

JUDICIAL COUNCIL
OF THE FIRST CIRCUIT

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

BEFORE
Torruella, Thompson, AND Barron, Circuit Judges
Delgado-Hernández AND Talwani, District Judges

ORDER

ENTERED: APRIL 14, 2020

Petitioner, a pro se litigant, has filed a petition for review of Chief Judge Howard's order dismissing petitioner's misconduct complaint, under 28 U.S.C. § 351(a), against a district judge and a magistrate judge in the First Circuit. Petitioner alleged judicial misconduct in connection with petitioner's civil case over which the judges presided. Chief Judge Howard dismissed the complaint as baseless and as not cognizable.¹

Petitioner originally alleged that the subject judges were biased against petitioner because he was pro se and wrongfully "forced" petitioner to use pro bono counsel.

¹ Petitioner also filed a misconduct complaint against three 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. Chief Judge Howard 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). Petitioner filed a petition for review, and the Judicial Council affirmed the Chief Judge's order. See Judicial Council of the First Circuit, Order, In Re: Judicial Misconduct Complaint Nos. 01-18-90020 - 01-18-90023 (June 28, 2019).

Petitioner alleged that, by repeatedly rejecting petitioner's pro se filings as "improper" and appointing unwanted counsel, the district judge treated petitioner in a "demonstrably egregious and hostile manner." Petitioner added that, failing to recognize the adequacy of petitioner's pro se filings, the district judge improperly ruled that petitioner had not complied with discovery requirements, denied petitioner's motions requesting final decisions in the case, and delayed the proceeding.

Petitioner also alleged that both subject judges engaged in improper ex parte communication with defendant's attorney when they excluded petitioner from a scheduling conference over which the magistrate judge presided. Finally, petitioner asserted that the court delayed in docketing petitioner's motion to reschedule the conference and that the district judge should have recused from the case because of the misconduct complaint.

In dismissing the complaint, Chief Judge Howard first explained that the judicial misconduct 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. The Chief Judge further explained that the filing of a misconduct complaint does not alone provide a basis for recusal from the underlying case and that the circumstances in this matter did not warrant recusal. See Judicial Conference of the United States

Committee on Codes of Conduct Advisory Opinion No. 103: Disqualification Based on Harassing Claims against Judge.

Chief Judge Howard determined that, based on the reviewed record, including the misconduct complaint, the docket of the proceeding, and the court's orders, there was no support for petitioner's conclusory allegations of bias or other wrongdoing by either of the subject judges. Chief Judge Howard observed that, at the subject district judge's direction, the clerk's office randomly referred petitioner's civil case to a magistrate judge, who is not the subject of this complaint (the first magistrate judge), to appoint pro bono counsel. Petitioner promptly sought to set aside the order referring the case to appoint pro bono counsel. The district judge terminated pro bono counsel because counsel was unable to contact petitioner.

Chief Judge Howard further observed that petitioner filed a response to defendant's answer and repeatedly requested an immediate ruling on the case. The district judge issued orders explaining that petitioner's motions were improper, that procedural rules dictate the progress of litigation, appointing another pro bono counsel, directing petitioner to discuss discovery with defendant, and staying the case.

The Chief Judge observed that the subject magistrate judge, to whom the case had been randomly reassigned after the first magistrate judge recused from the proceeding, called but did not hold a scheduling conference because petitioner's counsel was not present, and the case had been stayed. The same day, petitioner filed a motion

requesting that the conference be held before expiration of the stay, which the magistrate judge denied.²

Chief Judge Howard further observed that petitioner continued to file multiple pleadings pro se requesting an immediate conclusion to the case. In denying petitioner's motions, the district judge explained that they demonstrated petitioner's noncompliance with applicable procedural rules and with a discovery order, and warned that continued noncompliance would result in sanctions and dismissal of the case.

The Chief Judge also observed that a third magistrate judge, to whom the case was randomly assigned after the subject magistrate judge recused, ordered petitioner to file all pleadings through counsel. The third magistrate judge granted petitioner's counsel's third motion to withdraw based on petitioner's lack of cooperation.

