

JUDICIAL COUNCIL  
OF THE FIRST CIRCUIT

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IN RE  
COMPLAINT NO. 01-09-90024

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BEFORE

Lipez and Thompson, Circuit Judges,  
Saris, Lisi and Gelpi, District Judges

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ORDER

ENTERED: OCTOBER 19, 2010

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Petitioner, a litigant, has filed a petition for review of Chief Judge Lynch's order dismissing a complaint under the Judicial Conduct and Disability Act, 28 U.S.C. § 351 (a), against a district judge in the First Circuit. The petitioner originally alleged that the judge engaged in misconduct while presiding over the petitioner's product liability action.

The petitioner originally alleged that, in addressing the defendants' motion to dismiss, the judge intimidated, threatened and "bullied" the petitioner into foregoing reasonable legal claims. The petitioner contended that, from the start, the judge conveyed a "hostile bias" that a previous class action settlement precluded the petitioner's claims, despite "undisputed evidence that the facts underlying [the petitioner's] claims were completely different from those in the class action . . . ."

The petitioner asserted that, at the hearing on the defendants' motion to dismiss and in the court's subsequent order denying that motion, the judge "demonstrated a remarkable indifference"

to the issues, and repeatedly threatened to impose sanctions on both the petitioner and petitioner's counsel if they pursued the case. The petitioner contended that the judge did his own research in order to "find a rationale" for his ruling and used the threat of sanctions to prevent the petitioner from seeking a final appealable order.

The petitioner further claimed that the judge "had not even seen the Amended Complaint," on which the class action settlement had been based, when he determined that claims based upon any product defect "plainly could have been litigated in the [class] action . . . ." The petitioner concluded that, while "even a very bad decision cannot be the basis for a misconduct complaint," the judge's intimidations and threats "crossed the line from poor judging to egregious behavior," and ultimately forced the petitioner to withdraw the case, for fear of financial retribution imposed by the court.

Chief Judge Lynch dismissed the complaint. Based upon a review of the misconduct complaint, the docket, pleadings, the transcript of the relevant hearing, and court orders, Chief Judge Lynch concluded that the judge's handling of the case did not constitute judicial misconduct. The Chief Judge determined that, contrary to the petitioner's allegations, the reviewed record did not support the claims that the judge threatened or "bullied" the petitioner, exhibited bias against the petitioner, or harbored any predetermined aversion to the petitioner's legal claims.

Based upon the transcript of the hearing on the defendants' motion to dismiss, Chief Judge Lynch observed that the judge patiently heard from both parties in full before issuing rulings.<sup>1</sup> The Chief Judge determined that there was absolutely no indication of a "hostile bias" in favor of

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<sup>1</sup>Because it was a non-evidentiary hearing, the court did not retain the audio recording of the proceeding.

the defendants, a "remarkable indifference" to the issues at hand, or any other judicial animus against the petitioner.

Chief Judge Lynch further observed that, after a recess, the judge orally denied the motion to dismiss but voiced "reservations" about doing so. The court held that, based upon averments in the complaint, the petitioner's product was different from those addressed in the class action. That said, however, the judge ordered discovery on the limited question of whether the petitioner's product had undergone the same treatment as (and were therefore like) the product at issue in the class action, and directed the parties to move for summary judgment on that basis. The court concluded:

It seems to me inevitable . . . because I give the class action a lot more credence than [petitioner's counsel] does in this case . . . if it turns out through discovery that [a] good faith basis for making [the] claim that your clients were not a member of the that class is not borne out, there's a decent chance you are going to be paying the defendant's attorney's fees. And I just ask you to bear Rule 11 and its requirements in mind on that because this, while very expertly presented . . . [it] has the appearance to me of some folks who did not know of the class action litigation and were trying to crowbar it open.

The Chief Judge determined that the judge was not threatening, impatient, or otherwise inappropriate in articulating his opinions concerning both the likelihood of success of the petitioner's case and the ethical obligations concomitant to the petitioner's pursuit of the action. Chief Judge Lynch explained that judges are entitled to form views based on the merits of the issues before them and to express these views, see Boudin, C.C.J. In Re: Complaint No. 444, January 23, 2007, at 2-3, and that the judge's handling of the proceeding fell within this principle. There was no indication in the record that the judge's questions, opinions, comments and judgments were based on any source beyond the pleadings and evidence presented. As the allegations of bias and intimidation were unsupported by the evidence, the complaint was

dismissed. See 28 U.S.C. § 352(b)(1)(B). See also Rules for Judicial-Conduct and Judicial-Disability Proceedings (Rules for Judicial-Conduct), Rule 11(c)(1)(D).

