

**UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

No. 06-1378

**DAN YATES,
Plaintiff-Appellant,**

vs.

**ANGELA ARKINS, et al.
Defendants-Appellees.**

**Appeal from the United States District Court for the District of
Colorado
Case No. 06-CV-00089
The Hon. Walker D. Miller**

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APPELLEES DO NOT REQUEST ORAL ARGUMENT

CORPORATE DISCLOSURE

Defendant-Appellee The Child and Family Center, Inc., is a Colorado corporation. There is no parent corporation and no publicly held corporation that owns 10% or more of its stock.

None of the other defendant-appellees is a corporation.

Defendant-Appellee Truhlar and Truhlar, L.L.P., is a Colorado limited liability partnership whose partners are Robert Truhlar and Doris Truhlar.

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STATEMENT OF RELATED CASES

There are no prior or related appeals.

JURISDICTIONAL STATEMENT

Defendants accept Plaintiff's jurisdictional statement.

STATEMENT OF ISSUES

1. Whether Plaintiff may properly assert a claim on appeal concerning random assignment of his case in the District Court when he did not assert such claim in the District Court and has made no showing or argument concerning plain error.
2. Whether Plaintiff's insistence that the Magistrate Judge had no authority to order the dismissal of his case is meaningful when it was the District Court Judge, not the Magistrate Judge, who ordered that dismissal.
3. Whether the District Court Judge's summary of Plaintiff's participation in motions practice and modification of the recommendation provided by the Magistrate Judge demonstrate that the District Court Judge engaged in a *de novo* review and determination of the Magistrate Judge's recommendation.
4. Whether the District Court Judge's order of dismissal for willful failure to comply with court orders, in general accord with the Magistrate Judge's recommendation, is actually a finding of contempt by the Magistrate Judge and

whether the rules pertaining to contempt proceedings involving Magistrate Judges even apply here.

5. Whether D.C.COLO.LCivR 41.1 permits a Magistrate Judge to enter an order of dismissal or improperly expands the decision-making authority of a Magistrate Judge when that rule merely permits a Magistrate Judge to enter an order to show cause.

STATEMENT OF THE CASE

This case is before the Court on a request for review by Plaintiff-Appellant Dan Yates (“Plaintiff”) of the District Court’s Order on Recommendation of Magistrate Judge. In that Order, the District Court Judge accepted the Magistrate Judge’s recommendation with modifications. The District Court Judge agreed with the Magistrate Judge’s recommendation of dismissal of Plaintiff’s case as a sanction. However, the District Court Judge dismissed Plaintiff’s case without prejudice, rather than with prejudice, as recommended by the Magistrate Judge. And, the District Court Judge’s basis for dismissal was Plaintiff’s “willful failure to obey court orders,” a basis more narrow than that cited by the Magistrate Judge.

STATEMENT OF THE FACTS

On January 19, 2006, Plaintiff filed a Verified Complaint and Jury Demand in the District Court for the District of Colorado. In that Complaint, he alleged claims against Defendant-Appellees Angela Arkin, Doris Truhlar, Truhlar & Truhlar, L.L.P., Elode Brodbeck, The Child and Family Center, Inc., Claire Purcell, and Louise Yates (collectively, “Defendants”) for “conspiracy to deprive and actual deprivation of his rights secured by the First, Fifth, Ninth, and Fourteenth Amendments to the U.S. Constitution, as well as 42 U.S.C. section 1983; intentional infliction of emotional distress (outrageous conduct); unjust enrichment; and abuse of process” (Doc. 1 at 1). Plaintiff asserted that “Defendants[’] wrongful acts as described herein, were executed [in] furtherance of Defendant Louise Yates[’] initial threat as set forth in ¶ 18 of this Verified Complaint, to interfere with the Plaintiff’s rights in relation to the care, custody and control of the minor child I.Y., to destroy the Plaintiff’s reputation and career, and to cause the Plaintiff financial ruin” (Doc. 1 at 5).

Although failing to describe how the defendants acted under color of law, Plaintiff nevertheless claimed that “All Defendants acted under the Colorado of law” to deprive him of various constitutional rights (Doc. 1 at 6). Plaintiff asserted that all Defendants intentionally inflicted emotional distress (Doc. 1 at 6-7). And, Plaintiff claimed unjust enrichment, in that one Defendant required him to pay

three of the Defendants “for the misconduct alleged herein” (Doc. 1 at 8). Plaintiff also made a claim for malicious abuse of process (Doc. 1 at 9).

Although the Complaint does not so state, Plaintiff’s case is an action brought by an ex-husband against his ex-wife and others, including a state court judge and court-appointed special advocate for the couple’s minor child, alleging civil rights violations and state law torts allegedly arising in connection with child custody determinations made in about 2001 (see Doc. 6 at 1-2). As stated in Judge Angela Arkin’s Motion to Dismiss, Plaintiff and Defendant Louise Yates were involved “in a hotly contested dissolution of marriage and child custody action before the Douglas County District Court” and that, in the present action, Plaintiff “seeks money damages to compensate him for alleged harm arising from Judge Arkin’s orders” regarding child custody and other issues (Doc. 13 at 1-2).

