

JUDICIAL COUNCIL  
OF THE FIRST CIRCUIT

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IN RE  
COMPLAINT NO. 01-23-90010

BEFORE  
Barron, Chief Circuit Judge

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ORDER

ENTERED: JUNE 15, 2023

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Complainant, a plaintiff in a civil proceeding, has filed a complaint under 28 U.S.C. § 351(a) against a district judge in the First Circuit. Complainant alleges judicial misconduct in connection with two civil cases over which the judge presided, one of which complainant filed and the other to which complainant is not a party. The misconduct complaint is baseless, is not cognizable, and is not indicative of misconduct.

**Complaint**

Complainant alleges that, in presiding over complainant's case, the judge failed to disclose that the judge's family member was employed by an affiliate of two defendants, and that this failure was "fundamentally prejudicial to [complainant's] pursuit of justice and [an] obstruction of justice." Complainant asserts that the judge "was obligated to . . . disclose" this relationship in her case at least at the time the judge disclosed it in an unrelated case (not involving complainant), which was over a month after complainant's case had closed.

Complainant further objects to the manner in which the judge addressed allegations that defense counsel coached a witness during complainant's trial. Complainant states that the judge falsely claimed that there were no video recordings of the witness's testimony, and that, although the judge said that the attorneys would be "force[d]" to review the recordings, only the judge reviewed them. Explaining that court staff informed complainant that the cameras at the front of the courtroom were not working, complainant asserts that "it was [the judge's] responsibility to ensure that all equipment in the courtroom is functioning properly." Complainant alleges that the judge "simply dismissed the issue" and did not interview certain "witnesses in the courtroom that may have witnessed the acts."

With regard to the unrelated case, complainant alleges that the judge violated federal law by failing to provide "essential . . . [,] relevant . . . , [and] required" details concerning the family member's employment relationship with an affiliate of the defendant in that case, and engaged in misconduct by "summarily den[ying]," without a hearing, a motion to recuse. Complainant asserts that the judge was required to recuse from both cases under Canon 3(C)(1)(a) of the Code of Conduct for U.S. Judges (Code of Conduct) and 28 U.S.C. § 455.<sup>1</sup> Complainant asserts that the judge's actions in both cases

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<sup>1</sup> Canon 3(C)(1)(a) of the Code of Conduct provides: "A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances in which . . . the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding." While complainant also alleges that the judge violated the Massachusetts Code of Judicial Conduct and the American Bar Association Model Code of Judicial Conduct, the Code of Conduct for U.S. Judges applies to the federal judiciary.

were "prejudicial to the effective and expeditious administration of the business of the courts" and "interfered with the performance of [the judge's] judicial duties."

### **Summary of the Proceedings**

The reviewed record, including the misconduct complaint and attachments, and the dockets and transcripts of the relevant proceedings, provides no basis for complainant's allegations of misconduct.

#### **Complainant's Case**

Complainant, who was represented by counsel, filed an employment discrimination action against her former employer and a number of affiliates. The case proceeded to trial, and, a number of days into the trial, complainant's attorney informed the court that an individual observing the trial from the courtroom reported to him that defense counsel was coaching a defense witness during cross-examination, and moved for a mistrial.

The judge held an evidentiary hearing on the matter, outside of the presence of the jury, at which complainant's counsel questioned the observer, who testified that he saw defense counsel gesturing repeatedly during the witness's cross-examination while the witness looked toward them. Complainant's counsel questioned the witness, who denied that he had been coached.

The judge then explained, in response to complainant's counsel's question, that there are cameras in the courtroom that the judge did not believe were on during the trial,

but that the court would inquire with the U.S. Marshals Service into whether there were recordings. Defense counsel told the judge that he did not signal to the defense witness and that, if the trial was recorded, he would review the tapes in detail. The following day, the judge entered an order directing the U.S. Marshals Service to release any recordings of the proceedings in order for the court to consider the witness coaching allegation.

