

JUDICIAL COUNCIL  
OF THE FIRST CIRCUIT

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IN RE  
COMPLAINT NOS. 01-18-90013 and 01-18-90014

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BEFORE  
Howard, Chief Circuit Judge

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ORDER

ENTERED: APRIL 1, 2019

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Complainant, a pro se litigant, has filed a complaint of misconduct, under 28 U.S.C. § 351(a), against a district judge and a magistrate judge in the First Circuit in connection with complainant's civil case over which the district judge presides and the magistrate judge presided. The misconduct complaint is baseless and is not cognizable.<sup>1</sup>

Complainant alleges that the district judge and magistrate judge are biased against complainant because he is pro se and wrongfully "forced" complainant to use pro bono counsel, although the court's pro bono program is "optional." Complainant asserts that, by repeatedly rejecting complainant's pro se filings as improper and appointing unwanted

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<sup>1</sup> Complainant also filed a misconduct complaint against three (3) judges of the United States Court of Appeals for the First Circuit, and against a district court judge, sitting by designation in the First Circuit, in connection with cases over which they preside. See Judicial Misconduct Complaint Nos. 01-18-90020 - 01-18-90023. I dismissed the complaint as not cognizable, as not indicative of misconduct, and as baseless. See Howard, C.C.J., Order, In Re: Judicial Misconduct Complaint Nos. 01-18-90020 -- 01-18-90023, November 27, 2018. A petition for review of the order dismissing the misconduct complaint is pending.

counsel, the district judge has treated complainant in a "demonstrably egregious and hostile manner." Complainant adds that, failing to recognize the adequacy of complainant's pro se filings, the judge improperly ruled that complainant had not complied with discovery requirements, denied complainant's motions requesting final decisions in the case, and improperly delayed the proceeding.

Complainant also alleges that both subject judges engaged in improper ex parte communication with defendant's attorney when they excluded complainant from a scheduling conference over which the magistrate judge presided. Finally, complainant asserts that the court delayed in docketing complainant's motion to reschedule the conference immediately and that the district judge should recuse from his case because of this misconduct complaint.<sup>2</sup>

As an initial matter, the judicial misconduct complaint procedure does not provide an avenue for obtaining relief in a pending case, including the recusal of a judge. See 28 U.S.C. § 351, *et seq.*; see also Rules for Judicial-Conduct and Judicial-Disability Proceedings (Rules of Judicial-Conduct), Rules 11, 19, and 20. Further, the filing of a misconduct complaint does not alone provide a basis for judicial recusal from the underlying case. See Judicial Conference of the United States Committee on Codes of Conduct Advisory Opinion No. 103: Disqualification Based on Harassing Claims against Judge ("When a complaint is filed against a judge under the [Judicial Conduct and

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<sup>2</sup> Complainant also makes allegations against his pro bono counsel. The judicial misconduct procedure does not provide an avenue for making complaints against attorneys. See 28 U.S.C. § 351, *et seq.*, and Rules for Judicial-Conduct and Judicial-Disability Proceedings (Rules of Judicial-Conduct), Rule 1(b).

Disability Act], he or she is not required to recuse from a case involving the complainant unless, under the general principles of Canon 3C(1) [of the Code of Conduct for United States Judges] the circumstances raise a reasonable question about the judge's impartiality. Such a reasonable question about the judge's impartiality arises if there is a realistic potential for the complaint to lead to adverse consequences for the judge." No such circumstances exist in the present matter that would warrant the judge's recusal.

The complaint is meritless. The reviewed record, including the misconduct complaint, the docket of the proceeding, and the court's orders, provides no support for complainant's conclusory allegations of bias or other wrongdoing by either of the subject judges. According to the record, complainant filed a civil case against his bank. At the district judge's direction, the clerk's office referred the case randomly to a magistrate judge who is not the subject of this complaint (the first magistrate judge) to appoint pro bono counsel. Complainant promptly sought to set aside the order to appoint pro bono counsel and to proceed pro se.<sup>3</sup> Approximately a month later, complainant's pro bono counsel filed an informative motion, explaining her multiple, unsuccessful attempts to contact complainant. The district judge terminated counsel's pro bono representation and, subsequently, referred the case to the first magistrate judge for an initial scheduling conference.

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<sup>3</sup> Complainant filed an interlocutory appeal of the order appointing counsel that the Court of Appeals dismissed for lack of jurisdiction.

The record further indicates that complainant filed a response to defendant's answer, objected to the order referring the case to the magistrate judge, and repeatedly requested that the district judge rule on the case immediately. The district judge issued orders explaining that complainant's motions did not comply with court procedures, that rules dictate the progress of litigation, appointing pro bono counsel, directing complainant to discuss discovery with defendant, and staying the case to allow counsel time to meet with complainant. Complainant objected to each of these orders.

Meanwhile, the first magistrate judge recused from the proceeding and the subject magistrate judge, to whom the case was randomly reassigned, set an initial scheduling conference. The subject magistrate judge called but did not hold the initial scheduling conference because complainant's pro bono counsel was not present and the case had been stayed. The same day, complainant filed a motion requesting that the initial scheduling conference be held before expiration of the stay, which the magistrate judge denied.<sup>4</sup> Subsequently, the subject magistrate judge recused, and the case was randomly assigned to a third magistrate judge.