This case, by random draw pursuant to D.C.COLO.LCivR 40.1, was assigned to Senior Judge Richard P. Matsch (Aplt. App. at 27A.) For reasons not clear from the record, but probably related to the senior status of Judge Matsch, the Docketing Clerk for the United States District Court reassigned the matter to Judge Walker D. Miller.

On January 24, 2006, the District Court Judge issued an Order of Reference to Magistrate Judge, stating as follows:

Pursuant to 28 U.S.C. § 636 (b)(1)(A) and (B) and Fed. R. Civ. P. 72(a) and (b), United States Magistrate Judge Boyd N. Boland is designated to conduct proceedings in this civil action as follows:

- (X) Convene a scheduling conference under Fed. R. Civ. P. 16(b) and enter a scheduling order meeting the requirements of D.C.COLO.LCivR 16.2.
- (X) Conduct such status conferences and issue such orders necessary for compliance with the scheduling order, including amendments or modifications of the scheduling order upon a showing of good cause.
- (X) Convene settlement conferences and direct related procedures as may facilitate resolution of this case.
- (X) Hear and determine pretrial matters, including discovery and other non-dispositive motions.
- (X) Conduct hearings, including evidentiary hearings, and submit proposed findings of fact and recommendations for rulings on dispositive motions.
- (X) Conduct a pretrial conference and enter a pretrial order.

It is ORDERED, that this civil action is referred to the named magistrate judge to proceed according to the designations marked (X) above.

(Doc. 2 at 1).

On February 2, 2006, Plaintiff filed a “Notice of Correction re: Order of Reference to Magistrate Judge” (Doc. 4). In this “Notice,” Plaintiff stated that the Order showed it was “executed” by District Court Judge Miller on January 20,

2006, but that it was not “filed” until January 24, 2006, and that “Judge Walker D. Miller’s actions are in excess of his authority to delegate the litigation referenced herein to Magistrate Boyd N. Boland, in violation of 28 U.S.C. § 636” (Doc. 4 at 1-2). Plaintiff stated that the order “improvidently grants [the Magistrate Judge] the authority to dispose of substantive issues, in violation of 28 U.S.C. § 636(c)” because “Magistrates have no jurisdiction to rule upon substantive issues, absent written consent of all named parties,” and that Plaintiff did “not consent to the jurisdiction of Magistrate Boyd. N. Boland” (Doc. 4 at 2). Plaintiff then asserted that “[t]he Order of Reference is void” (Doc. 4 at 2).

After being served with the Complaint, two of the defendants filed motions for extension of time to file an answer (Docs. 6 & 10). After referral by the District Court (Docs. 7 & 11), the Magistrate Judge granted those motions (Docs. 8 & 12). Nevertheless, Plaintiff subsequently moved to strike portions of these motions for extension of time, arguing that the Magistrate Judge granted those motions without allowing him time to respond and that the motions were “designed to argue facts in support of their opposition to the claims asserted in Plaintiff’s Complaint” (Docs. 25 & 26). The Magistrate Judge characterized the motions to strike as “frivolous” and denied them (Doc. 29).

Despite the Magistrate Judge’s denial of his motion to strike as frivolous, upon Defendant Yates’ filing of her own motion for extension of time to file an

answer (Doc. 31), Plaintiff filed another, nearly identical Motion to Strike (Doc. 37). The Magistrate Judge denied this motion as well, characterizing it too as frivolous (Doc. 44).

On April 13, Defendants Brodbeck and The Child and Family Center, Inc., filed a Motion for Extension of Time to File Designation of Nonparties (Doc. 33). On April 18, 2006, the Magistrate Judge set this motion for a hearing on May 19, 2006, at 8:30 a.m. and ordered the parties to respond to the motion by May 3, 2006 (Doc. 43).

Defendant Judge Angela Arkin filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction and for Failure to State a Claim Upon Which Relief Can Be Granted (Doc. 13). In response, Plaintiff filed "Plaintiff's Objections" (Doc. 45). Plaintiff again argued that District Court Judge Miller had unlawfully delegated authority to Magistrate Judge Boland "when he referred [Defendant Arkin's Motion to Dismiss]," because "Magistrates have no jurisdiction to rule upon substantive issues that effectively dispose of the case," because "Defendant Arkin's pleading requests dismissal of Plaintiff's claims," and because "Plaintiff does not consent to the jurisdiction of Magistrate Boyd N. Boland" (Doc. 45 at 2). Plaintiff again asserted that "the Order of Reference is void as a matter of law" (Doc. 45 at 3).

