

JUDICIAL COUNCIL
OF THE FIRST CIRCUIT

IN RE
COMPLAINT NO. 01-09-90019

BEFORE
Lynch, Chief Circuit Judge

ORDER

ENTERED: FEBRUARY 2, 2010

Complainant, in his capacity as a party in bankruptcy and as counsel (representing himself and his professional corporation), filed a complaint of judicial misconduct under 28 U.S.C. § 351(a) against a First Circuit bankruptcy judge. The complainant alleges misconduct in connection with four bankruptcy cases over which the judge has presided. The cases include two Chapter 7 proceedings, on behalf of the complainant personally and on behalf of his professional corporation, and two related adversary proceedings filed against the complainant.

The complainant alleges that the judge exhibited personal and professional bias against him in a series of hearings -- through his rulings, his language, his tone and his demeanor. This, in turn, the complainant says, led him to file a motion to recuse the judge, which the complainant supplemented by giving a copy of this complaint of misconduct to the judge. He complains of the judge's denial of the recusal motion and of his tone and demeanor in doing so. I and my staff have reviewed the so-called biased rulings and listened to the recordings of the hearings and find no basis

for the complaint. I dismiss the complaint because complainant has not shown any misconduct on the part of the judge. Rather, the complainant's unhappiness stems from the judge's positions on the merits of complainant's claims before the judge and the judge's temperate expressions of frustration based upon the judge's views that complainant continually brought and pursued claims without merit and often failed to meet the standards of competence and professionalism expected in that court. There was no misconduct.

I.

The complainant contends that the judge is not able to separate out his familiarity with the complainant's "professional difficulties," including some discipline by state authorities, from his "rights to be treated as fairly and positively as any other bankruptcy [party]" The complainant charges that the judge's demeanor reflected his "audible, clearly palpable hostility" in handling each of the complainant's four proceedings.

The complainant identifies six hearings at which the complainant says the judge showed bias and a hostile demeanor, as well as one order. In a supplemental submission, the complainant identifies a seventh hearing addressing, in part, the complainant's motion for recusal of the judge. We try to summarize the hearings involved without revealing information as to the identity of the complainant.

The complainant first cites two hearings filed in his personal bankruptcy case. The first of these was held on the complainant's motion for sanctions. The complainant states that, during this hearing, the judge engaged in a "unabashed public display of ridicule and disdain toward [the complainant]," and then denied the motion without allowing the complainant a "meaningful opportunity to speak." As to the second hearing, the complainant contends, without providing

specifics, that the judge fostered the complainant's "impression that the judge is partial to the trustees"

At the third cited hearing, also held in the complainant's personal bankruptcy case, the complainant's associate appeared on the complainant's behalf in opposition to a motion for relief from stay. The complainant alleges that the judge intentionally mispronounced the complainant's name and misinterpreted the complainant's opposition to the motion. The complainant states that the judge "audibly, snidely, and discourteously interrupted [complainant's counsel]," denying him the opportunity to clarify the complainant's position. The complainant adds that his associate reported that the judge's behavior at the hearing was "professionally and needlessly humiliating, disillusioning, and indicative of the judge's apparent dislike of [the complainant]."

The fourth cited hearing occurred in the case filed on behalf of the complainant's firm. The complainant states that a creditor had improperly attached and frozen certain funds necessitating the filing of a motion to compel the release of these funds. The complainant alleges that opposing counsel in this matter sits on a rules committee with the judge, appears frequently before him, and maintains his office in the same building. The complainant charges that the judge had "pre-judged" this motion "without apparently caring about or understanding the . . . rules associated with the issue" exhibited anger, bias and "injudiciousness." The complainant quotes the judge's remarks from the hearing transcript:

I have to tell you, I don't understand this motion. [The law firm] is a Chapter 7 debtor. It better not be operating. If it is operating, then there are bigger problems than the disposition of those funds And as a Chapter 7 debtor, it has no right to those funds outside the auspices of the trustee and has no standing to compel their release. Why did you file the motion . . . and what are we doing here?