Approximately a month after his appointment, complainant's pro bono counsel moved to withdraw, citing his inability to contact complainant. The district judge ordered complainant to cooperate with counsel and held the motion to withdraw in abeyance pending counsel's status report. Nevertheless, complainant continued to file

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<sup>4</sup> According to the docket, the clerk's office docketed complainant's motion two (2) business days after receipt. There was no appreciable delay, and, regardless, the delay by court staff would not be indicative of misconduct by the judge. See, e.g., Lynch, C.C.J., Order, In Re: Judicial Misconduct Complaint No. 01-15-90002, June 11, 2015, at 7.

multiple pleadings pro se seeking an immediate conclusion to the case. The district judge denied the motions, explained that they indicated that complainant continued to ignore applicable procedural rules despite the court's warnings, noted that complainant had not complied with a discovery order, and warned that continued non-compliance would result in sanctions and dismissal of the case. Over the next few days, complainant filed multiple motions objecting to the court's orders and seeking an immediate ruling on the case, all of which the district judge denied.

Thereafter, complainant filed numerous letters in his case and his pro bono counsel filed a renewed motion to withdraw, explaining his continued inability to contact complainant. The third magistrate judge held an initial scheduling conference, during which the parties agreed to a discovery schedule; the court further ordered complainant not to file pro se motions on the docket, but to direct all pleadings to counsel. By consent of the parties, the case was referred to the magistrate judge for all further proceedings, including entry of judgment. The magistrate judge has since denied a motion to dismiss that defendant filed and granted complainant's counsel's motion to withdraw.

The reviewed record provides no support for complainant's claims that the district judge or magistrate judge was biased against complainant because of his pro se status or engaged in any other wrongdoing. To the contrary, the record indicates that the district judge repeatedly explained the federal civil litigation process to complainant and provided complainant multiple opportunities to comply with the governing procedural rules. When complainant failed to do so, the district judge determined that, because of

complainant's difficulties with following procedural rules, the interests of justice and judicial economy would be best served by appointing pro bono counsel.<sup>5</sup> The judge's orders appointing pro bono counsel are not remotely suggestive of judicial bias or otherwise indicative of misconduct.

Nor do any of the court's orders indicate "egregious [or] hostile" treatment of complainant. See Rules of Judicial-Conduct, Rule 4(a)(2)(B) ("Cognizable misconduct . . . includes . . . treating litigants [or] attorneys . . . in a demonstrably egregious and hostile manner . . ."). The district judge did not use hostile, let alone egregious, language; rather the orders explained the discovery process, the inadequacy of complainant's filings under procedural rules, and the resulting need for court appointed counsel. In describing the inadequacy of complainant's pleadings, the district judge "do[es] not even approach 'the sort of deepseated unequivocal antagonism that may constitute misconduct.'" See Lynch, C.C.J., Order, In Re: Judicial Misconduct Complaint No. 01-12-90015, July 11, 2012, at 6 (quoting In Re: Jane Doe, 640 F.3d 861, 863 (Judicial Council of the Eighth Circuit, February 24, 2011)).

Likewise, there is no evidence that the subject judges engaged in improper ex parte communication with defendant's counsel by excluding complainant from a scheduling conference. Recognizing that complainant's counsel was absent and that the case had been stayed, the magistrate judge did not hold the scheduling conference. See

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<sup>5</sup> Although not necessary to the resolution of the misconduct complaint, the court appointed counsel for complainant in accordance with federal law, see 28 U.S.C. § 1915(e), and the governing local rule.

supra p. 4. Accordingly, the misconduct complaint is dismissed as baseless, pursuant to 28 U.S.C. § 352(b)(1)(A)(iii). See also Rules of Judicial-Conduct, Rule 11(c)(1)(D).

Where, as here, there is no evidence of bias or improper motive, complainant's objections to the court's rulings -- including denying complainant's motions for final rulings and to reschedule the conference, concluding that complainant failed to comply with the discovery order, and appointing pro bono counsel -- are not cognizable. These claims amount to nothing more than challenges to the substance of orders with which complainant disagrees. See Rules of Judicial-Conduct, Rule 4(b)(1) ("Cognizable misconduct does not include an allegation that calls into question the correctness of a judge's ruling . . . . If the decision or ruling is alleged to be the result of an improper motive . . . or improper conduct in rendering a decision or ruling, . . . the complaint is not cognizable to the extent that it calls into the question the merits of the decision."). The same is true for complainant's allegation that the district judge delayed complainant's case by appointing pro bono counsel. See id. Rule 4(b)(2) ("Cognizable misconduct does not include an allegation about delay in rendering a decision or ruling."). Accordingly, the complaint is dismissed as not cognizable, pursuant to 28 U.S.C. § 352(b)(1)(A)(ii). See also Rules of Judicial-Conduct, Rule 11(c)(1)(B).

For the reasons stated, Complaint Nos. 01-18-90013 and 01-18-90014 is dismissed, pursuant to 28 U.S.C. §§ 352(b)(1)(A)(ii) and 352(b)(1)(A)(iii). See also Rules of Judicial-Conduct, Rules 11(c)(1)(B) and 11(c)(1)(D), respectively.

April 1, 2019  
Date

  
Chief Judge Howard