No. 78-2896. Summary Calendar
United States Court of Appeals, Fifth Circuit

Williams v. Wood

612 F.2d 982 (5th Cir. 1980)
Decided Mar 3, 1980

No. 78-2896. Summary Calendar.–

– Fed.R.App.P. 34(a); 5th Cir. R. 18.

March 3, 1980.

Reginald Williams, pro se.

Nickolas P. Geeker, U.S. Atty., Pensacola, Fla., Clinton Ashmore, Tallahassee, Fla., for defendant-appellee.

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Appeal from the United States District Court for the Northern District of Florida.

Before CHARLES CLARK, VANCE and SAM D. JOHNSON, Circuit Judges.

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PER CURIAM:

A deputy clerk of a federal district court allegedly failed to notify appellant of the entry of final judgment and thereby prevented him from appealing it. His ensuing action against the deputy clerk was dismissed by the district court on the basis of absolute immunity. We reverse and remand.

I.

On June 29, 1977, Reginald E. Williams, a District of Columbia resident, filed a motion to alter or amend the adverse judgment in his pro se action in the Northern District of Florida against Edward Roger Williams. The district court denied the motion on July 8, 1977, and a deputy clerk, Andrea Revell, entered that order in the official docket record on the same day with a notation of "copies to parties." Appellant Williams alleges that he did not receive a copy of the order and that, when he called the clerk's office by telephone at an unspecified later date, Revell and another deputy clerk, Marie Wood, told him that "the Court had not made a determination in the Cause" and that the clerk's office could not locate the file. Williams also alleges that Wood promised to "return the call and advise [him]" when the order was entered. Appellant inquired again on or about September 20, 1977, and Wood told him that the order had been entered on July 8 and sent him a copy. He filed a notice of appeal on October 6. This court dismissed the appeal because the notice was untimely filed.

Appellant then filed suit against Wood, a Florida resident, in the same district court. He alleged that she maliciously deprived him of due process and equal protection under the fifth and fourteenth amendments and violated 42 U.S.C. §§ 1981 and 1983.[1] He requested punitive and compensatory damages and other relief. Wood moved for dismissal on the basis of absolute quasi-judicial immunity and failure to state a claim, and

moved in the alternative for summary judgment. The district court denied summary judgment because of disputed facts but dismissed the action. The basis for dismissal was the district court's holding that Wood's duties in filing orders and notifying parties were judicial functions falling within the absolute immunity of the district judge. The court also held that 42 U.S.C. §§ 1981 and 1983 and 28 U.S.C. § 1343 are inapplicable to actions under color of federal law, and intimated that Williams had not stated a claim upon which relief could be granted. That intimation apparently was based on this court's decision in *Davis v. Passman,* 571 F.2d 793, 801 (5th Cir. 1978) (en banc). The Supreme Court subsequently reversed that decision, *Davis v. Passman,* 442 U.S. 228, 243, 99 S.Ct. 2264, 2276, 60 L.Ed.2d 846 (1979), and we have applied *Davis* retroactively, *Seibert v. Baptist,* 599 F.2d 743 (5th Cir. 1979). Under these holdings Williams has stated a fifth amendment claim and we therefore must consider the lower court's conclusions with respect to Wood's immunity.

[1] The complaint alleged jurisdiction under 28 U.S.C. §§ 1332, 1343, and 2201-2202. The Declaratory Judgment Act, *id.* §§ 2201-2202, does not confer subject-matter jurisdiction, as the district court recognized. *Skelly Oil Co. v. Phillips Petroleum Co.,* 339 U.S. 667, 671, 70 S.Ct. 876, 878, 94 L.Ed. 1194 (1950). The jurisdictional section for § 1981 and § 1983 claims, 28 U.S.C. § 1343, does not apply because any deprivation was under color of federal law, as the district court noted. *Mack v. Alexander,* 575 F.2d 488, 489 (5th Cir. 1978). Jurisdiction exists under 28 U.S.C. §§ 1332 and 1331.

II.

A clerk of a federal court performing routine duties such as entering and order and notifying parties does not enjoy an absolute immunity from damages actions for injuries caused by that conduct. This circuit instead
985 extended qualified immunity from damages actions under the Civil Rights Act of 1871 to clerks of state *985 courts in connection with their failure to forward a trial transcript to the state appellate court and their denial of copies of the records of other state court actions. *Rheuark v. Shaw,* 547 F.2d 1257, 1259 (5th Cir. 1977); *Qualls v. Shaw,* 535 F.2d 318, 319 (5th Cir. 1976). The same qualified immunity from damages actions is appropriate for clerks of federal courts performing similar acts.[2] A clerk "may receive immunity in his own right for the performance of a discretionary act or he may be covered by the immunity afforded the judge because he is performing a ministerial function at the direction of the judge." *Waits v. McGowan,* 516 F.2d 203, 206 (3d Cir. 1975). Absolute immunity from damages actions applies, only in a narrow range of actions, for clerks of court acting in a nonroutine manner under command of court decrees or under explicit instructions of a judge. Damages will not be awarded for a clerk's actions of this type even if in bad faith or with malice. *E.g., Zimmerman v. Spears,* 428 F. Supp. 759, 762 (W.D.Tex.), *aff'd on other grounds,* 565 F.2d 310 (5th Cir. 1977) (enforcing summons); *Weaver v. Thomas,* 399 F. Supp. 615, 617 (S.D.Tex. 1975) (refusing to file petition without required fee).[3] The rationale is that, in this limited group of functions, the clerk of court acts as the arm of the judge and comes within his absolute immunity. *See Barr v. Matteo,* 360 U.S. 564, 569, 79 S.Ct. 1335, 1338, 3 L.Ed.2d 1434 (1959). No immunity extends to clerks of court acting outside the scope of their jurisdiction, as is true for judges. *See Bradley v. Fisher,* 80 U.S. (13 Wall.) 335, 343, 20 L.Ed. 646 (1872).