The complainant states that he immediately tried to correct the judge on the merits of the motion but that the judge interrupted him by stating that the funds "belong to the trustee until the trustee releases them, Sir. Your motion is denied." Thereafter, the complainant states that the judge "slammed" something down "in disgust" and sarcastically said "thank you." The complainant asserts that the judge's demeanor and level of emotion during this hearing were inconsistent with the judge's calm behavior in other matters. The complainant continues that the judge denied him the opportunity to explain the governing law, and that the state court ultimately ruled in his favor on the issue. The complainant recognizes that the misconduct procedure is not intended to re-examine the merits of a ruling but argues that the "judge's presumptuousness, needless and unfairly accusatory demeanor, sarcastic aplomb, rudeness, voice-raising, unwillingness to really 'hear,' and inability to be open minded (sic)" warrant intervention.

The complainant states that the next relevant hearing took place in the adversarial case that the trustee "saw fit to file . . . seeking revocation of the discharge" the complainant had been granted in his personal Chapter 7 case. The complainant reiterates that the judge's otherwise courteous and polite demeanor changed as soon as his case was called. The complainant asserts that the judge was sarcastic in addressing the pretrial issues, including the complainant's motion for a jury trial. The complainant states that the judge then denied the motion for a jury trial without allowing the complainant to speak, albeit with less "aplomb than has characterized his other rulings regarding [the complainant]."

The sixth cited hearing, also filed in the trustee's adversary proceeding, addressed a motion to strike affidavits that the complainant had filed. The complainant contends that, at this hearing, the judge relied on the movant's papers and again "simply lit into" the complainant,

stating that the affidavits "are unrelated to any pending motion or anything that I can figure out [and] . . . have absolutely no evidentiary quality [and] . . . mean nothing . . . other than they clutter up the docket"

Lastly, the complainant cites an order issued in this adversarial case allowing the trustee an extension of time in which to oppose the complainant's summary judgment motion. The complainant asserts that the judge wrongfully allowed the motion, over the complainant's objection and without hearing, and concluded: "Contrary to those instances when the court has taken the defendant to task, the plaintiff's motion displays an understanding of the pertinent law and rules." The complainant infers that this comment was indicative of the judge's "adverse predisposition [against him,] and of a biased, continually condescending demeanor . . . that causes [the complainant] to have no confidence in his ability to serve as a judge in [his] case."

The complainant filed a supplemental submission addressing the hearing on the complainant's motion for recusal. The complainant states that, at this hearing, the judge was "seemingly patient and reasonably explanatory," and that the judge admitted that he had "on occasion 'lost patience with [the complainant]'" but stated that he did so only in reaction to the complainant's pleadings. The complainant asserts that the judge accused him of a "'failure to apply . . . intellectual discipline and honesty,'" and of "bully[ing]" him into allowing the recusal motion by attaching the present misconduct complaint. The complainant states that he had filed the judicial misconduct complaint prior to the recusal motion and, thus, was not attempting to use the misconduct matter as leverage in the recusal motion.¹

¹The Office of the Circuit Executive was first notified of the misconduct complaint in this matter when it was forwarded by the judge. When contacted, the complainant stated that he had sent it to the Clerk's Office and did intend for it to be processed.

II.

As part of an inquiry, undertaken pursuant to the Rules for Judicial-Conduct and Judicial-Disability Proceedings (Rules of Judicial Misconduct), Rule 11(b), my staff and I have reviewed the complaint, the case records, and the audio recordings of each of the cited hearings. The essence of the complaint -- that the judge's repeated instances of intemperate, sarcastic, and/or short-tempered behavior and language demonstrated a fundamental bias against the complainant -- is not supported by either the facts or the law.

Judges are entitled to form views based on the merits of the issues before them and to express these views.

It is well settled that judges are entitled to form views about the merits, and to express them, during the course of the case so long as the judgments rest on the evidence and arguments in the proceeding itself Leaving aside extraordinary circumstances, the expression of views by the judge on the merits or application of such views through questioning is neither a basis for recusal nor does it constitute bias.

Boudin, C.C.J. In Re: Complaint No. 444, January 23, 2007, at 2-3, citing In re Marisol Martinez-Catala, 129 F.3d 213 (1st Cir. 1997). See also Committee on Codes of Conduct, Advisory Opinion No. 66 ("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. Strongly stated judicial views rooted in the record, a stern and short-tempered judge's efforts at courtroom administration, expressions of impatience, dissatisfaction, annoyance and even anger directed to an attorney or a party should not be confused with judicial bias.").

