

JUDICIAL COUNCIL
OF THE FIRST CIRCUIT

IN RE
COMPLAINT NO. 01-20-90006

BEFORE
Thompson and Barron, Circuit Judges
Talwani, Arias-Marxuach, and McElroy, District Judges

ORDER

ENTERED: OCTOBER 28, 2021

Petitioner, a criminal defendant, has filed a petition for review of Judge Lynch's order dismissing his complaint, under 28 U.S.C. § 351(a), against a district judge in the First Circuit. Petitioner alleged that the judge, who presides over his criminal case, was racially biased. Judge Lynch dismissed the complaint as unsupported and as not indicative of misconduct.

Petitioner alleged that the judge was racially biased and, therefore, could not be impartial and should have recused from petitioner's criminal case. Petitioner based his claim of bias on the judge's alleged use of a specific phrase to reference petitioner's

former counsel.¹ Petitioner also suggested that the judge may have conspired with petitioner's attorney to discourage petitioner from filing a motion to recuse.²

Judge Lynch determined that the record, including the misconduct complaint and the docket of the proceeding, did not provide a basis for further inquiry. Specifically, Judge Lynch determined that petitioner's allegation that the judge exhibited racial bias by privately referring to petitioner's attorney as alleged, considered in conjunction with counsel's repeated verbal and written denials of the claim, see infra pp. 3-4, was insufficient to "raise an inference that misconduct ha[d] occurred." See 28 U.S.C. § 351, et seq. See also Rules for Judicial-Conduct and Judicial-Disability Proceedings (Rules of Judicial-Conduct), Rule 11(c)(1)(D) ("A complaint may be dismissed . . . to the extent that the . . . judge concludes that the complaint . . . is based on allegations lacking sufficient evidence to raise an inference that misconduct has occurred . . .").

Judge Lynch further determined that the alleged statement by the judge, even if true, would not amount to judicial misconduct under the statute. See 28 U.S.C. § 351, et seq., and Rule 11 Commentary ("Essentially, the standard [governing the judge's inquiry into allegations of judicial misconduct] is that used to decide motions for summary judgment pursuant to Fed. R. Civ. P. 56. Genuine issues of material fact are not resolved

¹ Petitioner also referred to a purported magazine article related to a different criminal case and suggested that this article indicated that the subject judge considers race in sentencing defendants. Petitioner did not include the article, and an internet search did not reveal it. A motion that petitioner filed in the case includes, as an exhibit, a purported internet post quoting another criminal defendant as making this and other statements critical of the judge.

² Petitioner included allegations of wrongdoing by his former attorney, which were not addressed in the context of the misconduct complaint, as the judicial misconduct procedure applies only to complaints against federal judges. See 28 U.S.C. § 351, et seq. See also Rules for Judicial-Conduct and Judicial-Disability Proceedings (Rules of Judicial-Conduct), Rule 1.

at the summary judgment stage. A material fact is one that 'might affect the outcome of the suit under the governing law,' and a dispute is 'genuine' if 'the evidence is such that a reasonable jury could return a verdict for the nonmoving party.' Anderson v. Liberty Lobby, 477 U.S. 242, 248 (1986)."). Finally, Judge Lynch determined that the record provided no evidence to support petitioner's conclusory allegation that the judge conspired with petitioner's attorney either to dissuade petitioner from seeking the judge's recusal or otherwise.

In dismissing the complaint, Judge Lynch recounted petitioner's claims. Petitioner alleged that he spoke to his attorney in the courthouse on the day of counsel's appointment and that counsel told petitioner that the judge privately referred to counsel by the alleged term.³ Petitioner further contended that, during a subsequent telephone conversation, his attorney stated that the judge had used this phrase "just [as] a joke." Petitioner asserted that, several months later, he told counsel that he would like to file a motion for the judge's recusal based on the judge's racial bias as evidenced by the judge's use of the term. Petitioner contended that counsel responded by denying that he had said that the judge used this phrase, stating that counsel used the phrase to refer to himself, and advised petitioner against filing a motion for recusal. Petitioner added that counsel wrote a letter to petitioner's mother memorializing this conversation.

³ According to the docket, a magistrate judge appointed this attorney as petitioner's second lawyer under the Criminal Justice Act (CJA), after allowing petitioner's first CJA attorney to withdraw. The second attorney's associate also entered an appearance as counsel for petitioner.

