

JUDICIAL COUNCIL
OF THE FIRST CIRCUIT

IN RE
COMPLAINT NO. 01-15-90002

BEFORE
Lynch, Chief Circuit Judge

ORDER

ENTERED: JUNE 11, 2015

Complainant, the defendant in a probation revocation matter, has filed a complaint, under 28 U.S.C. § 351(a), against the presiding district judge. The complainant's underlying criminal conviction took place in another circuit, but supervision of complainant's probation had been transferred to a district court in the First Circuit. Complainant levies a myriad of claims against the judge, all of which, for the reasons explained below, are baseless.

Complaint

Complainant alleges that the judge exhibited racial bias and blatant hostility toward complainant by disregarding complainant's objections to the attorneys appointed to represent him, speaking rudely, and violating complainant's Constitutional rights. Complainant contends that the judge exhibited these behaviors during two status conferences and during the final revocation hearing.

Complainant asserts that, during the first status conference, the judge "summarily denied" complainant's *pro se* motions, addressed complainant in a "threatening tone," "screamed" at complainant, and prematurely terminated the hearing in order to teach a class. Complainant adds that the judge also improperly denied complainant's requests to appear *pro se* and to continue his education while incarcerated.

Complainant continues that, at the next status conference, the judge wrongfully stated that complainant "won the lottery" when his second attorney was appointed and improperly denied complainant's request for new counsel.

Complainant further alleges that, during the final probation revocation hearing, the judge "forced" complainant to plead guilty and made improper statements that demonstrate the judge's "favoritism" of the government. Complainant asserts that these statements - that complainant was "obviously planning to rape, kidnap, and kill children and he has not yet crossed the line into serial murder," and that "any normal person would see the[] items [found in complainant's possession] for one purpose" - prove that the judge "pronounced [complainant] to be guilty of a range of serious felonies" with which complainant had been neither charged nor convicted.

Complainant further objects to a number of orders entered in the case, including an order denying complainant requested funds to retain an expert and the order "banning [complainant] from possessing or using legal adult materials allowed under the 1st [sic] Amendment" Complainant adds that the court has wrongfully delayed in ruling on a number of complainant's motions and asserts that, regardless of when they were filed, all

of his pending motions were simultaneously denied by electronic order "in unexplained circumstances."

Complainant also contends that clerk's office staff improperly gave complainant conflicting information concerning a motion for recusal that he had filed *pro se*. Finally, complainant includes a newspaper article referencing the judge in an unrelated matter, and concludes that, by declaring complainant guilty and punishing him for crimes having nothing to do with the alleged probation violation at issue (tampering with his ankle bracelet), the judge has demonstrated "contempt for [complainant's] civil rights" and is "unable to perform the duties of his office fairly, impartially, and diligently."

Complainant asks that a different judge be appointed to his case.

Limited Inquiry

As an initial matter, the judicial misconduct complaint procedure does not provide an avenue for obtaining the removal or replacement of a judge. See 28 U.S.C. § 351, *et. seq.*, and Rules for Judicial-Conduct and Judicial-Disability Proceedings (Rules of Judicial-Conduct), Rules 11, 19 and 20.

A review of the record in the case, including the docket, relevant pleadings and orders, and the transcripts of the three referenced hearings before the judge, lends no support to complainant's claims of judicial wrongdoing. The record demonstrates that, at each of the three hearings, the judge patiently heard from all parties before entering any

orders. The judge did not exhibit any bias, racial or otherwise, and was not hostile, rude or disrespectful of complainant.

At the first status conference, the judge allowed complainant's motion for new counsel, despite the government's observation that complainant had had multiple attorneys during the underlying proceeding in the original jurisdiction. In doing so, the judge warned complainant that future requests for new counsel would elicit greater scrutiny, noting "it will be dramatically more difficult to get lawyer Number 3 than lawyer Number 2, let's put it that way." The judge did not prematurely terminate the hearing; the court referenced a scheduled class when arranging the subsequent conference for the following week. The court repeatedly noted the need for the proceeding to move quickly and observed that, since there is not internet access in prison, expediting the proceeding would be the best way for complainant to continue with his on-line education.

At the second status conference, the judge denied complainant's request to reappoint his first lawyer. In so doing, the judge observed that complainant "hit the lottery," when his second attorney was appointed. This statement is not remotely indicative of judicial misconduct. See 28 U.S.C. § 352(b)(1)(A)(i). See also Rules of Judicial-Conduct, Rule 11(c)(1)(A).