Other defendants also filed motions to dismiss (Docs. 40, 41, 48), and Defendants joined in the relevant portions of each others' motions to dismiss (Docs. 52, 53, 55). The Magistrate Judge ordered that Plaintiff timely respond to the motions to dismiss (Doc. 42, 54).

Instead, on May 3, 2006, Plaintiff filed an Amended Verified Complaint and Jury Demand (Doc. 56). The most notable change to the original Complaint was that Plaintiff added as a new defendant Mary Mullarkey, Chief Justice of the Colorado Supreme Court, alleging that she was "responsible for the design of and constitutional administration of child and family custom, practice and procedure which enable private profiteering and abuses of process both inside and outside of Colorado courts" and that those "child and family customs, practices and procedures . . . are unconstitutional on their face and as applied to the Plaintiff" (Doc. 56 at 1, 7-8). In his "Plaintiff's Statement re: Amended Verified Complaint and Jury Demand and Magistrate Boland's Operation Outside the Scope of 28 U.S.C. § 631 *et seq.*," also filed on May 3, 2006, in addition to arguing that his Amended Complaint must be accepted under Fed. R. Civ. P. 15(a), Plaintiff argued again that Magistrate Boland was presiding without authority in this case and that the "District of Colorado's local practice of delegating decisions on motions to dismiss or summary judgment is void in accordance with Article III of the United States Constitution" (Doc. 58).

Because no defendant had yet filed a responsive pleading, the Magistrate Judge ruled on May 12, 2006, to accept the Amended Complaint and denied without prejudice the various motions to dismiss as moot because they were “no longer directed at the operative complaint” (Doc. 64). Accordingly, Defendants filed another round of motions to dismiss (Docs. 66, 79, 80), and the Magistrate Judge ordered that Plaintiff timely respond (Doc. 77, 84, 85).

By Minute Order dated April 18, 2006, the Magistrate Judge scheduled a hearing for May 19, 2006, on Defendants’ Motion for Extension of Time to File Designation of Nonparties (Doc. 43).

Five counsel, representing the various defendants singly and in combination, attended the May 19th hearing (Transcript, 5/19/06). Plaintiff failed to appear at the hearing (Doc. 88 at 1). During the hearing, the Magistrate Judge explained that he had scheduled the hearing, even though the non-party motion was seemingly uncontested, in order to discuss scheduling and discovery matters with the parties (Transcript, 5/19/06). At the hearing, the Magistrate Judge entered an Order to Show Cause on the record, which he issued in written form the same day, stating that Defendants’ “counsel appeared at [the scheduled time], but the plaintiff, who is proceeding *pro se*, neither appeared nor contacted the court” (Doc. 88 at 1). The Magistrate Judge then quoted D.C.COLO.LCivR 41.1, as follows:

A judicial officer may issue an order to show cause why a case should not be dismissed for lack of prosecution or for failure to comply with

these rules, the Federal Rules of Civil Procedure, or any court order. If good cause is not shown within the time set in the show cause order, a district judge or magistrate judge exercising consent jurisdiction may enter an order of dismissal with or without prejudice.

(Doc. 88 at 1-2).

The Order to Show Cause then stated:

IT IS ORDERED that the plaintiff shall show cause, if any there be, in writing and on or before **May 30, 2006**, why this case should not be dismissed pursuant to D.C.COLOLCivR 41.1 for lack of prosecution and failure to comply with the order of the court setting the Motion re Non-Parties for hearing. The plaintiff's failure to show cause and/or respond to this Order to Show Cause will result in a recommendation to the district judge that this case be dismissed.

(Doc. 88 at 2).

Rather than appear at the hearing on May 19th, Plaintiff instead filed, by fax, apparently eight minutes before the hearing was to begin, his "Plaintiff's Reservation of Rights Pursuant to Article III" (Doc. 89; see Doc. 103 at 3). In this document, Plaintiff argued that "THIS COURT'S PROPOSED SCHEDULING ORDER OPERATES IN DEROGATION OF FEDERAL LAW," that "Magistrate judges do not possess the authority to enter scheduling orders *sua sponte*," and that "Magistrate Boland's directives are void" (Doc. 89 at 3-4). Indeed, Plaintiff argued that "[t]he Court's Orders, including its April 18, 2006, and May 12, 2006 Orders, constitute an unwarranted interference with the Plaintiff's litigation" (Doc. 89 at 5).

Plaintiff did not respond to the Order to Show Cause. Instead, on May 31, 2006, one day after the deadline set by the Magistrate Judge for response to the Order to Show Cause, Plaintiff filed his “Appeal to Judge Walker D. Miller for Order to Show Cause Why Magistrate Boyd N. Boland Should Continue to Act Outside the Limited Authority Conferred by 28 U.S.C. § 636” (Doc. 91). The gist of this “appeal” can be conveyed by quoting its first sentence: “The Plaintiff is consistent in his objections to Magistrate Boyd N. Boland’s wrongful assumption of Judge Walker D. Miller’s Article III authority” (Doc. 91 at 1). Plaintiff also made the specific argument that D.C.COLO.LCivR 41.1 did not authorize Magistrate Judge Boland to issue a show cause order because he “is not a judicial officer” and “is not exercising consent jurisdiction in this case” (Doc. 91 at 2).

