

JUDICIAL COUNCIL
OF THE FIRST CIRCUIT

IN RE
COMPLAINT NO. 01-09-90024

BEFORE
Lynch, Chief Circuit Judge

ORDER

ENTERED: APRIL 12, 2010

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 that the judge engaged in misconduct while presiding over the complainant's product liability action.

The complainant alleges that, in handling the defendants' motion to dismiss, the judge intimidated, threatened and "bullied" the complainant and her husband into foregoing their reasonable legal claims. The complainant explains that she brought suit against the defendant alleging "widespread performance failure" in the purchased product. The complainant concedes that the primary issue, at least initially, was whether the case was barred by a class action settlement reached with the defendants several years earlier. The complainant's position was that the class action did not preclude her litigation because both the underlying product and the defect were different from that at issue in the class action. The complainant contends that, from the start, the judge conveyed a "hostile bias" that the class action settlement precluded the complainant's claims,

despite "undisputed evidence that the facts underlying [her] claims were completely different from those in the class action"

Specifically, the complainant asserts that, at the hearing on the defendants' motion to dismiss and in the court's subsequent order denying that motion, the judge "demonstrated a remarkable indifference" to the issues, and repeatedly threatened to impose sanctions on both the complainant and her counsel if they pursued the case. The complainant adds that the judge did his own research in order to "find a rationale" for his ruling and used the threat of sanctions to prevent the complainant from seeking a final appealable order. The complainant further contends that the judge "had not even seen the Amended Complaint," on which the class action settlement had been based, when he determined that the complainant's claims "plainly could have been litigated in the [class] action" The complainant states that, even if her legal argument was incorrect, it was not frivolous and, thus, did not warrant the threats and intimidation imposed by the judge. The complainant concludes that, while she understands that "even a very bad decision cannot be the basis for a misconduct complaint," the judge's intimidations and threats "crossed the line from poor judging to egregious behavior," and ultimately forced her to withdraw the case for fear of financial retribution imposed by the court.

As part of an inquiry, undertaken pursuant to the Rules for Judicial-Conduct and Judicial-Disability Proceedings (Rules of Judicial Misconduct), Rule 11(b), Circuit Executive Office staff has reviewed the complaint, the docket, and complete transcript of the cited hearing, as well as the relevant pleadings and court orders. The judge's handling of the case did not constitute judicial misconduct. Contrary to the complainant's allegations, the reviewed record lends no support to the claims that the judge threatened or "bullied" the complainant in any way, much less into foregoing

her claims. Nor did the judge demonstrate any bias against the complainant or predetermined aversion to her legal claims.

The complainant accurately recounts the case chronology and legal issues. However, her conclusions are misplaced. The transcript of the lengthy hearing on the defendants' motion to dismiss establishes that the judge patiently heard from both parties on each of the relevant issues before issuing rulings. The judge reassured both counsel: "You are both going to get to talk as long as you want; so don't worry about that. As long as you're not repeating yourself, you can take all day with this." The judge endeavored to understand counsels' respective arguments, observing that the complainant claimed that her product was not of the "type" addressed in the class action. At the close of the hearing, the judge explained that it is his practice to rule on dispositive motions on the day of oral argument, as it can promote meaningful discussion between counsel. There was absolutely no indication of a "hostile bias" in favor of the defendants, a "remarkable indifference" to the issues at hand, or any other judicial animus against the complainant.

After a recess, the judge orally denied the motion to dismiss but voiced "reservations" about doing so. The court held that, based upon averments in the complaint, the complainant's product was different from that addressed in the class action. That said, however, the judge ordered discovery on the limited question of whether the complainant's product had undergone the same treatment as the products at issue in the class action and so was like the product in the class action, and directed the parties to move for summary judgment on that basis. The judge concluded:

It seems to me inevitable . . . because I give the class action a lot more credence than [complainant's counsel] does in this case . . . if it turns out through discovery that [a] good faith basis for making [the] claim that your clients were not a member of the that class is not borne out, there's a decent chance you are going to be paying the defendant's attorney's fees. And I just ask you to bear Rule 11 and its requirements in mind on that because this, while very expertly presented . . . [it] has the

appearance to me of some folks who did not know of the class action litigation and were trying to crowbar it open.