After the conclusion of the evidentiary portion of the trial, the judge explained that, in reviewing the video recording, the court did not see any evidence of witness coaching, observed that the witness was asked complex questions, the answers to which would be difficult to signal, and denied complainant's motion for a mistrial in an oral order.<sup>2</sup> Subsequently, the jury returned a verdict in favor of defendants, and the judge entered judgment.

With respect to the issue concerning the purported cameras in the front of the courtroom, complainant attached emails to the misconduct complaint indicating that, after judgment entered, complainant emailed the courtroom deputy, explaining that complainant had reviewed the video recording of the trial and requested the recordings from the front of the courtroom. The courtroom deputy responded, explaining that there are no cameras in the front of the courtroom and that complainant received the tapes from the only camera in the courtroom.

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<sup>2</sup> The record indicates that there is only one video recording of the proceedings, which the U.S. Marshals Service released, pursuant to the court's order, and copies of which the judge made available to the parties.

### The Unrelated Case

A plaintiff filed a disability discrimination action against one of the defendants in complainant's case. More than a month after judgment entered in complainant's case, the judge notified the parties in the unrelated case that defendant is affiliated with the employer of a family member of the judge. The judge explained that the family member does not have a financial interest in the case, that the outcome of the case would not affect the family member's employment, and that, while the judge does not believe that there is any reason to recuse pursuant to 28 U.S.C. § 455, the parties could object.

Plaintiff filed a motion for the judge's recusal in which he asserted that the disclosed relationship raised questions as to the judge's impartiality, to which defendant objected. The judge denied the motion, explaining that there was no basis for recusal under 28 U.S.C. § 455, as the family member has no financial interest in the case, the result of the case would not affect the family member's employment, defendant and the employer are separate legal entities, and accordingly, no reasonable person would question the judge's ability to be impartial.

### **Discussion**

The misconduct complaint is without merit. The complaint and record provide no evidence that the judge harbored any illicit animus or was improperly motivated in handling complainant's case, either with regard to the judge's alleged obligation to disclose a relative's employment relationship with an affiliate of defendants or in connection with the court's handling of the witness coaching claim. The voluntary

disclosure of the judge's relative's employment by an affiliate of a defendant in an unrelated case, over a month after judgment entered in complainant's case, does not alone support the inference that the disclosure was necessary, under either the Code of Conduct or the federal recusal statute, in complainant's case either while the case was pending or after its conclusion.<sup>3</sup> See supra p. 5. Further, even if the judge was under an ethical duty to make such a disclosure in complainant's case, of which there is no evidence, absent information suggesting some nefarious reason or improper motive for the judge's handling of the disclosure issue, any such error would not alone be indicative of misconduct.<sup>4</sup> While not necessary to the resolution of the present matter, complainant also does not provide any basis for concluding that the judge's failure to disclose the employment relationship impacted complainant's case, let alone was "fundamentally prejudicial" to the proceeding. Accordingly, this claim is dismissed as unsupported and as not indicative of misconduct. See 28 U.S.C. §§ 352(b)(1)(A)(iii) and (i). See also Rules

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<sup>3</sup> The mere fact that a judge's relative is employed by an affiliate of a party in a case before the judge would not alone evidence a conflict interest or an appearance of partiality, or require recusal under either the federal disqualification statute, 28 U.S.C. § 455, or the Code of Conduct. See, e.g., Hewlett-Packard Co. v. Bausch & Lomb, Inc., 882 F.2d 1556, 1569 (Fed. Cir. 1989) (holding that the judge's son's employment by a party did not "raise a serious question of impartiality" requiring disqualification under 28 U.S.C. § 455(a), when the son was a non-management employee, with no policy making role, in a company with tens of thousands of employees, and the outcome of the case would have no effect on the son's employment or financial interest in the party, and that the judge was not required to disclose the employment relationship).