On June 2, 2006, the Magistrate Judge issued his Recommendation of United States Magistrate Judge as to the Order to Show Cause (Doc. 92). The recommendation traced the history, set forth above, of the May 19th motion hearing and Plaintiff’s failure to attend or otherwise contact the court (Doc. 92 at 1). The recommendation emphasized that the Magistrate Judge “warned the plaintiff that his failure to show cause and/or to respond to the Order to Show Cause would result in a recommendation to the district court judge that this case be dismissed” and stated that Plaintiff’s “appeal” (Doc. 91) is both nonresponsive and “frivolous” (Doc. 92 at 2). The recommendation stated that, under 28 U.S.C.

§ 636(b)(1)(A) and (B) and the District Judge’s Order of Reference to Magistrate Judge (Doc. 2), “I have authority to issue an order to show cause and to recommend to the district court judge that this case be dismissed” (Doc. 92 at 3). The recommendation then cited Fed. R. Civ. P. 41(b), “which authorizes sanctions, including the dismissal of a case, for failing to comply with court rules or any order of the court,” and set forth the factors in Ehrenhaus v. Reynolds, 965 F.2d 916, 921 (10th Cir. 1992), (Doc. 92 at 4) which a court should consider before imposing the sanction of dismissal with prejudice.

The Magistrate Judge acknowledged that “dismissal represents an extreme sanction appropriate only in cases of willful misconduct” and then stated that “[t]his is a case of willful misconduct” (Doc. 92 at 4). The recommendation continued:

. . . . The plaintiff’s behavior has prejudiced the defendants by requiring their attorneys, at substantial cost to the defendants, to attend a hearing which the plaintiff flagrantly failed to attend. In addition, the plaintiff’s misconduct has significantly interfered with the judicial process. The plaintiff has refused to acknowledge my authority. He has ignored my order to appear in court for a hearing, and he has ignored my Order to Show Cause. Instead of moving this case forward on its merits, I am forced to address the plaintiff’s unfounded arguments and contumacious behavior.

(Doc. 92 at 4-5). The recommendation concluded as follows:

In summary, I find that under the specific facts of this case, the aggravating factors of the plaintiff’s misconduct outweigh the judicial system’s strong predisposition to resolve cases on the merits. The plaintiff has failed to show cause why this case should not be

dismissed for lack of prosecution and failure to comply with order of this Court.

I respectfully RECOMMEND that this action be DISMISSED WITH PREJUDICE for the plaintiff's . . . lack of prosecution and failure to comply with orders of this Court.

(Doc. 92 at 5).

Throughout the following two months, the parties filed various motions to dismiss, joinders in those motions, responses to those motions, and replies to those responses (Docs. 93, 95, 97, 98, 100, 101, 102, 104, 108, 109, 110, 111, 114, 115, 116, 118).

In the midst of that briefing, Plaintiff filed his “Fourth Appeal to Judicial Officer Exercising Article III Jurisdiction on Case Number 06-CV-0089-WDM (BNB) under 28 U.S.C. § 636 and F.R.C.P. 72” (Doc. 103). Plaintiff maintained his objection to the Magistrate Judge’s authority to issue an order to show cause under D.C.COLO.LCivR 41.1 and stated that, eight minutes before the hearing scheduled for 8:30 a.m. on May 19, he “timely filed written objection and notification with the Court” concerning the May 19th hearing, that is, his “Plaintiff’s Reservation of Rights Pursuant to Article III” (Doc. 103 at 3; see Doc. 89). Plaintiff also contended that there was no legal authority for “the Magistrate’s *sua sponte* order of dismissal” (Doc. 103 at 5). He further asserted that, because he had appealed the Order to Show Cause to the District Court Judge, the Magistrate

Judge had no authority to enter his recommendation as to that Order to Show Cause (Doc. 103 at 6).

On July 31, 2006, the District Court Judge entered his Order on Recommendation of Magistrate Judge (Doc. 119). In this order, the District Court Judge stated that Plaintiff had filed a timely objection to the Magistrate Judge's recommendation (Doc. 119 at 1), an apparent reference to Plaintiff's "Fourth Appeal" (Doc. 103). The District Court Judge also stated that he had "reviewed *de novo* the pertinent portions of the record" (Doc. 119 at 1). The order continued as follows:

In reviewing the Recommendation, I have paid particular attention to Magistrate Judge Boland's analysis of the facts set forth in Ehrenhaus v. Reynolds, 965 F.2d 916, 921 (10th Cir. 1992). In normal cases, a *pro se* [party's] failure to appear for a single court appearance may not amount to conduct sanctionable by dismissal. In this case, however, [Plaintiff] has filed documents which the court has deemed frivolous, as discussed in the recommendation, has failed to appear as ordered, and has repeatedly challenged Magistrate Judge Boland's authority to conduct proceedings and enter orders in this case.