The present matter falls squarely within this principle. The reviewed record and audio

recordings contain no indication that the judge's questions, opinions, comments and judgments were based on any source beyond the pleadings and evidence presented in the cases over which he presided. Review of the complainant's citations from the record corroborate this determination. The judge's directed questioning and expression of opinions on the issues, clearly based exclusively on the record, are not indicative of bias. See 28 U.S.C. § 352(b)(1)(A)(i). See also Rules of Judicial Misconduct, Rule 11(c)(1)(A), and Advisory Opinion No. 66, *supra*.

The complainant suggests that the judge was influenced by matters outside the record of the bankruptcy proceedings, including media reports concerning the complainant's professional difficulties and/or by the judge's professional relationship with counsel for the U.S. Trustee and with the attorney for one of the creditors. However, there is no information anywhere in the reviewed record corroborating these charges, and the judge has denied them. (At the hearing on the complainant's motion for recusal, the judge stated that the trustee "wins some and loses some just like everybody else." The judge added that he has no knowledge about the complainant's personal or professional life.) Thus, the claim that the judge was influenced by "extra-judicial" sources lacks any "factual foundation," and is dismissed pursuant to 28 U.S.C. § 352(b)(1)(B). See also Rules of Judicial Misconduct, Rule 11(c)(1)(D).

Further, "absent extraordinary circumstances, the tone maintained by the judge during a proceeding is not a basis for a finding of misconduct." Boudin, C.C.J. In Re: Complaint No. 444, *supra*, at 4. Insofar as the judge may at some but not all times have indicated impatience, his demeanor was neither unusual in the course of judicial proceedings nor indicative of bias.² The

²The complainant's contention -- that, after the hearing seeking the release of funds, the judge "slammed" something down "in disgust" and sarcastically said "thank you"-- is not supported by the audio recording. The judge did use his gavel but nothing was "slammed" and his

judge also apologized to complainant for any impatience he may have shown and explained the basis for his frustrations lay with complainant's frivolous arguments. Accordingly, the allegation that the judge's tone demonstrated bias against the complainant is dismissed pursuant to 28 U.S.C. § 352(b)(1)(A)(i). See also Rules of Judicial Misconduct, Rule 11(c)(1)(A), and Boudin, C.C.J., Order, In Re: Complaint No. 431, June 26, 2006, at 5 (A judge's "briskness of manner" was neither uncommon nor provided an "objective basis . . . to support a finding of either favoritism or discourtesy.").

Repeated throughout is the charge that the judge denied the complainant a "meaningful opportunity" to present his side of the argument. The audio recordings of the hearings undermine this claim. The recordings demonstrate that the judge was invariably well-prepared and often had specific questions based upon his review of the papers. The judge's questions consistently reflected his views of the issue(s) at hand. For example, during the hearing on the complainant's motion for sanctions, the judge interrupted the complainant in order to explain why, in his view, the complainant's argument lacked merit. He interrupted the opposing party with questions, as well. As with each of the cited hearings, the judge allowed the parties to present their respective arguments, regularly asking at the end of the hearings whether anyone had "anything further" before issuing a ruling. Thus, the claim that the judge denied the complainant a fair opportunity to be heard is "conclusively refuted" by the record. See 28 U.S.C. § 352(b)(1)(B). See also Rules of Judicial Misconduct, Rule 11(c)(1)(D).

Further, the judge shows no bias or impropriety at the hearing on the recusal motion. The judge stated that he had reviewed the papers with care, and explained that he did not, as

voice was not notably raised at this or any of the other cited hearings.

alleged, intentionally mispronounce the complainant's name. (I note that complainant's pronunciation of his name is not the common one.) He stated that he has "butchered more name than just [the complainant's and] meant no disrespect." The judge further apologized for "losing patience," at times and explained that, because the complainant is as an experienced attorney, he held him to a higher standard than he would a pro se litigant. Thus, he stated that he was frustrated by the complainant's adherence to untenable legal positions, such as requesting a jury trial on a revocation of discharge or submitting affidavits without an accompanying pleading. The judge explained that, as there were not grounds for recusal, he would comply with his duty to hear the case and not "push it off on another judge." The judge's responses to the complainant's accusations are altogether consistent with the reviewed record.

Finally, absent evidence of bias, of which there is none, the complainant's disagreement with the substance of the court's rulings (including the motion to recuse) does not constitute a cognizable 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.01-09-90019 is dismissed, pursuant to 28 U.S.C. §§ 352(b)(1)(A)(i), 352(b)(1)(A)(ii), and 352(b)(1)(B).

2/2/10
Date

Sandra L. Lynch
Chief Judge Lynch