

JUDICIAL COUNCIL  
OF THE FIRST CIRCUIT

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IN RE  
COMPLAINT NO. 01-15-90004

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BEFORE  
Lynch, Chief Circuit Judge

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ORDER

ENTERED: MAY 28, 2015

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Complainant, a criminal defendant, has filed a complaint, under 28 U.S.C. § 351(a), against the district judge who presided over his case. Complainant alleges that, during two hearings on complainant's motions for the appointment of new counsel, the judge exhibited hostility and bias. The misconduct complaint is baseless.

Complainant alleges that, during the two hearings, the judge addressed complainant in a raised voice, and insulted and chastised him. Complainant asserts that, during the first hearing, the judge "yelled at [complainant] in open court," and told complainant to "shut up." Complainant asserts that the judge insulted complainant's pro se status, saying: "Do you have a law degree? Your attorney has a law degree, You [sic] don't have a law degree so you need to shut up so we can do our job." When complainant

sought to make another point, the judge reportedly interrupted complainant, stating: "I had [sic] enough of you. Motion denial [sic]."

Complainant continues that, at a subsequent hearing, the judge contemptuously said "again," when it became apparent that complainant was filing another motion for new counsel. Complainant contends that, in denying the motion for a second time, the judge stated: "Like I said again before [sic]; you don't have a law degree. I think you are foolish and you don't know what you are doing. I am not going to let you do that." Complainant maintains that the judge said all of this in a raised voice, "yelling" at him. Complainant concludes, based on the judge's statements and tone, that he "can not [sic] get a fair [sic] and impartial trial from this Judge."

A review of the record, including the transcripts of the two hearings at issue, demonstrate that complainant had a history of filing motions for the appointment of new counsel. Complainant had filed two such motions in the case, prior to the hearings, one of which had been denied by the magistrate judge assigned to the case and the other of which had been withdrawn.

During the hearing on complainant's third motion for new counsel, the judge heard from complainant in full. The court pressed complainant to articulate his specific difficulties with counsel, which included sending complainant documents unrelated to his case, divulging complainant's personal information to the government, failing to pursue bail, and pressuring complainant to accept a plea bargain. The judge asked complainant's lawyer about each of these issues and received appropriate responses. Counsel

acknowledged that several documents from an unrelated state court case were inadvertently included among the discovery that had been sent to complainant and explained that a motion for bail would have been frivolous. The court observed that counsel is constitutionally required to tell complainant about any plea offers but complainant was under no pressure to accept a plea.

The judge did not tell complainant to "shut up." In an attempt to solicit from complainant the specific issues he had with counsel, the judge interrupted complainant a couple of times. The judge also pointed out that complainant had not attended law school and had a "fundamental misunderstanding" of his lawyer's obligations. After a lengthy hearing during which complainant had been heard in full, the judge concluded the hearing, and denied the motion.

Under a month later, complainant filed another motion for a new attorney, or alternatively, to proceed *pro se* with stand-by counsel. Among other things, complainant argued ineffective assistance of counsel and irreconcilable differences. Counsel responded, identifying the numerous meetings and communications counsel had had with complainant, as well as the fact that counsel had filed a successful motion to dismiss a number of the counts originally charged.

During the hearing on this motion, the court explained to complainant that the motions *in limine* that counsel had filed were intended to keep prejudicial information from the jury and noted the many hours that counsel had clearly spent on complainant's behalf. Although the judge initially denied the motion in order to keep complainant from

"ruining his own defense," the court reconsidered after a recess, and allowed complainant to proceed *pro se* "at his own peril." Prior to doing so, the judge emphasized the advantages of continuing with counsel and was undeniably frustrated by complainant's refusal to do so. The judge said complainant was "foolish to go that route" and was making a "huge mistake." Acknowledging that complainant has "an absolute right" to proceed *pro se*, the judge appointed complainant's lawyer as standby counsel and explained that he could ask her questions and take her advice as he saw fit.

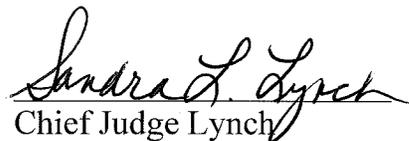
There is no evidence of judicial hostility, bias or other misconduct. The transcripts of the two hearings at issue demonstrate that the judge was endeavoring to protect complainant's interests by convincing him to proceed with appointed counsel. At both hearings, the judge heard from complainant in full and questioned counsel as to complainant's concerns, before ruling on his motions. The court ultimately allowed complainant's motion to proceed *pro se*. The judge's apparent frustration with what the judge clearly believed to be complainant's poor judgment in this regard does not constitute cognizable misconduct under the statute. See Boudin, C.C.J., Order, In Re: Judicial Misconduct Complaint No. 444, January 23, 2007, at 4 (The expression of views by a judge, based on the record, and the tone maintained by a judge do not alone provide a basis for a finding of judicial misconduct.). See also Lynch, C.C.J., Order, In Re: Judicial Misconduct Complaint No. 01-12-90015, July 11, 2012, at 3-4 (A judge's admonishment of counsel in a published order did not constitute "egregious" or "hostile" behavior, under Rule 3(h)(1)(D) of the Rules for Judicial-Conduct and Judicial-Disability

Proceedings (Rules of Judicial-Conduct)), and Judicial Conference Committee on Codes of Conduct, Advisory Opinion 66, June 2009 ("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. . . . [E]xpressions of impatience, dissatisfaction, annoyance and even anger directed to an attorney or a party should not be confused with judicial bias.")

There is no assertion that the judge's statements or views during the hearings were based on anything beyond the record in the case. As the reviewed record does not support complainant's allegations of bias, hostility or any other impropriety on the part of the judge, the misconduct complaint is dismissed, pursuant to 28 U.S.C. § 352(b)(1)(B), and Rules of Judicial-Conduct, Rule 11(c)(1)(D). Insofar as the misconduct complaint is based on complainant's disagreement with any of the orders issued in the case, it is dismissed as not cognizable. See 28 U.S.C. § 352(b)(1)(A)(ii), and Rules for Judicial-Conduct, Rule 11(c)(1)(B).

For the reasons stated, Complaint No. 01-15-90004 is dismissed, pursuant to 28 U.S.C. §§ 352(b)(1)(A)(ii) and 352(b)(1)(B). See also Rules of Judicial-Conduct, Rules 11(c)(1)(B) and 11(c)(1)(D), respectively.

5/28/15  
Date

  
Chief Judge Lynch