In a lengthy order denying the defendants' motion, issued the next day, the judge deemed the case not subject to dismissal at the present stage of proceedings. The judge observed, however, that there was not "any reason to doubt" the determination by the court in the class action case that all products manufactured during the relevant time period had been treated with certain chemicals in the same way.

The judge noted:

There is simply no support for the [complainant's] position that a plaintiff may sue a manufacturer, alleging that one of its products is deficient in one respect, then, after that suit proceeds to final judgment, sue the same manufacturer again, only this time alleging that the same product is deficient in some other respect.

The court sought "to alert [plaintiffs] and their counsel to the seeming inevitability that, if they are indeed members of the . . . class, they cannot prevail in this action." As at oral argument, the judge raised the question of "whether the [plaintiffs] and their counsel had a good-faith basis for maintaining . . . that their [product was] not covered by the [class action] judgment" before deciding that such a determination could not be made "at this stage in the proceedings" The court concluded by ordering discovery on the issue and the submission of summary judgment motions. After discovery, the plaintiffs filed a stipulation of dismissal.

There were no further proceedings, including no proceedings as to whether there had been a good faith basis for bringing and maintaining the suit. It is true that the judge addressed to complainant's counsel the need to ensure that his handling of the case reflected the results of the ordered discovery and were consistent with the obligations of Rule 11. In doing so, the judge was not threatening, remotely inpatient, or otherwise inappropriate. On the papers, there was a self-evident basis for the judge's concerns.

Beyond that, judges are entitled to form views based on the merits of the issues before them and to express these views. To do so is neither inappropriate nor indicative of bias. See Boudin, C.C.J. In Re: Complaint No. 444, January 23, 2007, at 2-3, citing In re Marisol Martinez-Catala, 129 F.3d 213 (1st Cir. 1997).¹ See also Committee on Codes of Conduct, Advisory Opinion No. 66 ("Opinions formed by a judge on the basis of facts introduced or events occurring in the course of current or prior proceedings ordinarily do not constitute a basis to show bias or partiality. Strongly stated judicial views rooted in the record, a stern and short-tempered judge's efforts at courtroom administration, expressions of impatience, dissatisfaction, annoyance and even anger directed to an attorney or a party should not be confused with judicial bias.").

The judge's handling of the complainant's case falls within this principle. There is no suggestion from the record that the judge's questions, opinions, comments and judgments were based on any source beyond the pleadings and evidence presented. In fact, the record demonstrates that it was the limitations of the available documentation before the court that prompted the judge to rule in the complainant's favor. The parties apparently engaged in discovery before the complainant decided, perhaps on the advice of counsel, to drop her claims. As our inquiry establishes that the allegations of bias and intimidation are unsupported by the evidence, the complaint is dismissed pursuant to 28 U.S.C. § 352(b)(1)(B). See also Rules of Judicial Misconduct, Rule 11(c)(1)(D).

The judge's reliance on his own legal research also does not suggest either bias or judicial

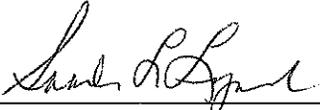
¹It is well settled that judges are entitled to form views about the merits, and to express them, during the course of the case so long as the judgments rest on the evidence and arguments in the proceeding itself Leaving aside extraordinary circumstances, the expression of views by the judge on the merits or application of such views through questioning is neither a basis for recusal nor does it constitute bias.

Boudin, C.C.J. In Re: Complaint No. 444, supra.

wrongdoing. See 28 U.S.C. § 352(b)(1)(A)(i). See also Rules of Judicial Misconduct, Rule 11(c)(1)(A). While the order at issue (denying the motion to dismiss) was in the complainant's favor, to the extent that the complaint reflects the complainant's disagreement with the substance of the judge's determinations on the facts and the law, it is not cognizable. See 28 U.S.C. § 352(b)(1)(A)(ii). See also Rules of Judicial Misconduct, Rule 11(c)(1)(B).

For the reasons stated, Judicial Misconduct Complaint No.01-09-90024 is dismissed, pursuant to 28 U.S.C. §§ 352(b)(1)(A)(i), 352(b)(1)(A)(ii), and 352(b)(1)(B).

4/12/10
Date


Chief Judge Lynch