judge. And while Judge Cowan's statement may have been inaccurate and inappropriate, any claim challenging it was barred by judicial immunity, which shields judges from liability for

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

conduct or speech arising from their judicial duties. The panel further held that because judicial immunity barred the Americans with Disabilities Act claim against Judge Cowan, Lund's claim against the Superior Court also failed. Finally, the panel held that the district court did not abuse its discretion when it denied Lund's motion for leave to file a second amended complaint because all of Lund's proposed amendments would have been futile.

COUNSEL

Sandra Slaton (argued), Horne Slaton PLLC, Scottsdale, Arizona; Joseph Busch III, Adkisson Pitet LLP, Newport Beach, California; for Plaintiff-Appellant.

Matthew L. Green (argued), Best Best & Krieger LLP, San Diego, California, for Defendants-Appellees.

OPINION

LEE, Circuit Judge:

For over a decade, Bradford Lund — the grandson of Walt Disney — has languished in perhaps the Unhappiest Place on Earth: probate court. Embroiled in a long-running dispute with family members and trustees, Lund has yet to claim a fortune estimated to be worth $200 million. In 2019, it appeared that Lund would finally receive his rightful inheritance when he reached a proposed settlement. But Judge David Cowan of the Los Angeles Superior Court rejected it, suggesting (apparently with questionable factual basis) that Lund has Down syndrome. Judge Cowan then

appointed a guardian ad litem over Lund without holding a hearing.

Understandably frustrated at this latest turn of events, Lund sued Judge Cowan and the Superior Court, arguing that the appointment of the guardian without notice or hearing violated his due process rights under 42 U.S.C. § 1983. Lund also argued that Judge Cowan's comment violated the Americans with Disabilities Act (ADA). The district court dismissed the complaint, and Lund now appeals both the dismissal and the denial of leave to amend.

We affirm because most of Lund's claims are now moot after Judge Cowan removed the guardian ad litem and relinquished this case to another judge. And while Judge Cowan's statement may have been inaccurate and inappropriate, any claim challenging it is barred by judicial immunity, which shields judges from liability for conduct or speech arising from their judicial duties.

BACKGROUND[1]

Since 2009, Bradford Lund, an heir to the Disney fortune, has been mired in a protracted and pitched battle in probate court. As a beneficiary of several trusts, Lund should have received his inheritance distributions on his 35th, 40th, and 45th birthdays. Despite being over 50 years old today, Lund has yet to receive a distribution because the trust agreements included a caveat that allowed trustees to withhold the money if Lund lacked the maturity or financial acumen to manage the funds.

[1] This factual background is based on the first amended complaint. At the dismissal stage, we accept all factual allegations as true and construed in the light most favorable to Lund.

Lund claims that certain trustees, along with some "estranged" family members, have stymied his efforts to receive the distributions by casting him as mentally incompetent. According to Lund, though, he has largely prevailed in rebutting these incompetency allegations. For example, a ten-day bench trial in Arizona state court ended in a judicial determination that Lund was "not incapacitated." Similarly, a California state court determined that Lund had the capacity to choose new trustees for one of his trusts.

That all changed when Lund ended up in front of Judge David Cowan in Los Angeles County Superior Court. Judge Cowan issued a sua sponte order to show cause whether the court should appoint a guardian ad litem over Lund. Shortly afterward, Lund and the trustees engaged in mediation that led to a proposed global settlement agreement.

The parties appeared before Judge Cowan to seek approval of the proposed settlement agreement. During the hearing, Judge Cowan remarked: "Do I want to give 200 million dollars, effectively, to someone who may suffer, on some level, from Down syndrome? The answer is no." Lund's counsel immediately informed Judge Cowan that Lund did not have Down syndrome and asked Judge Cowan to retract his statement. Judge Cowan refused. Ultimately, Judge Cowan rejected the settlement.

Judge Cowan then appointed a guardian ad litem over Lund without holding a hearing. The next month, Lund filed a statement of objection to Judge Cowan, seeking to disqualify him for judicial bias because of the Down syndrome comment. In response, Judge Cowan filed an order striking Lund's statement of disqualification under California Code of Civil Procedure § 170.4(b), which allows

judges to strike statements that offer "no legal grounds for disqualification."