(Doc. 119 at 2). The order also notes that Plaintiff "misreads Local Rule 1.1F which, contrary to his argument, clearly defines 'judicial officer' [a term used in D.C.COLO.LCivR 41.1] to mean district judge or magistrate judge" (Doc. 119 at 3). The order concludes as follows:

Given [Plaintiff's] willful refusal to submit to the lawful authority delegated to Magistrate Judge Boland in this case, I agree with the recommendation that dismissal is a proper sanction under the

Ehrenhaus factors. Although I also agree that dismissal with prejudice may be appropriate, I will make it without prejudice in the hope that [Plaintiff] will carefully consider whether there is any legal merit to his claims before filing another lawsuit. . . .

(Doc. 119 at 3).

The District Court Judge also stated in a footnote in his order:

I also disagree that [Plaintiff] has failed to prosecute this case. Although he failed to appear for the motion hearing, he has responded to the various motions to dismiss and he did respond to the order to show cause, albeit by an appeal to me. I therefore focus solely on [Plaintiff's] willful failure to obey court orders as a basis for the dismissal.

(Doc. 119 at 3 n.2).

This appeal followed.

STATEMENT OF THE STANDARD OF REVIEW

A district court's decision to impose the sanction of dismissal for failure to follow court orders and rules is reviewable only for an abuse of discretion. Gripe v. City of Enid, Oklahoma, 312 F.3d 1184, 1188 (10th Cir. 2002).

SUMMARY OF THE ARGUMENT

Plaintiff's appeal of the District Court Judge's order dismissing his case, after a recommendation to that effect from the Magistrate Judge, is yet another occasion for Plaintiff to voice his legally unsupported opinion that the Magistrate Judge lacked authority to play a role in his case, especially to enter an order to show cause or to recommend dismissal. Plaintiff repeatedly, and mistakenly, argues that it was the Magistrate Judge who dismissed his case; in fact, the

Magistrate Judge merely recommended that the District Court Judge dismiss the case with prejudice. The District Court Judge conducted his own analysis and made a *de novo* determination that dismissal (without prejudice) was appropriate under the particular circumstances of this case. Plaintiff's various arguments are simply without merit.

ARGUMENT

I. Plaintiff failed to raise his argument concerning random assignment in the District Court, and Plaintiff presents neither evidence nor argument on the issue of plain error.

Plaintiff contends that, “the Clerk of the District Court unlawfully struck [the random assignment of this case to Judge Richard P. Matsch], removing this civil action to Judge Walker D. Miller” (Opening Brief, p. 10). However, Plaintiff did not challenge the assignment of this case to Judge Miller in the district court.

If a party fails to raise an issue in the trial court, that issue is deemed waived on appeal unless plain error is demonstrated. Hynes v. Energy West, Inc., 211 F.3d 1193, 1201-02 (10th Cir. 2000). This claim is therefore reviewable only for plain error.

Under this standard, Plaintiff must show “(1) an error, (2) that is plain, which means clear or obvious under current law, and (3) that affects substantial rights.” Abuan v. Level 3 Communications, Inc., 353 F.3d 1158, 1173 (10th Cir. 2003). This Court “may only reverse in an exceptional circumstance, where the

error was patently erroneous and prejudicial and where fundamental injustice would otherwise occur.” Id.

While there is no explanation in the record for the striking of Judge Matsch’s name and the adding of Judge Miller’s name on the case assignment sheet (Aplt. App. at 27A), there is no evidence that it was not merely a “neutral” correction or a necessary adjustment for purposes of Judge Matsch’s senior status. Furthermore, Plaintiff does not complain of any prejudice, real or theoretical, which resulted from the assignment of his case to Judge Miller rather than Judge Matsch.

Plaintiff’s claim regarding case assignment fails.

II. A District Court Judge has the authority to dismiss a party’s case for failure to comply with an order of the court, and it was the District Court Judge, and not the Magistrate Judge, who entered the order of dismissal.

The Federal Rules of Civil Procedure “give a district court ample tools to deal with a recalcitrant litigant.” Jones v. Thompson, 996 F.2d 261, 264 (10th Cir. 1993). Those tools include Fed. R. Civ. P. 16(f), which authorizes a court to impose sanctions, including dismissal, when a party fails to appear at a scheduling or pretrial conference, and Fed. R. Civ. P. 37(b)(2), which permits a court to strike pleadings or dismiss the action where a party fails to obey an order to provide or permit discovery. Jones v. Thompson, supra. These tools also

include Fed. R. Civ. P. 41(b), pertaining to involuntary dismissal, which provides as follows:

For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. *Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.*

(Italics added.)

