

JUDICIAL COUNCIL
OF THE FIRST CIRCUIT

IN RE
COMPLAINT NO. 01-16-90024

BEFORE
Howard, Chief Circuit Judge

ORDER

ENTERED: JUNE 22, 2016

Complainant, who is neither a litigant nor an attorney, has filed a complaint of misconduct, under 28 U.S.C. § 351(a), against a First Circuit appellate judge.

Complainant alleges that the judge engaged in misconduct when the judge gave a speech containing remarks that the complainant alleges "offend[] our system of government."

I have thoroughly reviewed the text of the judge's speech in light of the governing ethical principles and have determined that it does not constitute judicial misconduct. See Rules for Judicial-Conduct and Judicial-Disability Proceedings (Rules of Judicial-Conduct), Rule 3(h)(2) ("Cognizable misconduct . . . is conduct occurring outside the performance of official duties if the conduct might have a prejudicial effect on the administration of the business of the courts, including a substantial and widespread lowering of public confidence in the courts among reasonable people.").

My inquiry demonstrates that the judge gave the speech to a group of students, faculty and others, during a conference at an accredited school of higher learning. See Rules of Judicial-Conduct, Rule 11(b) ("In determining what action to take [in response to a misconduct complaint], the chief judge may conduct a limited inquiry. The chief judge, or a designee, may communicate orally or in writing with the complainant, the subject judge, and any others who may have knowledge of the matter, and may obtain and review transcripts and other relevant documents."). During the speech, the judge offered commentary on certain historical events and critiqued a number of judicial opinions, treaties, and federal statutes.

Analysis of the judge's speech is informed, in part, by the Code of Conduct for United States Judges (Code of Conduct), which, although instructive, is not determinative of judicial misconduct issues.¹ Also illustrative is an opinion issued by the Judicial Conference Committee on Judicial Conduct and Disability (JC&D Committee), in which the Committee upheld an order dismissing a complaint of misconduct filed against a judge from another circuit. See Committee on Judicial Conduct and Disability, Memorandum of Decision, C.C.D. No. 14-01 (February 19, 2015) (JC&D Committee,

¹ The Code of Conduct may "provide standards of conduct for application in proceedings under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 (28 U.S.C. §§ 332(d)(1), 351-364). Not every violation of the Code should lead to disciplinary action. Whether disciplinary action is appropriate, and the degree of discipline, should be determined through a reasonable application of the text and should depend on such factors as the seriousness of the improper activity, the intent of the judge, whether there is a pattern of improper activity, and the effect of the improper activity on others or on the judicial system." Code of Conduct, Canon 1 Commentary.

Memorandum of Decision). In that matter, complainants had alleged that a speech on the death penalty that the judge gave at a law school constituted judicial misconduct. See id.

First, a judge's public "reiteration of [] previously expressed judicial opinion[s] does not constitute misconduct." JC&D Committee, Memorandum of Decision, Appendix, at 31. The speech at issue in the present matter was a restatement of views that the judge has articulated over many years in many contexts, including multiple published opinions.

Second, federal judges are encouraged to engage in outside activities concerning "the law, the legal system, and the administration of justice, including revising substantive and procedural law and improving criminal and juvenile justice." Code of Conduct, Canon 4A(1) and Canon 4 Commentary. For example, a judge's critique of the manner in which death penalty cases are prosecuted and a judge's speech about the direction of immigration law are not suggestive of misconduct. See JC&D Committee, Memorandum of Decision, Appendix, at 42 and *cases cited*.

The same principle applies to a judge's public criticism of Supreme Court cases. "It would be all but impossible for a judge to urge changes in the course of the law, or even to comment on substantive legal issues, without being able to reference and criticize decisions of the Supreme Court." JC&D Committee, Memorandum of Decision, Appendix, at 45. So long as the judge recognizes his or her duty to apply the law, such commentary cannot be said to undermine public confidence in the judiciary's integrity and impartiality. See id. at 47, *citing* Code of Conduct, Canons 1, 2A and 3.

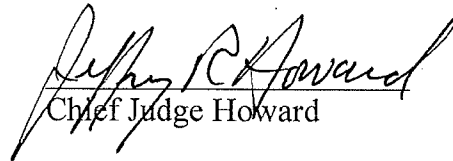
There is no information in the complaint, the speech, the judge's opinions or elsewhere suggesting that the judge harbors any intention to disregard governing precedent. Thus, the judge's public criticism of Supreme Court cases and commentary on historical and legal events are consistent with the judge's license to engage in outside activities relating to the law and its improvement. See Code of Conduct, Canon 4, *supra*.

Finally, insofar as the judge may have commented on the merits of any judicial proceedings that were pending at the time of the speech, the "prohibition on public comment on the merits does not extend to . . . scholarly presentations made for purposes of legal education." Code of Conduct, Canon 3A(6). Such a presentation, offered, as it was here, at "an accredited institution of higher learning" need not be "neutral" or objective in order to be "scholarly." See JC&D Committee, Memorandum of Decision, Appendix, at 67. Furthermore, because the judge's views had been repeatedly stated in published judicial opinions, "there is no reason to expect that [their] reiteration . . . in a public forum would either 'denigrate public confidence in the judiciary's integrity and impartiality,' Canon 3A(6) cmt., or cause 'a substantial and widespread lowering of public confidence in the courts among reasonable people,' Judicial-Conduct Rule 3(h)(2)." Id. at 70.

While complainant may disagree with statements that the judge made during the referenced speech, for the reasons explained, they do not provide a basis for a finding of judicial misconduct. Accordingly, Complaint No. 01-16-90024 is dismissed, pursuant to 28 U.S.C. § 352(b)(1)(A)(i). See also Rules of Judicial-Conduct, Rule 11(c)(1)(A) ("A

complaint must be dismissed in whole or in part to the extent that the chief judge concludes that the complaint . . . alleges conduct that, even if true, is not prejudicial to the effective and expeditious administration of the business of the courts . . .").

6.22.16
Date


Chief Judge Howard