<sup>4</sup> A violation of the Code of Conduct may inform consideration of a judicial misconduct complaint but does not necessarily constitute judicial misconduct. See Code of Conduct, Canon 1 Commentary (While the Code of Conduct may "provide standards of conduct for application in proceedings under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 (28 U.S.C. §§ 332(d)(1), 351-364), [n]ot every violation of the Code should lead to disciplinary action."); and Rules of Judicial-Conduct, Commentary to Rule 4 ("While the Code [of Conduct's] Canons are instructive, ultimately the responsibility for determining what constitutes cognizable misconduct is determined by the Act [28 U.S.C. § 351, et seq.] and these Rules . . ."). Likewise, "a violation of the disqualification statute, 28 U.S.C. § 455, is not automatically a violation of the Judicial Misconduct statute[; however,] conceivably, a sufficiently egregious violation, especially if coupled with evidence of bad faith, might . . . rise to the level of judicial misconduct." See Boudin, C.C.J., Order, In Re: Complaint No. 362 (Dec. 16, 2003) (citation omitted).

for Judicial-Conduct and Judicial-Disability Proceedings (Rules of Judicial-Conduct), Rules 11(c)(1)(D) and (A), respectively.

There is likewise no indication that the judge was improperly motivated in determining that the claim of witness coaching was unsupported. The record demonstrates that the court took the allegation seriously; the judge held an evidentiary hearing, at which the relevant parties were questioned, and reviewed the only available video before determining that the claim was not supported and denying the motion for a mistrial. See supra pp. 3-4 and note 2. Further, the record conclusively refutes the claim that the judge stated that there were no videos of the testimony or that counsel would be "force[d]" to review the recordings. See supra pp. 3-4. The judge did not "simply dismiss[] the issue," but made a reasoned determination based on a record that the court compiled in order to assess the claim. See id. Accordingly, the allegation that the judge's determination of this issue demonstrated misconduct is baseless. See 28 U.S.C. § 352(b)(1)(A)(iii). See also Rules of Judicial-Conduct, Rule 11(c)(1)(D).<sup>5</sup>

Where, as here, there is no evidence of bias or improper judicial motive, complainant's objections to the substance of the judge's determinations and rulings in complainant's case, including not disclosing a family member's alleged relationship with defendants or recusing sua sponte from complainant's case, finding that there was no

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<sup>5</sup> Regardless of whether there were no cameras in the front of the courtroom, as indicated by the courtroom deputy, or any such cameras were not working, the record demonstrates that the judge provided complainant with the only videorecording of the proceeding, see supra p. 4 and note 2, and, despite complainant's contention to the contrary, non-functioning courtroom equipment would not evidence judicial misconduct.

evidence of witness coaching, and denying complainant's motion for a mistrial, are not cognizable. See 28 U.S.C. § 352(b)(1)(A)(ii); and Rules of Judicial-Conduct, Rule 11(c)(1)(B). See also Rules of Judicial-Conduct, Rule 4(b)(1) ("Cognizable misconduct does not include an allegation that calls into question the correctness of a judge's ruling, including a failure to recuse. If the decision or ruling is alleged to be the result of an improper motive . . . the complaint is not cognizable to the extent that it calls into question the merits of the decision."), and Commentary to Rule 4 ("Any allegation that calls into question the correctness of an official decision or procedural ruling of a judge — without more — is merits-related.").

Finally, the allegations that the judge engaged in misconduct in handling the unrelated case by failing to disclose additional "details" concerning the family member's employment relationship with an affiliate of the defendant, or in denying the motion for recusal filed in that case, are unsupported. There is no evidence of any improper motive; to the contrary, by making the voluntary disclosure and explaining the subsequent denial of the recusal motion on the record, the court ensured that its determinations would be subject to review as appropriate. This claim is dismissed as unfounded and, insofar as it is based solely on complainant's disagreement with the court's ruling on the recusal issue, as not cognizable. See 28 U.S.C. § 352(b)(1)(A)(iii) and (ii); and Rules of Judicial-Conduct, Rules 11(c)(1)(D) and (B), respectively. See also Rules of Judicial-Conduct, Rule 4(b)(1).



For the reasons stated, Complaint No. 01-23-90010 is dismissed pursuant to 28 U.S.C. §§ 352(b)(1)(A)(i), (ii), and (iii). See also Rules of Judicial-Conduct, Rules 11(c)(1)(A), (B) and (D).

June 15, 2023

Date

  
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Chief Judge Barron