Judge Lynch also observed that, although not submitted with the complaint, it appeared from the docket that counsel's letter to petitioner's mother, to which petitioner referred, was filed in support of petitioner's subsequent request for new counsel. In the letter, counsel's associate, see supra note 3, stated that both attorneys recently had a phone conversation with petitioner, after which the attorneys concluded that petitioner had an irreconcilable difference of opinion with counsel regarding the legal strategy for his case and explained that they would seek to withdraw, with petitioner's assent. In addition, counsel's associate stated that the judge never used the referenced term, and petitioner's attorney never told petitioner that the judge had done so. Counsel's associate further explained that he had witnessed counsel's repeated attempts to clarify with petitioner that, to the extent counsel used the relevant phrase, he did so exclusively in reference to himself. Counsel's associate also explained that the attorneys did not believe that there was any basis for the judge's recusal and that they advised against filing a motion for recusal, but that whether to do so was a decision for petitioner and his new attorney.

Judge Lynch further observed that petitioner's attorney filed a motion to withdraw, and the judge held a hearing on the motion, at which petitioner expressed his desire for new counsel. The judge allowed the motion to withdraw and appointed new CJA counsel. A number of months later, petitioner filed a motion to replace his recently appointed counsel, which the judge denied, noting that petitioner's primary reason for seeking new counsel was a disagreement between counsel and petitioner on whether to file a motion

for recusal based on the alleged statement that was the subject of the misconduct complaint.

Judge Lynch next observed that petitioner filed pro se, with the court's permission, a motion seeking the judge's recusal based essentially on the same claim as the misconduct complaint - that the judge's alleged statement as conveyed by his former attorney evidenced judicial bias, or the appearance thereof, sufficient to require the judge's recusal. In a multiple page Memorandum and Order denying the motion, the court recounted petitioner's claims, including the allegations concerning the alleged statement by petitioner's former counsel and counsel's repeated denial thereof. Applying the governing legal standard, the judge determined that the alleged statement was not only uncorroborated, but staunchly denied by counsel, and that there was no claim that any such comment, even if made as alleged, suggested any hostility or animus toward petitioner or any minority group.

Judge Lynch found that, for essentially the same reasons, the misconduct complaint did not warrant further inquiry. Petitioner conceded and the record demonstrated that petitioner's attorney denied stating that the judge made the purported comment.

Moreover, Judge Lynch determined that, whether the judge made this purported statement did not, on the present record, present "a genuine issue . . . [of] material fact" that alone, absent evidence of improper judicial animus, would warrant further inquiry. See Rules of Judicial-Conduct, Rule 11 Commentary. Judge Lynch determined that the

record was devoid of any such evidence and, as such, this singular, private statement would not be "reasonably likely to 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." See id. Rule 4(a)(7). Judge Lynch further determined that the record of the proceeding demonstrated that the judge had held multiple conferences and hearings, and ruled repeatedly in petitioner's favor, including, but not limited to, allowing petitioner's requests for multiple extensions of time and for new counsel, and authorizing him to file the recusal motion pro se. See supra pp. 4-5.

As there was no information suggesting that the judge was improperly motivated, conspired with petitioner's attorney, or engaged in any other wrongdoing in presiding over petitioner's case, Judge Lynch dismissed the misconduct complaint as lacking sufficient evidence, pursuant to 28 U.S.C. § 352(b)(1)(A)(iii), and as not indicative of misconduct, pursuant to 28 U.S.C. § 352(b)(1)(A)(i). See also Rules of Judicial-Conduct, Rules 11(c)(1)(D) and 11(c)(1)(A), respectively.⁴

In the petition for review, petitioner repeats the allegations that the judge had a "conscious racial bias" as evidenced by the judge's alleged use of the relevant phrase. Petitioner adds that the judge is implicated, even if only counsel had used the phrase, because it was used "in the context of [counsel's] friendship with the judge, . . . suggests [that the] judge has an unconscious bias," and would be a violation of Canons 1 and 2 of

⁴ Petitioner has since been released from custody, pleaded guilty, and is scheduled for sentencing before the subject judge.

the Code of Conduct for U.S. Judges (Code of Conduct), as it shows the judge is "not observing [or enforcing] high standards of conduct [] at all times" by "entertaining a racist joke."⁵

Petitioner realleges that the judge may have conspired with petitioner's attorney to discourage petitioner from filing a motion to recuse, as evidenced by counsel's "threat[]" to petitioner that "filing a motion [to recuse] would backfire." Petitioner adds that counsel's friendship and former professional relationship with the judge are further evidence of this conspiracy.

