

JUDICIAL COUNCIL
OF THE FIRST CIRCUIT

IN RE
COMPLAINT NO. 479

BEFORE
Boudin, Chief Circuit Judge

ORDER
ENTERED: APRIL 9, 2008

On February 12, 2008, complainant, a litigant, filed a complaint of judicial misconduct under 28 U.S.C. § 351(a) against a district judge in the First Circuit. The complainant alleges wrongdoing in connection with a civil case, initially filed against the complainant and others in 1987.

The complainant charges that the judge was responsible for deletions from the trial record, including segments of the complainant's testimony, other "evidence that was favorable to [the] complainant," and comments by the judge at the conclusion of the non-jury trial (which took place during several weeks of 1994). The complainant also contends that there were "[o]ther deletions . . . made in other proceedings as well that were prejudicial to [the complainant]" These allegedly include a question asked at an unspecified hearing in 1995 ("What do you want me to do bring back the anti trust case?"), as well as a question and statement directed by the court to the plaintiff at the end of trial ("Where's your proof, I don't see, what you are doing here' followed up with 'I will read 21 CFR.'").

The complainant does not state when he first learned of the alleged deletions but states that,

in October 2001, after requesting audio tapes of his trial, the complainant had a conversation with an identified court employee during which she stated that she "was not sure" if she could give the complainant the requested tapes but that "the deletions in the transcripts 'did not prejudice' [the complainant's] case." The complainant states that, later that month, he received a letter from the judge stating that the trial tapes "were erased shortly after the transcriptions were made."

The complainant continues that, "[s]ometime between 2002 and 2005, [he] made a visit to the court to see the . . . file in the case," but that the file, although purported to be complete by the clerk, consisted of "motions and replies" but did not include any trial tapes. The complainant further explains that, after this visit to the court, he discovered that court reporters take "steno notes" during proceedings which, the complainant surmises, should have been made available to him, "if there was no wrongdoing by [the judge], . . . even if the tapes were destroyed as claimed." The complainant infers that the judge "did not want [the complainant's] case to be in his court and he was willing to take whatever action was necessary to make sure [the] case was over."

The complainant adds that, in May 2007, the judge's clerk "wrote that the Steno Notes [sic] had been destroyed," and states that he has "the letters from [the judge] and his clerk if needed" The complainant concludes that "[d]elays, stonewalling and deception from the court seem to be the rule in this matter, [that the judge] was directly involved in the deletions . . . [and that] if the tapes were destroyed, [the judge] destroyed them when [the complainant] requested them."

After initial review of the complaint, the complainant was asked to provide the "letters from [the judge] and his clerk" referenced in the complaint, as well as any other documents relevant to his charges. In response, the complainant submitted four apparent letters. The first was from the judge to the complainant, dated October 2001, and stated, as follows:

Dear Mr. . . . :

I have discussed your . . . letter with my former court reporter She informs me that the transcripts that she prepared accurately and completely included the portions of the exhibits that you read into the record. She also informs me that she reused the audiotapes after the transcripts were completed. Therefore, the audiotapes that you requested are no longer available.

The second letter was from the complainant to the judge, dated later in October 2001, and was apparently written in response to the judge's letter. In it, the complainant noted the alleged deletions from the transcripts and requested a hearing.

The third letter was from another court employee, the judge's courtroom clerk at the time, to the complainant, and was dated May 2007. Written in apparent response to a request from the complainant under the Freedom of Information Act (FOIA) for "all records . . . and any information as to the audio tapes used at [the complainant's] trial," the clerk explained that FOIA does not apply to the judiciary and stated that, as indicated by the judge, the tapes "were erased and re-used by the court reporter shortly after she prepared the official transcripts in this matter. Further, the steno notes of the court reporter were destroyed after ten (10) years pursuant to the records disposition schedule set forth in the Guide to Judiciary Policies and Procedures."

The fourth enclosed letter was directed to the judge from the complainant and was dated later in May 2007. In it, the complainant reiterated his concern about the alleged destruction of the tapes, noted that he had not received a reply to his inquiry concerning the court's policy regarding the reuse of tapes during the relevant time period, and explained that he had requested the "steno notes" before expiration of the 10-year period during which their preservation was mandated.

