

JUDICIAL COUNCIL
OF THE FIRST CIRCUIT

IN RE
COMPLAINT NO. 01-08-90097

BEFORE

Selya and Lipez, Circuit Judges,
Saris, Smith and Gelpi, District Judges

ORDER

ENTERED: OCTOBER 1 , 2009

Petitioner, a litigant, has filed a petition for review of Chief Judge Lynch's order dismissing her complaint of judicial misconduct, under 28 U.S.C. § 351(a), against a district judge in the First Circuit. The petitioner alleged that the judge exhibited bias and engaged in impropriety in connection with the petitioner's civil action.

The petitioner first alleged that the judge unlawfully compelled the petitioner to undergo a psychiatric examination. The petitioner next charged that the judge failed to enforce provisions of federal law and local procedural rules that require the petitioner's personal and medical records to be kept confidential. The petitioner stated that this information appeared in exhibits filed with the defendants' motion for summary judgment (and, therefore, available on the court's publically accessible website).

Third, the petitioner contended that the judge failed to penalize defense counsel for clear violations of Fed.R.Civ.P. 11 (when "declarations" made in the defendants' summary judgment

motion conflicted with the evidence). The petitioner next charged that the judge improperly changed a final pretrial conference to a status conference at which he allowed argument on the defendants' summary judgment motion without a court reporter in attendance. The petitioner maintained that, at this conference, the judge expressed his personal bias by telling the petitioner to "get on with [her] life," and that she was "too sensitive." The petitioner asserted that, as a result of these statements by the judge, her counsel encouraged the petitioner to accept an unreasonably low settlement offer, and withdrew shortly before trial.

The petitioner added that, due to concerns raised by the judge's mandated psychiatric examination, the petitioner was unable to retain adequate replacement counsel, that the judge issued conflicting and unclear orders regarding the attempt to find replacement counsel, and that the judge appointed an unqualified lawyer to represent the petitioner.

Finally, the petitioner charged that clerk's office staff failed to docket the petitioner's notice of appeal. The petitioner submitted what appeared to be a date-stamped copy of the notice of appeal and a copy of the cancelled check indicating the court's acceptance of the filing fee.

Chief Judge Lynch dismissed the complaint. The Chief Judge first explained that allegations of wrongdoing by clerk's office staff, as well as the petitioner's charges of impropriety by defense counsel, are not cognizable under the judicial misconduct statute. See Rules for Judicial-Conduct and Judicial-Disability Proceedings (Rules of Judicial Misconduct), Rule 4. Nor are they indicative of judicial wrongdoing. See Lynch, C.J., Order, In Re: Complaint Nos. 01-08-90012, and 01-08-90013, July 29, 2008, at 9.¹

Chief Judge Lynch next summarized the chronology of the proceeding in detail. In short,

¹Nevertheless, the issue raised concerning the docketing of the petitioner's appeal was promptly addressed.

the petitioner initially filed the case through counsel. During discovery, the defendants filed a motion to conduct a mental examination of the petitioner, see Fed.R.Civ.P. 35, which the court allowed over the petitioner's objection. Thereafter, the defendants moved for summary judgment and the petitioner filed an emergency motion to seal the defendants' motion on the ground that, as alleged in the complaint, the motion contained personal information of the petitioner's not suitable for publication on the court's public website. The judge immediately allowed this motion.

The petitioner also filed an opposition to the defendants' summary judgment motion, as well as a motion for default judgment. The judge denied the latter motion, and held the conference referenced in the complaint. As alleged, this session was changed from a final pretrial conference to a status conference, and the court heard from the parties, through counsel, on the motion for summary judgment. After the hearing, the court issued an order directing the petitioner to file a revised opposition to the defendants' summary judgment motion in order to "contest the issues raised by the defendants' motion and not [to] respond by merely arguing discovery disputes." After the petitioner filed a responsive memorandum, the judge granted the summary judgment motion in part, denied it in part, and issued a scheduling order (including a trial date) with respect to the pending counts.

Chief Judge Lynch further observed that the petitioner's counsel then moved to withdraw and, for reasons that are not clear, this motion was referred to a different district judge. The second judge allowed it and gave the petitioner roughly 60 days within which to retain new counsel. Upon the petitioner's request, the first judge extended this deadline another 60 days. Notified of the petitioner's inability to retain counsel, the court (that is, the original judge) then

held a status conference on after which it appointed pro bono counsel to represent the petitioner.

When appointed counsel declined to accept the case, the judge issued an order staying the trial until counsel could be retained, explaining that “the case cannot be effectively tried without competent counsel.” The court subsequently revoked the order appointing pro bono counsel on the ground that the petitioner would not accept available counsel, instead indicating that she wanted to proceed pro se.

The petitioner thereafter filed another motion for default judgment, pro se. The judge denied the motion, and ordered the case dismissed if the petitioner did not, within 30 days, retain counsel or indicate her willingness to accept court-appointed counsel. The petitioner did not submit a response and the case was closed.