Although the first sentence of Rule 41(b) addresses dismissals by motion made by a defendant, the italicized portion of the rule show that the rule itself “is not restricted to that situation.” U. S. v. Procter & Gamble Co., 356 U.S. 677, 680 (1958). Accordingly, this Court, citing this same rule, has expressly held that the “Federal Rules of Civil Procedure authorize sanctions, including dismissal, for . . . failing to comply with court rules or any order of the court[.]” Gripe v. City of Enid, Oklahoma, *supra*. A district court also has an “inherent power” to “levy sanctions in response to abusive litigation practices.” Jones v. Thompson, *supra*.

Pursuant to 28 U.S.C. § 636(b)(1), a Judge may designate a Magistrate Judge to hear and determine any pretrial matter pending before the court, except, among others, a motion to dismiss. Pursuant to that statute, a Judge may also designate a Magistrate Judge to conduct hearings, including evidentiary hearings,

and to submit to a Judge of the court proposed findings of fact and *recommendations* for the disposition, by a Judge of the court, of a dispositive motion, such as a motion to dismiss. 28 U.S.C. § 636; see F.R.C.P. 72(b). As to dispositive motions, a Magistrate Judge “has no authority to make a final and binding disposition.” United States v. Raddatz, 447 U.S. 667, 673 (1980). Nevertheless, a Magistrate Judge may *recommend* dismissal as a sanction for failure to comply with the court’s orders. Bass v. Jostens, Inc., 71 F.3d 237, 242 (6th Cir. 1995).

D.C.COLO.LCivR 41.1 provides in pertinent part that “A judicial officer may issue an order to show cause why a case should not be dismissed for lack of prosecution or failure to comply with these rules, the Federal Rules of Civil Procedure, or any court order.” A “judicial officer” is defined to include a magistrate judge. D.C.COLO.LCivR 1.1F.

Parties to litigation “have no power to interfere with a district judge’s statutory authority to delegate various responsibilities to Magistrates as long as the delegation is within the confines of” that authority. Foster v. Gloucester County Bd. of Chosen Freeholders, 465 F. Supp. 293, 296 (D.C. N.J. 1978); see 28 U.S.C. § 636(b); see generally Colorado Bldg. & Constr. Trades Council v. B.B. Andersen Constr. Co., 879 F.2d 809, 811 (10th Cir. 1989) (district judge may assign magistrate judge additional duties not described in 28 U.S.C. § 636 so long as

those duties are not inconsistent with the Constitution and laws of United States; district judge retains the ultimate responsibility for decision making); United States v. Raddatz, supra (statutory authority to delegate various responsibilities to magistrate judges is not violative of Article III constraints).

Here, it is abundantly clear from the record that it was the District Court Judge, and not the Magistrate Judge, who entered the order dismissing Plaintiff's case. The Magistrate Judge's entry of an order to show cause merely demanded an explanation from Plaintiff why he did not appear for the motion hearing on May 19. The show cause order was not itself a sanction and did not dispose of Plaintiff's case. Consistent with due process, the show cause order afforded Plaintiff an opportunity to respond to the Magistrate Judge's concerns before any action was taken. See Braley v. Campbell, 832 F.2d 1504, 1515 (10th Cir. 1987)(when court, *sua sponte*, intends to consider sanctions against a party, "due process is satisfied by issuance of an order to show cause why a sanction should not be imposed and by providing a reasonable opportunity for filing a response").

D.C.COLO.LCivR 41.1 authorized the Magistrate Judge to enter the order to show cause, and this limited authority does not improperly expand the Magistrate Judge's *decision-making* authority. See generally Colorado Bldg. & Constr. Trades Council v. B.B. Andersen Constr. Co., supra. Only after Plaintiff's failure to respond to the order to show cause, and his earlier failure to appear at the May

19 hearing, did the Magistrate Judge *recommend* to the District Court Judge that he should dismiss Plaintiff's case as a sanction for Plaintiff's "contumacious" conduct. The issue of a Magistrate Judge's "consent jurisdiction," which Plaintiff raises frequently, is irrelevant because it was the District Court Judge, not the Magistrate Judge, who ordered the dismissal of Plaintiff's case.

Plaintiff simply refuses to acknowledge that, while the Magistrate Judge recommended dismissal, it was the District Court Judge who actually dismissed the case. Plaintiff's refusal to accept this fact, however, changes nothing. The District Court Judge had authority to enter the order of dismissal as a sanction for willful failure to comply with the court's orders, and so Plaintiff's argument must be rejected. See Fed. R. Civ. P. 41(b); U. S. v. Procter & Gamble Co., supra; Gripe v. City of Enid, Oklahoma, supra.