A review of the docket sheet, as well as available pleadings and court orders¹, indicate that the case was originally filed in federal court in another circuit in 1987 against the complainant alleging the misappropriation of trade secrets and copyright infringement. In 1989, the case was transferred to the district court in the First Circuit and consolidated with another related matter. After two of the parties settled and the court dismissed the complainant's counterclaims on summary judgement, a non-jury trial, lasting over two weeks, was held in the fall of 1994. Thereafter, the judge found that the complainant had been misappropriating the plaintiff's intellectual property for over a decade and had fabricated testimony at trial. The court issued a lengthy (25 page) published opinion and order. The case was closed in 1995 and, in 1996, the court of appeals affirmed the decision of the lower court.

Subsequently, in 1998, the defendants filed a motion to have the complainant held in contempt for apparent failure to pay the fees incurred by the monitor retained to ensure compliance with the court's order for injunctive relief. After multiple hearings, the judge granted the motion for contempt, and ordered the complainant to pay costs and attorneys' fees of roughly \$20,000, as well as the monitor's fees of roughly \$14,000.

The docket additionally indicates that the court received four letters in the fall of 2001, one of which is presumably the complainant's letter of October 2001 to the judge, noted above. The docket demonstrates that, in December 2001, the court held that, to the extent that the complainant's correspondence sought reopening of the case, the request was denied. In March 2003, the complainant, now pro se, filed a motion to vacate all of the court's orders because of misconduct by

¹Due to the age of the case, the file itself has been archived in storage and is not readily accessible.

the plaintiff. In March 2004, in a 17-page memorandum, the judge denied the complainant's motion and allowed the plaintiff's motion for an order barring the complainant from attacking the validity of the court's judgment without leave of court. In 2005, the court of appeals again affirmed the lower court's decision and also noted that any issue concerning the alleged erasure of the trial tapes was waived because it had not been raised in the district court.

As an initial matter, I note that the Rules of the Judicial Council of the First Circuit Governing Complaints of Judicial Misconduct or Disability (Rules of Judicial Misconduct), require that complaints be filed "promptly." Rules of Judicial Misconduct, Rule 1(d).

A complaint may be dismissed if it is filed so long after the events in question that the delay will make fair consideration of the matter impossible. A complaint may also be dismissed if it does not indicate the existence of a current problem with the administration of the business of the courts.

Id. The misconduct alleged in the present matter--including the deletions from the trial transcripts, the erasure of the trial tapes and the subsequent disappearance of the stenographer's notes--concerns a trial that took place over 13 years before the complaint was filed. By the complainant's own admission, he only first raised these issues with the court in late 2001, still seven years after the trial and four years after the conclusion of the complainant's first appeal (for which the transcripts had been produced). The complainant offers no explanation for this extraordinary delay nor any indication of any current problem with either the judge or with the courts. See Rules of Judicial Misconduct, Rule 1(d), *supra*.

Moreover, neither the complaint, the docket, the reviewed pleadings and court orders, nor the supplementary letters submitted by the complainant upon request, offer any information supporting the charges that the judge harbored any illicit motivation in connection with the

complainant's case, or was otherwise involved in the mishandling of trial transcripts, audio tapes or stenographer's notes. To the contrary, the reviewed record indicates that the judge presided over the proceeding for over 14 years, held a lengthy trial, issued a published opinion which was upheld on appeal, and ruled on numerous post-trial motions before ultimately barring the complainant from further challenges to the court's judgement. On these facts, the charge that the judge "did not want" the complainant's case in his court is patently without basis. To the extent that the judge's last order reflected the court's interest in obtaining finality in the very old proceeding, it did not remotely suggest judicial animus. Furthermore, both the judge and his clerk promptly responded to the complainant's 2001 inquiry, explaining that the transcripts were accurate, the tapes had been reused, and the stenographer's notes were unavailable. As the complainant presents no evidence to the contrary, the complaint is dismissed pursuant to 28 U.S.C. §§ 352(b)(1)(A)(iii).

Insofar as any clerical or administrative error may have resulted in omissions from the record--a claim for which the complainant provides no support--any such errors would not standing alone demonstrate judicial misconduct within the meaning of the statute. See Order, Judicial Council of the First Circuit, In Re: Complaint No. 406, December 22, 2005, at 4, and 28 U.S.C. § 352(b)(1)(A)(i). Finally, to the extent that the complaint reflects disagreement with orders issued in the case, it is not cognizable. See 28 U.S.C. § 352(b)(1)(A)(ii).

For the reasons stated, Judicial Misconduct Complaint No. 479 is dismissed pursuant to 28 U.S.C. §§ 352(b)(1)(A)(i), (ii), and (iii).



Chief Judge Boudin