

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION**

**RAMON HOSEA McGRAW
ADC #142102**

PLAINTIFF

V.

4:10CV01846-WRW

JAMES M. MOODY

DEFENDANT

ORDER

Plaintiff, currently incarcerated at the Arkansas Department of Correction's Tucker Maximum Security Unit, filed a *pro se* complaint, pursuant to 42 U.S.C. § 1983, (Doc. No. 1), on November 23, 2010, naming as a Defendant United States District Judge James M. Moody.

I. SCREENING

Before docketing the complaint, or as soon thereafter as practicable, the court must review the complaint to identify cognizable claims or dismiss the complaint if it: (1) is frivolous or malicious; (2) fails to state a claim upon which relief may be granted; or (3) seeks monetary relief against a defendant who is immune from such relief.¹ Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." In *Bell Atlantic Corporation v. Twombly*,² the Court stated, "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. . . . Factual allegations must be enough to raise a right to relief above the speculative level."³ A complaint must contain

¹See 28 U.S.C. § 1915A.

²550 U.S. 544, 555 (2007) (overruling *Conley v. Gibson*, 355 U.S. 41 (1967), and setting new standard for failure to state a claim upon which relief may be granted).

³*Id.* (Citing 5 C. Wright & A. Miller, Federal Practice and Procedure § 1216, pp. 235-236 (3d ed. 2004)).

enough facts to state a claim to relief that is plausible on its face, not merely conceivable.⁴
Twombly at 570. However, a *pro se* plaintiff's allegations must be construed liberally.⁵

II. ANALYSIS

A. Recusal

Although no recusal request has been filed, I raise the issue *sua sponte* of whether I should recuse from hearing a case involving a fellow district court judge. Under 28 U.S.C. § 455(a), “[a]ny Justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.” The inquiry under §455(a) is “one of objective reasonableness.”⁶ The test for disqualification is whether a reasonable person with knowledge of the facts and circumstances might question a judge’s impartiality.⁷ Applying this test, it is clear that a reasonable person with knowledge of the facts and circumstances would not question my impartiality. Based on this, I do not see a need to recuse myself from this case.

B. Immunity

In his complaint, Plaintiff asserts that Judge Moody improperly dismissed a prior lawsuit. However, Judge Moody is immune from suit, and Plaintiff has therefore failed to state a claim upon which relief may be granted.

"Judges performing judicial functions enjoy absolute immunity from § 1983 liability."⁸

⁴*Id.* at 570.

⁵*Burke v. North Dakota Dept. of Corr. & Rehab.*, 294 F.3d 1043, 1043-44 (8th Cir.2002) (citations omitted).

⁶*Lunde v. Helms*, 29 F.3d 367, 370 (8th Cir. 1994).

⁷*Id.*

⁸*Robinson v. Freeze*, 15 F.3d 107, 108 (8th Cir.1994).

Like other forms of official immunity, judicial immunity is an immunity from suit, not just from ultimate assessment of damages.⁹ The evaluation whether an act of a judge can be considered “judicial” is dependent on the nature of the act itself – whether the act is a function normally performed by a judge in his judicial capacity.¹⁰ Entering an order to dismiss a lawsuit is certainly an act normally performed by a judge in his judicial capacity. Accordingly, Plaintiff’s complaint must be dismissed.

CONCLUSION

IT IS THEREFORE ORDERED THAT:

1. Plaintiff’s complaint is DISMISSED WITH PREJUDICE for failure to state a claim upon which relief may be granted.
2. This dismissal counts as a “strike” for purposes of 28 U.S.C. § 1915(g).
3. The Court certifies that an *in forma pauperis* appeal taken from the order and judgment dismissing this action is considered frivolous and not in good faith.

DATED this 7th day of December, 2010 (Pearl Harbor Day).

/s/Wm. R. Wilson, Jr.
UNITED STATES DISTRICT JUDGE

⁹*Mireless v. Waco*, 502 U.S. 9, 11 (1991).

¹⁰*See Forrester v. White*, 484 U.S. 219, 228 (1988); *Stump v. Sparkman*, 435 U.S. 349, 362 (1978).