

JUDICIAL COUNCIL
OF THE FIRST CIRCUIT

IN RE
COMPLAINT NO. 01-13-90001

BEFORE
Lynch, Chief Circuit Judge

ORDER

ENTERED: MARCH 26, 2013

Complainant is an attorney representing the plaintiff in an employment discrimination case. Complainant filed a misconduct complaint under the Judicial Conduct and Disability Act, 28 U.S.C. § 351 (a), against the magistrate judge who, by consent of the parties, conducted a mediation in the case. Complainant alleges that, in conducting the mediation, the magistrate judge was disrespectful, unprofessional and improperly "pressured" complainant and his client to accept defendant's settlement offer.

As an initial matter, I note that the complaint was submitted to the district court, and not to me as Chief Judge, some months ago. For reasons that remain unclear, it was not brought to my attention for a significant period of time. The resulting delay in my review of the matter is regrettable.

Nonetheless, I have now thoroughly reviewed the misconduct complaint, as well as a response to the complaint that I requested from the magistrate judge. See Rules for Judicial-Conduct and Judicial-Disability Proceedings (Rules of Judicial-Conduct), Rule 11(b). For the reasons explained below, I conclude that the magistrate judge's conduct does not amount to misconduct under the statute. See 28 U.S.C. § 351, *et. seq.* However, it is apparent that complainant did not file this complaint lightly and his negative experience with this mediation is unfortunate.

Complainant contends that, during the two mediation sessions, in which the parties voluntarily participated, the magistrate judge "devalued" both his client and the client's damages by trivializing the defendant's behavior and the extent of the client's injury. Complainant states that the magistrate judge doubted the admissibility of key evidence that the complainant intended to submit at trial, and repeatedly told complainant and his client that they should not expect to get more at trial than the settlement amount offered by the defendant. Complainant adds that the magistrate judge improperly "subverted the attorney-client relationship" by telling the client directly that a jury may not award any damages.

Complainant further asserts that the magistrate judge's demeanor was domineering, condescending and sarcastic. He reports that, at the second mediation session, the magistrate judge stated that the mediation would continue until the judge says "it is over," and behaved throughout as if doing them a "favor" by conducting the mediation. Complainant states that the magistrate judge rudely interrupted complainant

when he misunderstood the purpose of a phone call (that occurred between the two mediation sessions and was apparently intended for determining whether the mediation would continue). Complainant adds that the magistrate judge impolitely sent a clerk to “dismiss” them when the mediation was apparently over, instead of personally returning to the room as expected.

Finally, complainant reports that the magistrate judge declined to watch a short video depicting the defendant’s wrongdoing, and stated that it was important only that the video had been shown to opposing counsel. Although complainant concedes that the magistrate judge’s “manner appeared polite at times,” he concludes that the judge’s “negative comments” and “cursory and trivializing way [of] . . . viewing the case . . . made settlement impossible”

I note first that there are no transcripts or recordings of mediation proceedings. Therefore, lacking any objective record, my review is based on the differing accounts proffered by the complainant and the judge. These accounts do not suggest a material dispute as to the substance of the communications that occurred during the two mediation sessions (and the one telephone call), but they do reflect very different views as to the magistrate judge’s tone, demeanor and handling of the matter. Nonetheless, I conclude that, while the magistrate judge’s handling of the proceeding troubled complainant and made him (and probably his client) quite uncomfortable, it does not constitute judicial misconduct under the statute. See 28 U.S.C. § 351, *et. seq.* I set forth some general principles and then address complainant’s specific allegations.

"Cognizable misconduct . . . is conduct prejudicial to the effective and expeditious administration of the business of the courts." Rules of Judicial-Conduct, Rule 3(h)(1). Judicial misconduct generally connotes an "illicit or improper motive" on the part of the judge. See id., at, Commentary on Rule 3. It is rare that an inadvertent or minor violation of the Code of Conduct for United States Judges or an allegation that calls into question the correctness of a judge's "official action" will rise to the level of misconduct. See id.

Moreover, a judge's characterization of the merits of a legal claim does not itself suggest an improper motive or misconduct, even if it were done so harshly, as alleged in this matter. See Rules of Judicial-Conduct, Commentary on Rule 3. This is particularly true where, as here, the magistrate judge was acting as a mediator who, unlike a fact-finder, often shares his or her views of the case as a tool to promote compromise where possible. In this context, the magistrate judge offered opinions during private sessions and not in the presence of opposing counsel, let alone a jury. See Boudin, C.C.J., Order, In Re: Complaint No. 444, January 23, 2007, at 3-4, and cases cited ("It is well settled that judges are entitled to form views about the merits [of a case] and to express them so long as the judgments rest on the evidence and arguments in the proceeding itself; remarks that may prejudice the jury are a different matter . . ."). The magistrate judge also would have nothing more to do with the case after the conclusion of the mediation.

In the present matter, complainant does not suggest, much less provide any evidence, that the magistrate judge was illicitly motivated in conducting the mediation. To the contrary, based on all accounts, the magistrate judge intended to promote

settlement while protecting the interests of the parties.

The record demonstrates that the magistrate judge strongly encouraged the complainant and his client to re-examine the merits of their case with regard to both the admissibility of certain evidence and the scope of damages. The magistrate judge's views were based exclusively on the available record. The magistrate judge did not commit misconduct by communicating directly with complainant's client in complainant's presence. Although the magistrate judge reminded complainant and his client of the potential to recoup no monetary award at trial, the record indicates that the magistrate judge also reiterated that the parties retain the right to go to trial, as they elected to in this case. There is no evidence of any intention to subvert the attorney-client relationship or the mediation process, let alone any other improper motivation on the part of the magistrate judge.

Nor do the allegations concerning the magistrate judge's demeanor support a finding of misconduct. While judicial misconduct may include "treating litigants or attorneys in a demonstrably egregious and hostile manner," Rules of Judicial-Conduct, Rule 3(h)(1)(D), complainant concedes that the magistrate judge's "manner appeared polite at times." The magistrate judge reported an intent to be respectful while pressing parties and counsel to reexamine the merits of their respective positions.

Assuming, as alleged, that the magistrate judge was blunt and even harsh at times, this is not misconduct. "[A]bsent extraordinary circumstances, the tone maintained by the judge during a proceeding is not a basis for a finding of misconduct." Boudin, C.C.J.,

Order, In Re: Complaint No. 444, *supra*, at 4. There are here no unusual circumstances or other information that the magistrate judge's behavior or tone was consistently "hostile," let alone "egregious." Rules of Judicial-Conduct, Rule 3(h)(1)(D).

The remaining issues - concerning the proffered video which the magistrate judge declined to review, the apparent misunderstandings concerning the purpose of the telephone call and the termination of the mediation by the judge's clerk - based on the available record, are not suggestive of improper motivation or other misconduct. As the magistrate judge's conduct did not amount to misconduct within the meaning of the statute, the misconduct complaint is dismissed, pursuant to 28 U.S.C. § 352(b)(1)(A)(i). See also Rules of Judicial-Conduct, Rule 3(h)(3)(A).

That said, it is clear that the complainant was thoughtful and sincere in deciding to submit these allegations, and that complainant found the magistrate judge's conduct to be not only discourteous but very troubling and ineffective at promoting the desired goal. The magistrate judge will receive a copy of this order.

For the reasons stated, Complaint No. 01-13-90001 is dismissed, pursuant to 28 U.S.C. § 352(b)(1)(A)(i). See also Rules of Judicial-Conduct, Rule 11(c)(1)(A).

3/26/13
Date

Sandra Lynch
Chief Judge Lynch