Lund sued both Judge Cowan and the Superior Court in federal court. Lund at first alleged a variety of constitutional due process claims under 42 U.S.C. § 1983, mostly related to the appointment of the guardian ad litem without notice or hearing. Later, Lund amended his complaint to add a claim under the Americans with Disabilities Act based on Judge Cowan's in-court statement about Down syndrome. Lund sought declaratory relief for the Section 1983 violations and money damages for the ADA violations. The defendants moved to dismiss the complaint, and the district court granted the motion, dismissing the case with prejudice. This appeal followed.

In November 2020 — after Lund filed his opening brief on appeal but before the defendants had filed an answering brief — Judge Cowan issued three orders. The first order discharged the guardian ad litem. The second order granted Lund's motion to reassign the case to a new judge in the probate division. Finally, the third was an order to show cause whether to disqualify Lund's lawyer for conflicts of interest. Judge Cowan commented that if Lund's lawyer were disqualified, then the new judge might want to consider reappointing the guardian ad litem to help deal with the aftermath of the disqualification.

STANDARD OF REVIEW

We review de novo the district court's order granting a motion to dismiss for failure to state a claim. *Los Angeles Lakers, Inc. v. Fed. Ins. Co*., 869 F.3d 795, 800 (9th Cir. 2017). In doing so, we accept all factual allegations as true and construe them in the light most favorable to Lund. *Mazurek v. St. Paul Fire & Marine Ins. Co*., 519 F.3d 1025,

1031 (9th Cir. 2008). We review for abuse of discretion the district court's denial of leave to amend the complaint. *AmerisourceBergen Corp. v. Dialysist W., Inc*., 465 F.3d 946, 949 (9th Cir. 2006).

ANALYSIS

I. Lund's Section 1983 Claims Are Moot or Barred by Sovereign Immunity.

The complaint alleges five Section 1983 counts seeking declaratory relief against Judge Cowan. Counts 1 through 4 relate to the appointment of the guardian ad litem without notice or hearing, while Count 5 objects to the order striking Lund's statement of disqualification. We affirm the district court's dismissal of the Section 1983 claims.

A. Counts 1 Through 4 Are Moot.

Counts 1 through 4 — all of which challenge the guardian ad litem appointment — are moot because Judge Cowan issued an order discharging the guardian.

"A party must maintain a live controversy through all stages of the litigation process." *Doe v. Madison Sch. Dist. No. 321*, 177 F.3d 789, 797 (9th Cir. 1999) (cleaned up). "If an action or a claim loses its character as a live controversy, then the action or claim becomes moot." *Id.* at 797–98 (cleaned up). For a defendant's voluntary conduct to moot a case, the standard is more "stringent: A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc*., 528 U.S. 167, 189 (2000) (cleaned up). Simply put, speculative suppositions, far-fetched fears, or remote possibilities of recurrence cannot overcome

mootness. *See Mayfield v. Dalton*, 109 F.3d 1423, 1425 (9th Cir. 1997); *Dufresne v. Veneman*, 114 F.3d 952, 955 (9th Cir. 1997).

Lund no longer faces any harm from the appointment of the guardian ad litem because Judge Cowan has lifted the order appointing her. And any possibility of future harm sounds only in speculation, especially because Judge Cowan has transferred this case to another judge (and, indeed, he no longer serves in probate court). Lund, however, protests that a possibility still exists that the new judge may reimpose a guardian ad litem. Under Lund's reading of Judge Cowan's orders, he "has specifically instructed the next judge to reappoint the GAL if the OSC were to be granted" and has effectively "directed" the reappointment of the guardian ad litem.

But Lund overstates the court's orders. Judge Cowan only wrote that *if* the new judge disqualifies Lund's counsel for conflict of interest, he or she "*may* wish to consider re-appointing the GAL (Ms. Lodise) to investigate whether the attorney's fees received by Ms. Slaton were in Brad's best interests." But even then, the ultimate decision to reappoint the guardian ad litem remains within the sole discretion of the new judge. Given all that, the possibility that the new judge would first disqualify Lund's counsel and then appoint a guardian ad litem without notice or hearing rests in the realm of speculation. In our view, the reappointment of the guardian ad litem "could happen only at some indefinite time in the future and then only upon the occurrence of future events now unforeseeable." *Mayfield*, 109 F.3d at 1425.

