

JUDICIAL COUNCIL  
OF THE FIRST CIRCUIT

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IN RE  
COMPLAINT NO. 01-08-90099

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BEFORE  
Lynch, Chief Circuit Judge

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ORDER

ENTERED: FEBRUARY 27, 2009

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Complainant, a pro se litigant, filed a complaint of judicial misconduct under 28 U.S.C. § 351(a) against a district judge in the First Circuit, who has presided over the complainant's civil case against a municipality and one its officers. The case, originally filed by the complainant in state court, had been removed by the defendants to federal court. The complainant alleges that the judge wrongfully exercised jurisdiction over the proceeding, engaged in improper ex parte communication, and coerced the complainant to sign a "waiver" of his rights.

The complainant first charges that, because the complainant had not raised a federal question, the judge wrongfully determined that the court had subject matter jurisdiction over the proceeding after the defendants removed it from state court. The complainant presents a summary of the events precipitating his lawsuit, beginning with his allegedly unlawful arrest, and states that, since his suit claimed violations of state law only, the federal court lacked jurisdiction over the matter.

The complainant next asserts that, when he appeared before the judge to “contest jurisdiction” at a hearing, defense counsel had been seated with the judge in chambers prior to the complainant’s arrival. The complainant infers that the two had an improper ex parte communication concerning the case. (“Complainant does not know how long [d]efense counsel . . . had the privilege of total privacy of [the judge][sic] to discuss the matter . . . .”).

The complainant further states that defense counsel proffered a “waiver” requiring the complainant to agree not to raise any federal claims. The complainant contends that the judge attempted to coerce the complainant to sign this unconstitutional waiver and wrongfully refused to remand the case to state court “unless [the c]omplainant accepted [this] waiver of his rights.” The complainant adds that the judge improperly gave the original of this waiver to the complainant, failing to note it on the docket.

The complainant continues that he “refused to waive his rights and signed under protest.” The document, a copy of which is included with the misconduct complaint, is titled, “Stipulation of Dismissal with Prejudice,” is signed by the complainant, “under protest,” and reflects the date of the referenced hearing.<sup>1</sup> There is also a hand-written notation at the bottom of the page stating that the document was “refused” by the judge and by defense counsel. The complainant concludes that the judge was “constitutionally bound” to remand the case; he asks that the judge resign or be impeached, and that his case be remanded to state court.<sup>2</sup>

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<sup>1</sup>It states: “Now come the parties to the above action, pursuant to Fed.R.Civ.P. 41(a)(1)(ii), and hereby stipulate and agree that all claims in the Complaint arising under the Constitution, laws, or treaties of the United States be dismissed with prejudice, without costs, fees or interest to any party, and waiving all rights of appeal.”

<sup>2</sup>The complainant asks for remand to the “lower” court but it is clear that the complainant is referring to state court.

To the extent the complainant wishes to modify the order issued, the judicial misconduct complaint process does not provide a means of modifying an order issued in a case. See 28 U.S.C. § 354, and Rules for Judicial-Conduct and Judicial-Disability Proceedings (Rules of Judicial Misconduct), Rule 20. A review of the case docket, relevant pleadings and the court's orders indicates that, shortly after the complainant filed the case in state court, one of the defendants filed a notice of removal to which the complainant objected, seeking remand of the matter. The judge, by electronic order, denied the complainant's request for remand. The court then held the scheduling conference to which the complainant refers at which the judge, over the complainant's objection, "determine[d] that the case was properly removed." Thereafter, the complainant filed a motion to dismiss for lack of jurisdiction and a motion to enjoin discovery, both of which the court denied. The judge then allowed the defendants' motion to compel discovery. The complainant promptly renewed his motions (to dismiss and for remand), which the court again denied.

The complainant subsequently filed his first of two appeals, and the judge denied the complainant's request to stay the proceeding pending the appeal. The following month, one of the defendants filed a motion to dismiss and the other filed a motion for summary judgment. The complainant then filed a motion for the judge's recusal. The court denied both the motion for recusal and the defendants' motion(s) to dismiss and for summary judgment "because the case is still on appeal . . . ."

Thereafter, the Court of Appeals dismissed the complainant's appeal for lack of appellate jurisdiction, and, the following month, the complainant filed his second appeal. After the Court of Appeals dismissed this matter for the same reason, the defendants refiled dispositive motions (to dismiss and for summary judgment). Despite the complainant's opposition, the judge allowed the

defendant's motion for summary judgment and found the motion to dismiss moot. The court held that, as the complainant had failed to file a statement of facts in compliance with the court's local rule, the undisputed facts, as presented in the summary judgment motion, necessitated judgment for the defendant and dismissal of the action.

To the extent the complaint otherwise asserts claims of misconduct there is no basis for the misconduct complaint. The reviewed record contains no evidence that the judge harbored any bias or improper motivation in his handling of the case. Accepting that defense counsel arrived for the conference with the judge before the complainant arrived in chambers at the scheduling conference does not in any way show there was improper ex-party communication concerning the merits of the complainant's case, see Code of Conduct for United States Judges, Canon 3(A)(4), or any other wrongdoing. Accordingly, these charges are dismissed as unsupported pursuant to 28 U.S.C. § 352(b)(1)(A)(iii). See also Rules of Judicial Misconduct, Rule 11(c)(1)(C).

Nor is there any evidence that the judge sought to "coerce" the complainant to sign the "Stipulation of Dismissal," submitted with the misconduct complaint. While the record does not indicate the origins of this document, it appears that it was likely proffered by the defendants, as alleged, as an option for the complainant to secure the dismissal of the federal proceeding (by agreeing that his claims would not include any federal question). The fact that it was not signed by the defendants or included in the record demonstrates only that it was not material to the disposition of the case, not that it was a mechanism for unconstitutional coercion by the judge. Accordingly, the charges relating to this document are likewise dismissed as unfounded pursuant to 28 U.S.C. § 352(b)(1)(A)(iii). See also Rules of Judicial Misconduct, Rule 11(c)(1)(C).

As there is no evidence of bias or illicit judicial motivation, the complainant's disagreement

with the rulings issued in the case, including, but not limited to, the court's exercise of federal jurisdiction (ie., the denial of the complainant's requests for remand), the denial of the motion for recusal, and the dismissal of the proceeding, do not present a cognizable basis for a complaint of misconduct. 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. 01-08-90099 is dismissed, pursuant to 28 U.S.C. §§ 352(b)(1)(A)(ii), and 352(b)(1)(A)(iii).

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Date

2/27/09

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Chief Judge Lynch