[2] Several circuits have afforded qualified immunity to clerks of state courts. *Shipp v. Todd,* 568 F.2d 133, 134 (9th Cir. 1978) (in their judicial functions); *McLallen v. Henderson,* 492 F.2d 1298, 1300 (8th Cir. 1974) (for good-faith acts); *Denman v. Leedy,* 479 F.2d 1097, 1098 (6th Cir. 1973) (in setting bail bond); *McCray v. Maryland,* 456 F.2d 1, 4-5 (4th Cir. 1972) (in filing papers negligently); *Marty's Adult World of New Britain, Inc. v. Guida,* 453 F. Supp. 810, 816 (D.Conn. 1978) (for ministerial duties).

[3] Several court of appeals decisions have extended absolute immunity to clerks of state courts involving similar exceptional actions. *Slotnik v. Staviskey,* 560 F.2d 31, 32 (1st Cir. 1977), *cert. denied,* 434 U.S. 1077, 98 S.Ct. 1268, 55 L.Ed.2d 783 (1978) (in entering judgment); *Lockhart v. Hoenstine,* 411 F.2d 455, 460 (3d Cir.), *cert. denied,* 396 U.S.

941, 90 S.Ct. 378, 24 L.Ed.2d 244 (1969) (under court order); *Brown v. Dunne,* 409 F.2d 341, 343 (7th Cir. 1969) (in administering conservatorship); *see Barnes v. Dorsey,* 480 F.2d 1057, 1060 (8th Cir. 1973) (in denying transcript under procedural rules); *Smith v. Rosenbaum,* 460 F.2d 1019, 1020 (3d Cir. 1972) (in revoking bail bond under statutory requirement); *Dieu v. Norton,* 411 F.2d 761, 763 (7th Cir. 1969) (in denying free transcript under procedural rules); *Steinpreis v. Shook,* 377 F.2d 282, 283 (4th Cir. 1967), *cert. denied,* 389 U.S. 1057, 88 S.Ct. 811, 19 L.Ed.2d 858 (1968) (in issuing summons under court rule and statute). *But see Stewart v. Minnick,* 409 F.2d 826 (9th Cir. 1969) (general quasi-judicial immunity). Two district court decisions have afforded absolute immunity to clerks of federal courts. *Burton v. Peartree,* 326 F. Supp. 755, 761 (E.D.Pa. 1971); *see* note 4 *infra.*

In entering an order and notifying the parties a clerk of court enjoys qualified but not absolute immunity. *See McCray v. Maryland,* 456 F.2d 1, 5 (4th Cir. 1972).[4] That routine duty of court clerks does not fall within the narrow exception for clerical actions explicitly commanded by a court decree or by the judge's instructions. Dismissal of an action on the basis of immunity is proper only when the official is absolutely immune and not when he is qualifiedly immune. *Imbler v. Pachtman,* 424 U.S. 409, 419 n. 13, 96 S.Ct. 984, 984 n. 13, 47 L.Ed.2d 128 (1976). The dismissal of Williams' action by the district court on the basis of the clerk's immunity was incorrect.

[4] *But see Davis v. McAteer,* 431 F.2d 81, 82 (8th Cir. 1970) (absolute immunity for filing documents); *Sullivan v. Kelleher,* 405 F.2d 486, 487 (1st Cir. 1968) (same); *Rudnicki v. McCormack,* 210 F. Supp. 905, 907-08 (D.Mass. 1962), *appeal dismissed,* 372 U.S. 226, 83 S.Ct. 679, 9 L.Ed.2d 714 (1963) (same).

Williams alleges that Wood failed to notify him of the entry of the order on his motion, and then told him that the order had not yet been rendered. He also contends that she promised then failed to contact him by telephone when the order was rendered, and that she "also advised [Williams] that she was responsible for the
986 malfeasance *986 and misfeasance." He charges that Wood acted in bad faith and with malice. Wood, of course, disagrees with these allegations. Williams has, however, alleged facts that, if true, would overcome Wood's qualified immunity and would justify relief. We do not reflect any view as to the verity of his allegations.

REVERSED and REMANDED.