It may have been more prudent for Judge Cowan to simply transfer the case without including this extra commentary. But nothing in any of the orders suggests that Judge Cowan affirmatively ordered the reappointment of the

guardian in any binding way. Unfounded fears cannot save the claims from the mootness challenge, so we affirm the dismissal of Counts 1 through 4 as moot.

B. Sovereign Immunity Bars Count 5.

That just leaves one remaining claim under Section 1983: Count 5 challenging Judge Cowan's order striking Lund's statement of disqualification against him. Lund seeks a declaratory judgment holding that California Code of Civil Procedure § 170.4(b) — the statute giving Judge Cowan the authority to strike a statement of disqualification "if on its face it discloses no legal grounds for disqualification" — is unconstitutional.

Sovereign immunity bars this claim because it impermissibly seeks retrospective relief against Judge Cowan. "The Eleventh Amendment bars individuals from bringing lawsuits against a state for money damages or other retrospective relief." *Arizona Students' Ass'n v. Arizona Bd. of Regents*, 824 F.3d 858, 864 (9th Cir. 2016) (cleaned up). State officials sued in their official capacities are generally entitled to Eleventh Amendment immunity. *Flint v. Dennison*, 488 F.3d 816, 825 (9th Cir. 2007). The Eleventh Amendment thus applies to Judge Cowan, who serves as a state court judge and is being sued in his official capacity. *See Simmons v. Sacramento Cty. Superior Ct.*, 318 F.3d 1156, 1161 (9th Cir. 2003) ("Plaintiff cannot state a claim against the Sacramento County Superior Court (or its employees), because such suits are barred by the Eleventh Amendment.").

The Eleventh Amendment does not permit retrospective declaratory relief. *Arizona Students' Ass'n*, 824 F.3d. at 865. To get around this bar, Lund characterizes his declaratory relief as prospective. Admittedly, the line between

retrospective relief and prospective relief can blur. *See Edelman v. Jordan*, 415 U.S. 651, 667 (1974). But in general, "relief that in essence serves to compensate a party injured in the past by an action of a state official in his official capacity that was illegal under federal law is barred even when the state official is the named defendant," while "relief that serves directly to bring an end to a present violation of federal law is not barred by the Eleventh Amendment even though accompanied by a substantial ancillary effect on the state treasury." *Papasan v. Allain*, 478 U.S. 265, 278 (1986) (cleaned up).

We agree with Judge Cowan that Count 5 seeks purely retrospective relief and thus cannot survive sovereign immunity. Count 5 amounts to an as-applied challenge of California Code of Civil Procedure § 170.4(b), and Lund does not allege any continuing violation or harm stemming from Judge Cowan's past conduct. *See Six Star Holdings, LLC v. City of Milwaukee*, 821 F.3d 795, 803 (7th Cir. 2016) (observing that "an as-applied challenge invites narrower, retrospective relief, such as damages"). Not only does this claim involve past conduct and past harm, but Judge Cowan has since reassigned the case to a new judge and, indeed, he no longer serves in the probate division. So Judge Cowan cannot handle Lund's probate matter again at any point in the future, and an opinion declaring that Judge Cowan acted unconstitutionally would be advisory. *See McQuillion v. Schwarzenegger,* 369 F.3d 1091, 1095 (9th Cir. 2004). Thus, we hold that Count 5 is barred by the Eleventh Amendment.

****

Because we hold that the Section 1983 claims are either moot or barred by sovereign immunity, there is no need to address the other issues raised by Lund, including whether

Section 1983 bars prospective declaratory relief,[2] as well as whether Lund must exhaust state appellate remedies before he can seek declaratory relief.

II. Judicial Immunity Bars Lund's ADA Claim.

Relying on Title II of the ADA, Lund seeks money damages against both Judge Cowan and the Superior Court based on Judge Cowan's in-court comment that he would not give money to someone who "may suffer, on some level, from Down syndrome." The district court dismissed the ADA claims, citing judicial immunity. We affirm.