Chief Judge Howard found that there was no support for petitioner's allegations of bias, improper treatment, or improper ex parte communication. Chief Judge Howard further determined that none of the court's orders included "hostile," let alone "egregious" language. See Rules of Judicial-Conduct, Rule 4(a)(2)(B) ("Cognizable misconduct . . . includes . . . treating litigants . . . in a demonstrably egregious and hostile manner . . ."). To the contrary, the reviewed record indicated that the district judge repeatedly explained federal civil litigation procedure, including the discovery process, to petitioner, provided

² The Chief Judge observed that, contrary to petitioner's allegation of delay in docketing this motion, the docket reflects that it was docketed two business days after receipt. Chief Judge Howard determined that there was no appreciable delay, and, regardless, court staff's delay would not be indicative of judicial misconduct. See Lynch, C.C.J., Order, In Re: Judicial Misconduct Complaint No. 01-15-90002 (June 11, 2015), at 7.

petitioner multiple opportunities to comply, and, based on petitioner's deficient filings and noncompliance with court orders, determined that appointing pro bono counsel would best serve the interests of justice and judicial economy.³ Based on the reviewed record, the Chief Judge also concluded that the magistrate judge did not hold the scheduling conference at which petitioner alleged that there was improper ex parte communication with defendant's counsel. See supra p. 3-4. Accordingly, Chief Judge Howard dismissed the misconduct complaint as baseless, pursuant to 28 U.S.C. § 352(b)(1)(A)(iii). See also Rules of Judicial-Conduct, Rule 11(c)(1)(D).

Because there was no evidence of bias or improper motive, Chief Judge Howard dismissed petitioner's objections to the court's rulings as not cognizable pursuant to 28 U.S.C. § 352(b)(1)(A)(ii). 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."). See also id. Rule 11(c)(1)(B). Chief Judge Howard found that the same was true for petitioner's allegations of delay. See id. Rule 4(b)(2) ("Cognizable misconduct does not include an allegation about delay in rendering a decision or ruling, unless the allegation concerns an improper motive in delaying a particular decision").

³ Chief Judge Howard observed that, although not necessary to resolution of the misconduct complaint, the court appointed counsel for petitioner in accordance with federal law, 28 U.S.C. § 1915(e), and the governing local rules.

In the petition for review, petitioner alleges that Chief Judge Howard treated him in a "demonstrably egregious and hostile manner" by dismissing the misconduct complaint. Petitioner further alleges that, to protect his colleagues, the Chief Judge ignored portions of the record and excluded specific dates of filings in the order dismissing the misconduct complaint.

With respect to the subject judges, petitioner realleges that the judges acted in an "egregious and hostile" manner by appointing unwanted counsel and adds that they did so to benefit the pro bono program. Petitioner further contends that the magistrate judge treated petitioner improperly by omitting from the order addressing the cancelled scheduling conference the fact that petitioner was excluded from the courtroom and by denying petitioner's request for an immediate scheduling conference.

Petitioner reiterates that, failing to recognize that discovery was completed before petitioner filed his civil case, the subject judges improperly ruled that petitioner had not complied with discovery orders. Petitioner also realleges that the judges improperly delayed his case by appointing pro bono counsel and adds that the judges compounded this delay by staying his case, and by delaying in ruling on and docketing various pleadings.

The petition for review is meritless. Petitioner offers, and the record includes no information that supports the allegations that Chief Judge Howard misrepresented the record or treated petitioner improperly in dismissing the complaint. To the contrary,

Chief Judge Howard thoroughly reviewed both the misconduct complaint and the underlying record, and, in doing so, appropriately determined that neither provided facts indicating that the subject judges were biased against petitioner, delayed petitioner's case, engaged in improper ex parte communication, or otherwise treated petitioner improperly. See Rules of Judicial-Conduct, Commentary to Rule 4 ("Any allegation that calls into question the correctness of an . . . action of a judge - without more- is merits related Thus, a complaint challenging the correctness of a chief judge's determination to dismiss a prior misconduct complaint would be properly dismissed as merits-related").

There remains no evidence to support petitioner's claims that the judges were biased, delayed petitioner's case, or treated petitioner improperly either by appointing pro bono counsel or otherwise in presiding over the proceeding. The record is replete with orders explaining the governing procedures to petitioner and providing petitioner with ample opportunity to comply and present his case accordingly. Likewise, the magistrate judge entered a thorough explanation of the conference that was called but not held, noting that petitioner was in the building, but that the case had been stayed, that petitioner's newly appointed counsel had not appeared, and that the conference had not been continued due to an inadvertent oversight. Petitioner's claims derive exclusively from petitioner's objections to the substance and timing of the court's orders.⁴ See Rules of Judicial-Conduct, Rules 4(b)(1) and 4(b)(2). Therefore, Chief Judge Howard properly

⁴ As Chief Judge Howard noted in the order dismissing the original misconduct complaint, any delays in docketing by court staff would not be indicative of judicial misconduct. See Lynch, C.C.J., Order, In Re: Judicial Misconduct Complaint No. 01-15-90002 (June 11, 2015), at 7; see also supra, p. 4 and n. 2.

dismissed the complaint as not cognizable and as baseless. See 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).

For the reasons stated herein, the order of dismissal issued in Judicial Misconduct Complaint Nos. 01-18-90013 and 01-18-90014 is affirmed. See Rules of Judicial-Conduct, Rule 19(b)(1).

April 14, 2020
Date



Susan Goldberg, Secretary