Chief Judge Lynch concluded that the reviewed record provided no evidence of bias or wrongdoing. With regard to the petitioner's specific charges, the Chief Judge first observed that the judge had issued an order to seal promptly upon receiving notice of the potential release of the petitioner's personal data in the defendants' summary judgment motion. Further, Chief Judge Lynch noted that the burden of redacting private information lies with the litigants, not with the court. Accordingly, the charge that the judge committed misconduct in connection with the release of the petitioner's confidential information was dismissed pursuant to 28 U.S.C. § 352(b)(1)(A)(iii). See also Rules of Judicial Misconduct, Rule 11(c)(1)(C).

Chief Judge Lynch next determined that the judge's decision to address the summary judgment motion at the referenced conference was not suggestive of wrongdoing. Moreover, after this hearing the judge offered the petitioner an additional opportunity to brief the relevant issues before ruling on the matter. Nor did the facts indicate that the judge was under any legal

or ethical obligation to address alleged misconduct by defense counsel. These charges were, therefore, dismissed pursuant to 28 U.S.C. § 352(b)(1)(A)(i). See also Rules of Judicial Misconduct, Rule 11(c)(1)(A).

Chief Judge Lynch further explained that, insofar as the judge may have, during this hearing, voiced opinions relating to the merits of the petitioner's case or her likelihood of success (i.e., that she should “get on with [her] life,” or that she is “too sensitive”), such statements are not alone suggestive of bias. See e.g., Boudin, C.J., Order, In Re: Complaint No. 444, January 23, 2007, at 3-4 and *cases cited*. The cases cited indicate that the formation and expression of a judge’s views of the merits of a case, where those views rest upon the evidence and are not voiced in the presence of a jury, do not constitute bias. Accordingly, these charges were also dismissed pursuant to 28 U.S.C. § 352(b)(1)(A)(i). See also Rules of Judicial Misconduct, Rule 11(c)(1)(A).

Chief Judge Lynch observed that the record was equally devoid of any information suggesting that the judge sought to subvert the petitioner’s attempts to obtain competent replacement counsel. See 28 U.S.C. § 352(b)(1)(A)(iii). See also Rules of Judicial Misconduct, Rule 11(c)(1)(C).

As there was no evidence of bias, the allegations arising from the petitioner’s disagreement with orders issued by the court – including, but not limited to, the order requiring the petitioner to undergo a psychiatric examination, the order on the summary judgment motion, and the order of dismissal – were dismissed as not cognizable. See 28 U.S.C. § 352(b)(1)(A)(ii). See also Rules of Judicial Misconduct, Rule 11(c)(1)(B).

In the petition for review, the petitioner charges that the judge failed to comply with

"Federal Laws [sic] and court rules." The petitioner first reiterates the original allegation that the judge neglected to enforce the "Privacy Rules," thus subjecting the petitioner to "identity and medical insurance theft." The petitioner next states that the judge also failed to enforce the "Requirement of Authentication," resulting in the submission of a "dateless, nameless paper . . . to be accepted as the [petitioner's] medical record." The petitioner restates her objection to the status conference, stating that she did not criticize the change from a pretrial conference to a status conference but the judge's "failure to enforce his instructions [to court-appointed counsel] and his comments that manifested prejudice and bias." The petitioner concludes that these statements, made during the conference -- that the petitioner should "get on with [her] life" and was "intelligent but too sensitive" -- demonstrated the judge's personal bias.

The petition for review is without merit. The petition for review contains no information beyond what was thoroughly addressed by Chief Judge Lynch's discussion of the proceeding. With regard to the release of the petitioner's personal data, Chief Judge Lynch explained that the judge issued a corrective order as soon as he was notified of the issue and, moreover, that the burden to maintain the confidentiality of such information lies with the litigants, not with the judge.

As also fully explained by the Chief Judge, the judge's alleged comments -- that the petitioner should "get on with [her] life," and was "intelligent but too sensitive" -- simply do not suggest bias. Such comments reflect the judge's opinion of the case based upon information gleaned during the proceeding. Such opinions are an inherent aspect of litigation and do not, without more, suggest wrongdoing of any kind. See e.g., Boudin, C.J., Order, *In Re: Complaint No. 444*, supra.

The petitioner's remaining concern -- that the judge failed to "enforce his instructions" either to court-appointed counsel or otherwise -- is unclear and, without more, not remotely suggestive of wrongdoing. The record indicates that the judge made every effort to help the petitioner to retain appropriate replacement counsel. Moreover, as Chief Judge Lynch observed, the lengthy record of the case is devoid of any evidence of judicial bias or other impropriety. Absent such evidence, judicial errors with regard to law and/or procedure (including the alleged admission of an unauthenticated medical record) do not constitute grounds for a cognizable complaint of judicial misconduct. Accordingly, the complaint was appropriately dismissed pursuant to 28 U.S.C. §§ 352(b)(1)(A)(i), 352(b)(1)(A)(ii), and 352(b)(1)(A)(iii).

For the reasons stated herein, the order of dismissal issued in Judicial Misconduct Complaint No. 01-08-90097 is affirmed. See Rules of Judicial Misconduct, Rule 19(b)(1).

A handwritten signature in cursive script, reading "Gary H. Wente", is written over a horizontal line.

Gary H. Wente, Secretary