A. Claim Against Judge Cowan

"It is well settled that judges are generally immune from suit for money damages." *Duvall v. Cnty. of Kitsap*, 260 F.3d 1124, 1133 (9th Cir. 2001). The question here is whether judicial immunity shields Judge Cowan for his questionable in-court comment.

Judicial immunity only applies to judicial acts, and not to "the administrative, legislative, or executive functions that

[2] Section 1983 states that "in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable." 42 U.S.C. § 1983. This language was added to the statute in 1996 as part of the Federal Courts Improvement Act. Other circuits have held that prospective declaratory relief is still available under this statutory amendment because the text only explicitly bars injunctive relief. *See Just. Network Inc. v. Craighead Cty.*, 931 F.3d 753, 763 (8th Cir. 2019) ("Currently, most courts hold that the amendment to § 1983 does not bar declaratory relief against judges."). Our court has not yet explicitly answered whether the statutory amendment bars declaratory relief, so Lund urges us to hold that it does not. But we leave that question for another day.

judges may on occasion be assigned by law to perform." *Forrester v. White*, 484 U.S. 219, 227 (1988). To determine whether an act is judicial, we consider these factors: whether "(1) the precise act is a normal judicial function; (2) the events occurred in the judge's chambers; (3) the controversy centered around a case then pending before the judge; and (4) the events at issue arose directly and immediately out of a confrontation with the judge in his or her official capacity." *Duvall*, 260 F.3d at 1133 (cleaned up).

Lund points out that this case differs from *Duvall* because the statement here was not specifically made in the context of ruling on a motion. *See* 260 F.3d at 1133 ("Ruling on a motion is a normal judicial function, as is exercising control over the courtroom while court is in session."). Rather, Judge Cowan uttered it during a settlement hearing. But Lund does not identify any caselaw suggesting that judicial statements are protected only when they are embedded in an official judicial ruling, rather than made during a court hearing more generally.[3] We reject a cramped and illogical reading of a judicial act that would include only instances when a judge expressly decides a formal motion or

[3] None of the cases cited by Lund apply. For instance, Lund relies on *Jordan v. City of Union City, Ga.*, 94 F. Supp. 3d 1328 (N.D. Ga. 2015) and *Donaldson v. Trae-Fuels, LLC*, 399 F. Supp. 3d 555 (W.D. Va. 2019), for the proposition that statements or comments by decision-makers can support ADA liability. But those cases involve employers, not judges acting in their judicial capacity. Nor does *Grant v. Comm'r, Soc. Sec. Admin.*, 111 F. Supp. 2d 556, 559 (M.D. Pa. 2000), bear on this case. That case involved comments by an administrative law judge in the context of a Social Security appeal, but the plaintiffs did not seek money damages against the judge. And the same goes for the judicial recusal cases cited by Lund. Again, the dispute here is not whether judicial statements can be biased (they can), but whether judicial immunity bars claims for money damages based on judicial statements made from the bench during a hearing.

request. Indeed, the Supreme Court has remarked that even when a proceeding is "informal and ex parte," that does not necessarily deprive "an act otherwise within a judge's lawful jurisdiction . . . of its judicial character." *Forrester*, 484 U.S. at 227.

This broad conception of what constitutes a judicial act makes sense, given the history and purposes of the judicial immunity doctrine. For one, judicial immunity ensures that challenges to judicial rulings are funneled through more efficient channels for review like the appellate process. "Judicial immunity apparently originated, in medieval times, as a device for discouraging collateral attacks and thereby helping to establish appellate procedures as the standard system for correcting judicial error." *Id.* at 225.

Judicial immunity also serves the goal of judicial independence. As the Supreme Court has noted, "it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself." *Bradley v. Fisher*, 80 U.S. 335, 347 (1871). Subjecting judges to liability for the grievances of litigants "would destroy that independence without which no judiciary can be either respectable or useful." *Id*. In some cases, this commitment to judicial independence might result in unfairness to individual litigants. *See Stump v. Sparkman*, 435 U.S. 349, 363 (1978). But it is precisely in those types of unfair or controversial situations that judicial immunity may be more necessary to preserve judicial independence. *Id*. at 364.

