

JUDICIAL COUNCIL
OF THE FIRST CIRCUIT

IN RE
COMPLAINT NO. 01-20-90006

BEFORE
Lynch, Circuit Judge

ORDER

ENTERED: NOVEMBER 2, 2020

Complainant, an incarcerated criminal defendant, has filed a complaint under 28 U.S.C. § 351(a) against a district judge in the First Circuit. Complainant alleges that the judge, who is presiding over his criminal case, is racially biased. The record does not support the allegations and does not show misconduct.

Complainant alleges that the judge is racially biased and, therefore, cannot be impartial and should recuse from complainant's criminal case. Complainant bases his claim of bias on the judge's alleged use of a specific phrase to reference complainant's former counsel. Complainant asserts that his former attorney told him that the judge used the phrase at issue and did so in jest, though complainant acknowledges that counsel has repeatedly denied doing so, and has indicated that it was he, not the judge, who used the

phrase in question.¹ Complainant also suggests that the judge may have conspired with complainant's attorney to discourage complainant from filing a motion to recuse.²

The record, including the misconduct complaint and the docket of the proceeding, does not provide a basis for further inquiry. Complainant's allegation that the judge exhibited racial bias by privately referring to complainant's attorney as alleged, considered in conjunction with counsel's repeated verbal and written denials of the claim, see infra pp. 3-4, is insufficient to "raise an inference that misconduct has 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 . . .").

Moreover, 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 at the

¹ Complainant also refers to a purported magazine article related to a different criminal case and suggests that this article indicated that the subject judge considers race in sentencing defendants. Complainant did not include the article and an internet search did not reveal it. A motion that complainant 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 Complainant includes allegations of wrongdoing by his former attorney which are not addressed in the present context, 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, Rule 1.

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, the record provides no evidence to support complainant's conclusory allegation that the judge conspired with complainant's attorney either to dissuade complainant from seeking the judge's recusal or otherwise.

According to the docket of complainant's criminal case, a magistrate judge appointed the attorney whose alleged statement is at issue as complainant's second lawyer, several months after complainant was charged, when complainant's first attorney, appointed under the Criminal Justice Act (CJA), sought to withdraw.³ Complainant alleges that he spoke to his attorney in the courthouse on the day of counsel's appointment and that counsel told complainant that the judge privately referred to counsel by the alleged term. Complainant further contends that, during a phone conversation several months later, his attorney stated that the judge had used this phrase "just [as] a joke."

Complainant further asserts 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. Complainant contends that, in response, counsel denied that he had said that the judge used this phrase, stating that counsel uses the phrase to refer to himself, and advised complainant against filing a motion for recusal.

³ The attorney's associate also entered an appearance as counsel for complainant.

Complainant adds that counsel wrote a letter to complainant's mother memorializing this conversation.

Although not submitted with the complaint, it appears from the docket that counsel's letter to complainant's mother, to which complainant refers, was filed in support of complainant's subsequent request for new counsel. In the letter, counsel's associate, see supra note 3, states that both attorneys recently had a lengthy phone conversation with complainant, after which the attorneys concluded that complainant had an irreconcilable difference of opinion with counsel regarding the legal strategy for his case and explained that they would seek to withdraw, with complainant's assent. In addition, counsel's associate stated that the judge never used the referenced term, and complainant's attorney never told complainant that the judge had done so. Counsel's associate further explained that he has witnessed counsel's repeated attempts to clarify with complainant 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 do not believe that there is any basis for the judge's recusal and that they advise against filing a motion for recusal, but that whether to do so is a decision for complainant and his new attorney.

The docket further indicates that complainant's attorney filed a motion to withdraw, and the judge held a hearing on the motion, at which complainant expressed his desire for new counsel. The judge allowed the motion to withdraw and appointed new CJA counsel.

Nearly six months later, complainant filed another motion for new counsel, which the judge denied. In so doing, the judge noted that complainant's primary reason for seeking new counsel was a disagreement between counsel and complainant on whether to file a motion for recusal based on the alleged statement that is the subject of the present complaint.

Thereafter, complainant filed pro se, with the court's permission, a motion seeking the judge's recusal based essentially on the same claim as the pending complaint - that the judge's alleged statement as conveyed by his former attorney evidences judicial bias, or the appearance thereof, sufficient to require the judge's recusal. In a multiple page Memorandum and Order, the judge denied the motion. The court recounted complainant's claims, including the allegations concerning the alleged statement by complainant'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 is no claim that any such comment, even if made as alleged, suggests any hostility or animus toward complainant or any minority group.

For essentially the same reasons, the misconduct complaint does not warrant further inquiry. Complainant concedes and the record demonstrates that complainant's attorney denies stating that the judge made the purported comment.

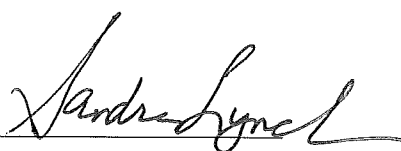
Moreover, whether the judge made this purported statement does not, on the present record, present "a genuine issue . . . [of] material fact" that alone, absent evidence

of improper judicial animus, would warrant further inquiry. See Rules of Judicial-Conduct, Rule 11 Commentary. The record is 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 Rules of Judicial-Conduct, Rule 4(a)(7). The record of the proceeding to date demonstrates that the judge has held multiple conferences and hearings, and ruled repeatedly in complainant's favor, including, but not limited to, allowing complainant'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.

There is no information suggesting that the judge was improperly motivated, conspired with complainant's attorney, or engaged in any other wrongdoing in presiding over complainant's case. Accordingly, the misconduct complaint is dismissed 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, Complaint No. 01-20-90006 is dismissed, pursuant to 28 U.S.C. §§ 352(b)(1)(A)(i) and 352(b)(1)(A)(iii). See also Rules of Judicial-Conduct, Rules 11(c)(1)(A) and 11(c)(1)(D).

November 2, 2020
Date


Judge Lynch