III. The District Judge independently reviewed the pleadings in this case and the Magistrate Judge's recommendation before ordering dismissal on a narrower basis than recommended by the Magistrate Judge and without prejudice, rather than with prejudice, as the Magistrate Judge had recommended.

A District Court Judge must review *de novo* a Magistrate Judge's recommendation that a case be dismissed for failure to follow court orders when that recommendation has been the subject of a timely objection. See 28 U.S.C. § 636(b)(1). A District Court Judge's decision to impose the sanction of dismissal for failure to follow court orders and rules is reviewable only for an abuse of

discretion. Gripe v. City of Enid, Oklahoma, *supra*; Archibeque v. Atchison, Topeka & Santa Fe Ry. Co., 70 F.3d 1172, 1174 (10th Cir. 1995). An abuse of discretion occurs when “it renders ‘an arbitrary, capricious, whimsical, or manifestly unreasonable judgement.’” Coletti v. Cudd Pressure Control, 165 F.3d 767, 777 (10th Cir. 1999).

The imposition of the sanction of dismissal must be both “just” and “related to the particular claim which was at issue” in connection with the party’s conduct. Ehrenhaus v. Reynolds, 965 F.2d 916, 920 (10th Cir. 1992). In Ehrenhaus v. Reynolds, *supra*, this Court set forth a number of factors that a district court should consider before imposing the sanction of dismissal for discovery abuses. Although these factors apply to the review of a dismissal with prejudice, and the dismissal in this case was without prejudice, the factors are nevertheless worthy of consideration. They are: “(1) the degree of actual prejudice to the defendant; (2) the amount of interference with the judicial process; (3) the culpability of the litigant; (4) whether the court warned the party in advance that dismissal of the action would be a likely sanction for non-compliance; and (5) the efficacy of lesser sanctions.” Ehrenhaus v. Reynolds, 965 F.2d at 921.

The factors have been utilized to review a dismissal under Fed. R. Civ. P. 41(b) for failure to follow court orders and rules. See Mobley v. McCormick, 40 F.3d 337, 340 (10th Cir. 1994); Jones v. Thompson, *supra*. These factors do not

constitute a rigid test but rather represent criteria for the court to consider and evaluate on the basis of the record. Mobley v. McCormick, supra.

Here, the Magistrate Judge and the District Court Judge addressed the Ehrenhaus factors before, respectively, recommending and entering the order of dismissal. Moreover, the District Court Judge acknowledged and gave due consideration to Plaintiff's *pro se* status.

As to the first Ehrenhaus factor, the actual prejudice to Defendants, the Magistrate Judge found that Plaintiff's behavior prejudiced Defendants by requiring their attorneys, at considerable cost, to attend a hearing that Plaintiff intentionally failed to attend. As to the second factor, the amount of interference with the judicial process, the Magistrate Judge found that Plaintiff's conduct had "significantly" interfered with the judicial process, particularly by disregarding an order to appear for a hearing and also the order to show cause. The District Court Judge noted that, in "normal cases," a *pro se* party's failure to appear for a single court appearance may not amount to conduct sanctionable by dismissal but that Plaintiff here had engaged in other behavior prejudicial to the judicial process, including filing frivolous motions and repeatedly challenging the Magistrate Judge's authority.

As to the third factor, the culpability of the litigant, both the Magistrate Judge and the District Court Judge concluded that Plaintiff had acted willfully.

The Magistrate Judge noted that Plaintiff did not dispute that he had been ordered to appear and to show cause. The District Court Judge noted that Plaintiff had acknowledged the Order to Show Cause by filing an “appeal” to the District Court Judge seeking sanctions against the Magistrate Judge for exceeding his authority. As to the fourth factor, whether the court warned the party in advance that dismissal of the action would be a likely sanction for non-compliance, the Magistrate Judge, in his Order to Show Cause, expressly warned Plaintiff that failure to respond would result in a recommendation of dismissal.

As to the fifth and final factor, the efficacy of lesser sanctions, after due consideration, both the Magistrate Judge and the District Court Judge concluded that sanction less than dismissal would not be effective. The Magistrate Judge found that Plaintiff had “blatantly ignored unambiguous Court orders and warnings” and showed a “total lack of respect for the court and the judicial system.” The District Court Judge additionally noted Plaintiff’s unfounded accusations that the District Court Judge had “wrongfully” delegated authority to the Magistrate Judge, had “maladministered” the case, and had “preempted his litigation and attempted to coerce admissions” from him through the entry of a routine scheduling order. Based upon all of these findings, the District Court Judge concluded that a sanction less than dismissal would not be effective in deterring Plaintiff from further disruption of the judicial process.