With that background in mind, Judge Cowan's in-court statement easily falls within the purview of a judicial act. Judge Cowan did not comment on Lund's perceived

disability out of the blue in the courtroom or (thankfully) on Twitter. Rather, Judge Cowan made the statement from the bench during an official settlement approval hearing in a probate case. The comment directly related to Judge Cowan's efforts to decide whether to approve a proposed settlement agreement that would have given Lund access to a large sum of monetary distributions. It was thus not unreasonable for Judge Cowan to comment on Lund's capacity to manage money; indeed, Lund's competency was central to the litigation.

To be clear, we find Judge Cowan's comment troubling. That someone has Down syndrome does not necessarily preclude the ability to manage one's own financial affairs. In any event, the record suggests that Lund does not have Down syndrome. But judicial immunity shields even incorrect or inappropriate statements if they were made during the performance of a judge's official duties. Indeed, a judicial act does not stop being a judicial act even if the judge acted with "malice or corruption of motive." *Forrester*, 484 U.S. at 227. Rather, the relevant inquiry focuses on "the particular act's relation to a general function normally performed by a judge," not necessarily the judicial act itself. *Mireles v. Waco*, 502 U.S. 9, 13 (1991). "If only the particular act in question were to be scrutinized, then any mistake of a judge in excess of his authority would become a 'nonjudicial' act, because an improper or erroneous act cannot be said to be normally performed by a judge." *Id.* at 12 (cleaned up).

Congressional representatives enjoy immunity for comments made on the congressional floor. *See Gov't of Virgin Islands v. Lee*, 775 F.2d 514, 520 (3d Cir. 1985). Lawyers have immunity for comments made during litigation. *See Robinson v. Volkswagenwerk AG*, 940 F.2d

1369, 1372 (10th Cir. 1991), *cert. denied*, 502 U.S. 1091 (1992). We see no reason to treat differently a judge making a comment from the bench during a judicial proceeding. Thus, we hold that judicial immunity applies when a judge makes a statement from the bench during an in-court proceeding in a case before the judge. We affirm the district court's dismissal of the ADA claim against Judge Cowan.

B. Claim Against Superior Court

Lund also seeks to hold the Superior Court liable based on the same in-court statement by Judge Cowan. Because judicial immunity bars the ADA claim against Judge Cowan, that claim against the Superior Court must also fail.

Under *Duvall*, Title II of the ADA allows respondeat superior liability. *Duvall*, 260 F.3d at 1141. But as a general matter, there can be no respondeat superior liability where there is no underlying wrong by the employee, which includes situations in which the employee is immune to suit. Because judicial immunity bars any finding of individual liability against Judge Cowan, the Superior Court similarly cannot be held liable for Judge Cowan's conduct. Thus, we affirm the district court's dismissal of the ADA claim against the Superior Court based on judicial immunity.

III. The District Court Did Not Err in Denying Leave to Amend.

Finally, we hold that the district court did not abuse its discretion when it denied Lund's motion for leave to file a second amended complaint. "Dismissal without leave to amend is proper if it is clear that the complaint could not be saved by amendment." *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1051 (9th Cir. 2008) (cleaned up). Here, all of Lund's proposed amendments were futile.

First, Lund tries to save his lawsuit by re-asserting the ADA claim against the Superior Court only, not Judge Cowan, to try to plead around judicial immunity. But in the end, the factual basis for the ADA claim remains the same, so any liability against the Superior Court would still stem from the conduct of Judge Cowan, who enjoys judicial immunity. Simply removing Judge Cowan as a defendant does not change the respondeat superior analysis. Lund also proposes adding disability discrimination claims under Section 504 of the Rehabilitation Act, based on the same in-court statement by Judge Cowan as the ADA claim. But if the Rehabilitation Act claims seek money damages, though, they are barred by judicial immunity. *See Duvall*, 260 F.3d at 1133. Finally, Lund tries to plead around judicial immunity by adding requests for injunctive relief and declaratory relief under both the ADA and Rehabilitation Act. But like with the Section 1983 claims, Lund seeks retrospective, not prospective, relief.

We thus affirm the district court's order denying leave to file a second amended complaint.

CONCLUSION

The district court's orders granting Cowan's motion to dismiss and denying Lund's motion for leave to file a second amended complaint are **AFFIRMED**.[4]

[4] The motion for judicial notice (Dkt. No. 19) is **GRANTED**.