

JUDICIAL COUNCIL
OF THE FIRST CIRCUIT

IN RE
COMPLAINT NO. 01-18-90017

BEFORE
Howard, Chief Circuit Judge

ORDER

ENTERED: MAY 10, 2019

Complainant has filed a complaint of misconduct, under 28 U.S.C. § 351(a), against a district judge in the First Circuit in connection with complainant's civil cases over which the district judge presided. The misconduct complaint is unsupported and is not cognizable.

Complainant alleges that the judge violated multiple provisions of Canon 3 of the Code of Conduct for United States Judges (Code of Conduct) by delaying and ultimately failing to refer complainant's attorney to an assistance program or disciplinary authority before dismissing complainant's cases. See Code of Conduct, Canons 3B(6) (requiring judges to "take appropriate action upon receipt of reliable information indicating the likelihood . . . that a lawyer violated applicable rules of professional conduct"); 3A(2) (requiring a judge to "maintain order and decorum in all judicial proceedings"); 3A(3)

(requiring judges to be "patient, dignified, respectful, and courteous" and requiring "similar conduct by those subject to the judge's control, including lawyers . . . "); and 3B(1) (requiring a judge to "diligently discharge administrative responsibilities" and "maintain professional competence in judicial administration . . . ").¹ Complainant asserts that the "judge should have seen that the merits of [the] case deserved a disciplinary review from the [board overseeing attorney conduct]."

Complainant further asserts that the judge was biased in presiding over complainant's cases and wrongfully denied his requests to seal his cases and to reopen his second case. Finally, complainant contends that the public availability of the orders and filings in his cases has prevented him from securing employment and requests that the court "prevent and block the contents of [his] court documents to be seen on the internet or any social media."

As an initial matter, the judicial misconduct procedure does not provide an avenue for obtaining relief in a case, including the sealing of a case. See 28 U.S.C. § 351, *et seq.*, and Rules for Judicial-Conduct and Judicial-Disability Proceedings (Rules of Judicial-Conduct), Rules 11, 19, and 20.

The reviewed record, including the misconduct complaint (and attachments), as well as the case dockets and orders issued in complainant's proceedings, is devoid of any

¹ Complainant also cites to the Code of Conduct for United States Judges (Code of Conduct), Canon 3B(5), requiring that "[a] judge with supervisory authority over other judges should take reasonable measures to ensure that they perform their duties timely and effectively," but neither alleges nor offers any information suggesting that the judge failed to comply with this provision. Accordingly, this reference requires no further discussion. While complainant also cites to the Model Code of Judicial Conduct (presumably the American Bar Association Model Code of Judicial Conduct), the Code of Conduct applies to the federal judiciary.

information suggesting that the judge engaged in misconduct. The record indicates that, roughly a decade ago, complainant filed a civil case, which the judge dismissed, without prejudice, for failure to file return of service. Approximately three (3) months later, complainant filed, pro se, a letter requesting that the case be reopened, explaining that he had been unable to reach his attorney since the case was dismissed and that he believed that service had been effected. Several weeks later, complainant's attorney filed a motion to vacate the dismissal, explaining that counsel had timely returned the service documents to the court in hardcopy and had been unaware that he had been required to file the documents electronically. The judge granted the motion and reopened the case.

The record shows that several months later, the judge directed complainant's counsel to file a status report. The attorney complied and, in the report, indicated that service had been completed and that defendants had yet to file an answer in the case. Defendants then filed a motion to dismiss arguing that complainant failed to complete proper service and exhaust administrative remedies. Complainant did not respond to the motion, and the judge dismissed the case.

The record further shows that, approximately two (2) months later, complainant, represented by his attorney, filed a second case, which was assigned to the same judge, alleging the same causes of action as in the first case but with additional facts. When no proof of service was timely filed, the judge ordered that the action would be dismissed without prejudice unless proof of service was filed or good cause was shown why service had not been made. Although complainant's counsel then filed an acknowledgement of

service, defendants moved to dismiss for failure to exhaust administrative remedies and for failure to effect timely service. After both parties briefed the service of process and exhaustion issues, the judge issued a multi-page order dismissing the case on both grounds. Complainant filed a motion for reconsideration, which the judge denied.

According to the record, nearly one (1) year later, complainant, pro se, filed motions to seal filings in his cases, which the judge denied. Almost three (3) years after the judge denied the motions to seal, complainant filed, pro se, a motion to reopen his second case, alleging inadequate representation by his attorney, including, but not limited to, counsel's failures to: include relevant facts in presenting complainant's claims; allow complainant to review his pleadings; properly effect service; and respond to complainant's communications. The judge denied the motion.