Chief Judge Lynch also noted that a judge's reliance on his own legal research also does not suggest bias or judicial wrongdoing. See 28 U.S.C. § 352(b)(1)(A)(i). See also Rules for Judicial-Conduct, Rule 11(c)(1)(A). Finally, while the order at issue (denying the motion to dismiss) was in the petitioner's favor, to the extent that the complaint reflected the petitioner's disagreement with the substance of the judge's determinations on the facts and the law, it was also dismissed as not cognizable. See 28 U.S.C. § 352(b)(1)(A)(ii). See also Rules for Judicial-Conduct, Rule 11(c)(1)(B).

In the petition for review, the petitioner essentially reiterates the original charges. The petitioner disputes the Chief Judge's determination that the judge "patiently" listened to argument during the hearing on the motion to dismiss. The petitioner states that the judge's "tone of voice, inflection, [and] sighs . . . were indicative of a person who considered the entire hearing to be a waste of his time." The petitioner adds that the written transcript fails to convey the impact of the judge's non-verbal communication.

The petitioner next restates the claim that the judge "threatened" financial sanctions, noting that "there was stunned silence from all parties present" (presumably when the judge issued his order). The petitioner asserts that this threat was intended to be intimidating and that it caused the petitioner to withdraw her claim.

Third, the petitioner adds that the judge could not have read the settlement in the class action litigation because it was sealed. The petitioner maintains that she "[knew] and could have proven" that the petitioner's product was defective in a different way than the products at issue in

the class action, and that the defendants used the settlement in the class action to "avoid responsibility" for the petitioner's defective product. The petitioner concludes that the judge's "reading of the issues [was] at best superficial and simplistic," by allowing the defendants "off the hook" for any defects not addressed in the class action, even when such flaws were "separate from and not related to" those identified in the first proceeding.

The petition for review is without merit. As determined by Chief Judge Lynch, the transcript of the hearing on the motion to dismiss provides no evidence of judicial bias or other wrongdoing. The judge listened to both parties in full and made a determination based upon the record. The judge indicated that he understood the petitioner's position -- that the petitioner's product had a defect distinct from the one at issue in the class action -- and that such a claim might not be subject to res judicata. Because of this question of fact, the court ruled in the petitioner's favor and denied the motion to dismiss with instructions to complete the requisite discovery.

The petitioner further argues that the bias and intimidation conveyed by the judge's tone cannot be appreciated from the written record. However, "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. There are no such circumstances where, as here, the court conducted a lengthy hearing, the transcript of which suggests no impropriety, and issued an extensive ruling based exclusively on the record.

The petitioner reiterates the related claim that the court wrongfully "threatened" sanctions if the petitioner could not prove that her claims were not bound by the class action settlement and, thereby, effectively coerced the petitioner into voluntarily dismissing the case. The judge

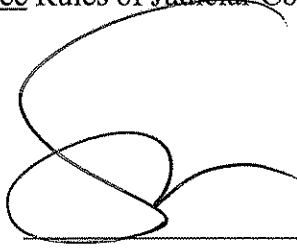
did not "threaten" sanctions; rather, he simply advised the petitioner and the petitioner's counsel of the parameters of Rule 11, in light of his view that it would be difficult for petitioner to show that the petitioner's claims were not precluded by the class action. As Chief Judge Lynch also explained, a judge's expression of views of the merits based on existing evidence is neither inappropriate nor indicative of misconduct. See Boudin, C.C.J. In Re: Complaint No. 444, *supra*, at 2-3, and Committee on Codes of Conduct, Advisory Opinion No. 66. In this matter, the judge did no more than state his opinion of the petitioner's likelihood of success and the governing ethical standards attendant to all litigation. This does not amount to misconduct.

Moreover, the judge did not, as alleged, let the defendants "off the hook." The court denied the defendants' motion to dismiss and gave the petitioner the opportunity to prove that her claims were not barred by the prior litigation. The original charges that the judge exhibited bias in handling the motion to dismiss or coerced the petitioner into dismissing the case were properly dismissed as without factual foundation. See 28 U.S.C. § 352(b)(1)(B). See also Rules for Judicial-Conduct, Rule 11(c)(1)(D).

Resolution of the petitioner's remaining assertion -- that the judge could not have read the class action settlement because it was sealed -- is not necessary to the present determination. Whether the judge did or could have read this document is not determinative of whether the judge engaged in misconduct in handling the petitioner's case. As Chief Judge Lynch correctly concluded, on the present facts, the judge's handling of the proceeding did not evidence bias or otherwise amount to misconduct. See 28 U.S.C. § 352(b)(1)(A)(i). See also Rules for Judicial-Conduct, Rule 11(c)(1)(A).

For the reasons stated herein, the order of dismissal issued in Judicial Misconduct

Complaint No. 01-09-90024 is affirmed. See Rules of Judicial Conduct, Rule 19(b)(1).

A handwritten signature in black ink, appearing to be 'S. Goldberg', written over a horizontal line.

Susan Goldberg, Acting Secretary