During the over one and one-half hour final revocation hearing, the judge heard from all parties concerning the probation violation (which involved multiple instances of complainant tampering with his electronic monitoring device). The judge did not "force"

complainant to plead guilty. Complainant's attorney represented that there was no factual dispute as to the probation violation; the only issue was the requested modifications to the conditions of release. After hearing from counsel in full, the judge offered complainant the opportunity to make a statement. Complainant apologized for his conduct, explained that he is pursuing his education, and thanked the judge and his clerk for their assistance, noting to the judge: "I know you are . . . very fair"

After a short recess, the judge determined that, while the "underlying violation . . . was relatively minor," complainant's conduct in violating the terms of his probation warranted the six months in a community correction center, to be followed by the polygraph testing and pornography proscription requested by the government. In doing so, the judge referenced the facts surrounding the original conviction. The court did not find complainant "guilty" of any crime besides the probation violation to which he admitted.

Nor did the judge make the other statements, as alleged - that complainant was "obviously planning to rape, kidnap, and kill children and he has not yet crossed the line into serial murder" or that "any normal person would see the[] items [found in complainant's possession] for one purpose." Noting that complainant's probation violation "doesn't mean that he is yet a serial killer," the judge determined the need for "asserting greater control over and supervision over the [complainant]." As to the other remark, the government, not the judge, argued that complainant's ostensible "purpose" of the items found in his possession were "fanciful at best."

There is no indication anywhere in the reviewed record that the judge was biased against complainant, because of his race or for any other reason, hostile or engaged in any other judicial wrongdoing. Accordingly, the misconduct complaint is dismissed as lacking any factual foundation, pursuant to 28 U.S.C. § 352(b)(1)(B). See also Rules of Judicial-Conduct, Rule 11(c)(1)(D).

Complainant's claim that the judge raised his voice during these hearings does not constitute cognizable misconduct. See Boudin, C.C.J., Order, In Re: Judicial Misconduct Complaint No. 444, January 23, 2007, at 4 (The expression of views by a judge, based on the record, and the tone maintained by a judge do not alone provide a basis for a finding of judicial misconduct.). See also Lynch, C.C.J., Order, In Re: Judicial Misconduct Complaint No. 01-12-90015, July 11, 2012, at 3-4 (A judge's admonishment of counsel in a published order does not constitute "egregious" or "hostile" behavior under the Rules of Judicial-Conduct), and Judicial Conference Committee on Codes of Conduct, Advisory Opinion 66, June 2009 ("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. . . . [E]xpressions of impatience, dissatisfaction, annoyance and even anger directed to an attorney or a party should not be confused with judicial bias.") Accordingly, this claim is dismissed pursuant to 28 U.S.C. § 352(b)(1)(A)(i). See also Rules of Judicial-Conduct, Rule 11(c)(1)(A).

Where, as here, there is no evidence of improper judicial motivation, complainant's objection to any of the orders issued in the case does not constitute cognizable

misconduct. These include, but are not limited to, the rulings on complainant's motions for new counsel, any ruling concerning the availability of expert testimony, and the conditions of release. See 28 U.S.C. § 352(b)(1)(A)(ii), and Rules for Judicial-Conduct, Rule 11(c)(1)(B).

The same holds true for complainant's claim that the court delayed in ruling on some of complainant's motions. "Cognizable misconduct . . . does not include . . . an allegation about delay in rendering a decision or procedural ruling." Rules of Judicial-Conduct, Rule 3(h)(3)(B).

Complainant's remaining claim - that clerk's office staff mishandled one of complainant's motions - is not indicative of judicial wrongdoing. Nor does the article that complainant included with the misconduct complaint suggest misconduct by the judge. See 28 U.S.C. § 352(b)(1)(A)(i), and Rules for Judicial-Conduct, Rule 11(c)(1)(A).

For the reasons stated, Complaint No. 01-15-90002 is dismissed, pursuant to 28 U.S.C. §§ 352(b)(1)(A)(i), 352(b)(1)(A)(ii) and 352(b)(1)(B). See also Rules of Judicial-Conduct, Rules 11(c)(1)(A), 11(c)(1)(B) and 11(c)(1)(C), respectively.

6/11/15

Date

Judica Lynch

Chief Judge Lynch