Petitioner also asserts that Judge Lynch erroneously failed to conduct "further inquiry" and dismissed the misconduct complaint without appropriately considering the evidence, including the article petitioner cites, see supra note 1, and the claim that, of the three times that petitioner's attorney and petitioner discussed the relevant term, only once, after petitioner asserted that the phrase was racist, did petitioner's attorney state that only counsel had used the term.⁶ Petitioner contends that further inquiry was justified as counsel's denial in a letter "is not the equivalent [of his] den[ial] in an official investigation."

Petitioner also asserts that Judge Lynch improperly concluded that, if the judge did use the phrase, the judge did so "singular[ly]" and in "private," as petitioner contends that

⁵ The cited provisions of the Code of Conduct require that a judge "maintain and enforce high standards of conduct and . . . personally observe those standards, so that the integrity and independence of the judiciary may be preserved," and "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." See Code of Conduct, Canons 1 and 2(A).

⁶ Petitioner notes that this claim was disputed by counsel's associate, who asserted that petitioner's attorney "repeated[ly]" told petitioner that the judge did not use the phrase.

his former attorney suggested that the judge repeatedly referred to counsel using the phrase. Petitioner adds that even a private use of the phrase is misconduct.

The petition for review is meritless. Petitioner includes no information that undermines the sufficiency of Judge Lynch's inquiry into petitioner's claims or the conclusions reached in the order of dismissal. Petitioner's assertion that the phrase at issue demonstrates bias on the part of the judge regardless of whether it was used by the judge or by petitioner's former counsel is untenable. Counsel's use of the phrase to characterize his relationship with the judge would not evidence illicit judicial motive, a violation of the Code of Conduct,⁷ or judicial wrongdoing. The petition, like the complaint and reviewed record, offers no evidence of conspiracy between the judge and petitioner's counsel, either to prevent petitioner from filing a motion to recuse or otherwise. To the contrary, and as Judge Lynch observed, the judge expressly allowed petitioner to file a motion pro se seeking the judge's recusal, in which petitioner asserted the same claims as presented in the present matter.

Petitioner's reiteration of the underlying allegation - that the judge used the phrase on multiple occasions to refer to the judge's relationship with petitioner's counsel - remains not only unsupported but, by petitioner's own admission, conclusively denied by


⁷ A violation of the Code of Conduct may inform consideration of a judicial misconduct complaint but does not necessarily constitute judicial misconduct under the statute. See Code of Conduct, Canon 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 [of Conduct] should lead to disciplinary action."); and 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 Act [28 U.S.C. § 351, *et seq.*] and these Rules . . .").

both of his attorneys. Accordingly, Judge Lynch appropriately determined that the matter did not warrant further inquiry. See supra pp. 2-3 and 5-6 (quoting Rules of Judicial-Conduct, Rule 11 Commentary). Furthermore, petitioner does not provide any evidence of improper judicial motivation or animus that would undermine Judge Lynch's conclusion that, on the present record, even if the judge had made the statement as petitioner alleged, it would not be "reasonably likely to have a prejudicial effect on the administration of the business of the courts." See supra pp. 5-6 (quoting Rules of Judicial-Conduct, Rule 4(a)(7)).⁸

Therefore, Judge Lynch properly dismissed the misconduct complaint as lacking sufficient evidence, pursuant to 28 U.S.C. § 352(b)(1)(A)(iii), and as not indicative of misconduct, pursuant to 28 U.S.C. § 352(b)(1)(A)(i). See also Rules of Judicial-Conduct, Rules 11(c)(1)(D) and 11(c)(1)(A), respectively.

For the reasons stated, the order of dismissal issued in Judicial Misconduct Complaint No. 01-20-90006 is affirmed. See Rules of Judicial-Conduct, Rule 19(b)(1).

10/28/2021
Date


Susan Goldberg, Secretary

⁸ The alleged article petitioner references, see supra note 1, has no relevance to petitioner's claims in the present matter.