Thus, before entering the order of dismissal, the District Court Judge plainly reviewed independently the Magistrate Judge's recommendation that the case be dismissed. After reciting some of the pertinent facts, the District Court Judge narrowed the basis on which the order of dismissal would rest: Plaintiff's willful failure to comply with a court order, rather than his failure to prosecute and also his failure to comply with a court order, as recommended by the Magistrate Judge. This determination reflects the District Judge's review of the entire file: the District Judge noted that Plaintiff "responded to the various motions to dismiss and he did respond to the order to show cause, albeit by an appeal to me. I therefore focus solely on [Plaintiff's] willful failure to obey court orders as a basis for the dismissal" (Doc. 119 at 3 n.2). Furthermore, the District Judge ordered that dismissal of Plaintiff's case would be dismissed *without* prejudice, although he noted the Magistrate Judge had recommended dismissal *with* prejudice (Doc. 119 at 3).

The District Court Judge did not merely "rubberstamp" the Magistrate Judge's recommendation; rather, the District Court Judge exercised his independent judgment. Plaintiff's stubborn refusal to submit to the Magistrate Judge's proper exercise of authority, and particularly Plaintiff's willful refusal to appear at a motion hearing as ordered, support the sanction of dismissal without prejudice for willful failure to obey court orders, and the sanction was therefore

within the District Court Judge's discretion. See Gripe v. City of Enid, Oklahoma, supra. There was nothing capricious or unreasonable about the District Court Judge's decision. Accordingly, this Court should affirm the order of dismissal without prejudice.

IV. The District Court Judge's order of dismissal for willful failure to comply with court orders, in general accord with the Magistrate Judge's recommendation, is not a finding of contempt by the Magistrate Judge, nor were there contempt proceedings, and so the rules pertaining to contempt proceedings involving Magistrate Judges do not apply here.

Plaintiff contends that the Magistrate Judge's "dismissal" of his case is equivalent to a finding of contempt by the Magistrate Judge, that a Magistrate Judge lacks authority to enter a finding of contempt, and that proper contempt procedures were not followed. Plaintiff is wrong. The record clearly shows that it was the District Court Judge who entered the order of dismissal of Plaintiff's case for failure to comply with court orders; the Magistrate Judge merely *recommended* dismissal.

The rules pertaining to contempt proceedings and Magistrate Judges simply do not apply here. Moreover, the fact that Magistrate Judges may have civil contempt authority in some circumstances does not affect a Magistrate Judge's authority to recommend a sanction of dismissal. See 28 U.S.C. § 636(e)(4) (concerning civil contempt authority in civil consent and misdemeanor cases)

(“This paragraph shall not be construed to limit the authority of a magistrate judge to order sanctions under any other statute, the Federal Rules of Civil Procedure, or the Federal Rules of Criminal Procedure.”).

Plaintiff’s contempt argument must be rejected.

V. D.C.COLO.LCivR 41.1 merely permits a Magistrate Judge to issue an order to show cause; it does not permit a Magistrate Judge to enter an order of dismissal and does not improperly expand the decision-making authority of a Magistrate Judge.

Fed. R. Civ. P. 41(b), pertaining to involuntary dismissal, provides as follows:

For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

D.C.COLO.LCivR 41.1 provides in pertinent part that “A judicial officer [which includes a Magistrate Judge, see D.C.COLO.LCivR 1.1F] may issue an order to show cause why a case should not be dismissed for lack of prosecution or failure to comply with these rules, the Federal Rules of Civil Procedure, or any court order.”

As noted above, Fed. R. Civ. P. 41(b) authorizes a court to impose the sanction of dismissal for failure to comply with any order of the court. See U.S. v. Procter & Gamble Co., supra; Gripe v. City of Enid, Oklahoma, supra. Plaintiff’s

claim that, under Fed. R. Civ. P. 41(b), only a defendant may move for dismissal, is simply wrong. There is no conflict between that rule and D.C.COLO.LCivR 41.1, which simply allows a judicial officer to issue an order to show cause – to demand an explanation or cogent argument – why the case should not be dismissed. Again, an order to show cause does not itself dismiss a case.

And, contrary to Plaintiff’s repeated assertion, a “judicial officer” is defined for purposes of the local rules as a district judge or a magistrate judge. See D.C.COLO.LCivR 1.1F. The definition does not limit a “judicial officer” to magistrate judges exercising consent jurisdiction. Regardless of whether he was exercising consent jurisdiction, Magistrate Judge Boland, as other Magistrate Judges, is *always* a “judicial officer.”

For these reasons, Plaintiff’s argument concerning the propriety of D.C.COLO.LCivR 41.1 must be rejected.

CONCLUSION

For all of these reasons, Plaintiff’s appeal should be rejected.

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(A)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). The brief contains 6,578 words, excluding parts of the brief exempted from the word count by Fed. R. App. P. 32(a)(7)(B)(iii).

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Respectfully submitted,

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I hereby certify that on this 12th day of January, 2007, two copies of the foregoing answer brief were placed in the United States mail, postage prepaid to the following:

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