The record further indicates that, approximately five (5) years later, complainant filed, pro se, motions to seal his cases, attaching a then recent state court order disbarring his former attorney for various misconduct.² The judge granted the motions but cautioned that the court had no control over information previously made available on the internet. In response to a subsequently filed motion to intervene, the judge limited the order to seal to pleadings containing substantive information regarding complainant's claims against the defendants.

² Complainant suggests that his attorney's mishandling of his case was a basis, in part, for his attorney's disbarment. The order of disbarment references a number of incidents of attorney misconduct, but it is not clear that complainant's case is among the referenced matters.

The misconduct complaint is without merit. The misconduct complaint and the reviewed record fail to indicate that the judge violated the Code of Conduct, let alone engaged in misconduct. See Code of Conduct, Rule 1 Commentary (While 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), [n]ot every violation of the Code should lead to disciplinary action."); Rules of Judicial-Conduct, Commentary to Rule 4 ("While the Code[of Conduct's] Canons are instructive, ultimately the responsibility for determining what constitutes cognizable misconduct is determined by the [Misconduct] Act and these Rules").

The Code of Conduct provides that a judge "should take *appropriate action* upon receipt of *reliable information* indicating the likelihood that . . . a lawyer violated applicable rules of professional conduct." See Code of Conduct, Canon 3B(6) (emphasis added). "[T]he question what constitutes 'appropriate action' in a particular case, like the question of what evidence reliably indicates unprofessional conduct, depends on the circumstances in the particular case and the exercise of judgment. Such a judgment would have to be quite unreasonable to constitute a violation of the Canons [and would have to be] willful or a part of a pattern of habitual conduct" to rise to the level of violating the misconduct statute. Boudin, C.C.J., In re: Complaint No. 400, March 3, 2005 at 3.

There is no indication that the judge exercised any such willful, habitual, or unreasonable judgment. To the contrary, only once during the pendency of both cases did complainant raise concerns about his attorney's conduct (when complainant requested that his first case be reopened and stated that he had not been able to reach his attorney), to which the judge responded by reopening the case and ordering counsel to file a status report. Complainant did not raise any additional concerns about his attorney's performance until more than three (3) and a half years after the dismissal of complainant's second case, when he asked for the case to be reopened on the basis of inadequate representation, a request that the judge denied.³ The judge's handling of the proceeding with respect to complainant's counsel, in response to complainant's belated concerns or based on the underlying record of the case, does not demonstrate the type of willful, habitual, or unreasonable judgment that would indicate a violation of Canon 3, let alone suggest cognizable misconduct under the governing statute or rules.

Nor is there any evidence for the conclusory allegation that the judge was biased or improperly motivated in presiding over complainant's cases. The record indicates that the judge considered the substance of the claims presented by the parties and ruled accordingly, including issuing orders in complainant's favor and providing multiple

³ The allegations raised in the misconduct complaint concern conduct that is approximately a decade old. While not determinative of the present matter, such delayed allegations, that depend upon events occurring years ago, prejudice the ability to conduct any meaningful investigation. See Boudin, C.C.J., Order, *In re: Complaint No. 400*, March 3, 2005 at 2-3 (dismissing a judicial misconduct complaint alleging failure to report attorney misconduct, filed nearly eight (8) years after the issue of attorney misconduct was first raised in the underlying case). See Rules for Judicial-Conduct and Judicial-Disability Proceedings, (Rules of Judicial-Conduct), Rule 9 (Where "the passage of time has made an accurate and fair investigation of a complaint impracticable, the complaint must be dismissed . . .").

opportunities for complainant to cure deficiencies. See, e.g., supra at 3-4 (granting complainant's motion to vacate dismissal of case; allowing complainant additional time to complete service; and granting complainant's motion to seal). As the complaint and reviewed record do not support complainant's claims of judicial wrongdoing, the misconduct complaint is dismissed pursuant to 28 U.S.C. § 352(b)(1)(A)(iii). See also Rules of Judicial-Conduct, Rules 11(c)(1)(D).

Where, as here, there is no evidence of improper judicial motivation, complainant's challenges to the court's orders, including those dismissing complainant's cases and denying complainant's motions, are not cognizable. 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 . . ."); id. Commentary to Rule 4 ("Any allegation that calls into question the correctness of an official decision or procedural ruling of a judge — without more — is merits-related."). The same holds true for any claim that the judge improperly delayed in referring complainant's counsel to a disciplinary authority. See Rules of Judicial Conduct, 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. . . ."). Therefore, the complaint is dismissed, 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 No. 01-18-90017 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.

May 10, 2019
Date


Chief Judge Howard