

JUDICIAL COUNCIL
OF THE FIRST CIRCUIT

IN RE
COMPLAINT NO. 01-21-90005

BEFORE
Howard, Chief Circuit Judge

ORDER

ENTERED: JANUARY 31, 2022

Complainant, an expert witness in a civil case, has filed a complaint, under 28 U.S.C. § 351(a), against a district judge in the First Circuit. Complainant alleges judicial misconduct in connection with a hearing over which the judge presided concerning the admissibility of complainant's expert testimony. The misconduct complaint is baseless, is not cognizable, and is not indicative of misconduct.

Complainant asserts that the judge acted with "prejudice, anger[,] and a total lack of judicial discipline . . . when [the judge] out of the blue, and with zero justification . . . , accused [complainant] of perjury and threatened to have [complainant] prosecuted by the U.S. [A]ttorney's [O]ffice." Complainant alleges that, because the judge accused him of perjury, complainant had to retain counsel, and "cancel [his] attendance" at and "forfeit the fees" he had paid for a professional conference. Complainant alleges that the judge was "outwardly abusive toward" complainant, "tried to intimidate [complainant] into

changing [his] opinions," "caused [him] . . . professional and financial harm," and made "disparaging remarks" about him.

Complainant further alleges that the judge "misinformed" him by indicating that the court could grant complainant immunity from perjury charges. Complainant also asserts that, after allowing complainant's attorney to leave the hearing, the judge improperly "attempted to withdraw" a standing order that the court had issued preserving complainant's invocation of his Fifth Amendment privilege but requiring him to answer all questions.

Complainant contends that, by directing complainant not to contact plaintiff's counsel, who had retained complainant, and by allowing counsel to be "verbally abusive" toward complainant, the judge "ma[d]e [complainant's] life miserable." Complainant also asserts that the judge's denial of plaintiff's request for a continuance after one of plaintiff's attorneys had to leave the hearing caused complainant to have to "continue to testify under . . . most harsh circumstances." Complainant contends that he was "sequestered" in a "bar[r]en" room and was not informed of the status of the hearing or of the court's schedule.

Complainant requests that the judge be removed from the case and be "publicly sanction[ed]."

As an initial matter, the judicial misconduct procedure does not provide an avenue for removing a judge from a case; nor does it provide for issuing a sanction where, as here, the allegations are unsubstantiated. See 28 U.S.C. § 351, et seq., and Rules for

Judicial-Conduct and Judicial-Disability Proceedings (Rules of Judicial-Conduct), Rules 11, 19(b), and 20(b).

In essence, complainant contends that the judge improperly accused him of perjury based on defendants' accusations of inconsistencies in his expert testimony and that the judge's mismanagement of the hearing amounted to misconduct. The reviewed record, including the misconduct complaint, the docket of the proceeding, the transcripts of the hearing, and the court's orders, provides no evidence that the judge was biased against or threatened complainant, or engaged in any other judicial wrongdoing in presiding over the hearing.

The record indicates that plaintiff called complainant as an expert witness in a civil case. Several days into a multiple-day, pre-trial hearing on the admissibility of complainant's proposed expert testimony at trial, complainant testified regarding the reason for his opinion concerning the duty of one of defendants. When defense counsel questioned complainant as to whether complainant had referenced this reason in his written report or discussed it during his depositions, complainant answered that it was not included in his report and that he could not recall if he discussed it in his depositions.

Subsequently, complainant revised this testimony, indicating that he had referenced the specific reason for his opinion during his deposition. After further discussion, complainant explained that the specified reason for his opinion was in the exhibits to another witness' deposition that complainant had said he had reviewed during his deposition. Asserting that complainant's revised testimony was misleading, one of

defendants' attorneys asserted that complainant should be referred to the U.S. Attorney's office for perjury, and another defense attorney requested that complainant be disqualified as an expert witness. The judge denied the request without prejudice.

During complainant's continued cross-examination, defense counsel again asserted that complainant committed perjury when complainant purportedly provided inconsistent testimony regarding another of his opinions. After complainant left the courtroom at the judge's request, defendants alleged additional discrepancies in complainant's testimony and moved to strike complainant's testimony and disqualify complainant on the basis of inconsistent testimony that amounted to perjury. The judge provided plaintiff an opportunity to respond to the motions in writing.

When complainant returned to the courtroom, the judge explained that defendants had accused him of perjury and moved that he be disqualified. The judge advised complainant that he may hire his own attorney and that, due to a conflict of interest, he should not speak to plaintiff's counsel until the matter of his disqualification was resolved. The judge explained that the court was providing complainant with immunity from perjury charges and would not refer perjury allegations to the U.S. Attorney arising from statements that complainant had made up until that time, and sealed the transcripts that included the allegedly false statements.

Plaintiff objected to defendants' motion to disqualify complainant, moved for the judge's disqualification, asserting that the judge was biased as evidenced by the court's consideration of defendants' perjury allegations, and requested the referral of certain of

defendants' attorneys to a disciplinary committee. The judge denied the motion for disqualification, explaining that the court was authorized by law to advise complainant of defendants' allegations of perjury, and reiterated that the court would not refer the allegations of perjury (based on statements complainant had already made) to the U.S. Attorney. The judge also denied the motion to refer defense counsel for disciplinary action, but warned all counsel that failure to treat witnesses and each other professionally could result in sanctions.

Complainant appeared at the continued hearing with counsel who explained that only the executive branch may grant immunity from perjury prosecution; the judge responded that the court had genuinely attempted to ensure that complainant would not be prosecuted for the alleged perjury. When complainant's attorney repeatedly moved to invoke complainant's Fifth Amendment privilege during complainant's cross-examination, the judge allowed counsel to make a standing invocation of the Fifth Amendment on complainant's behalf and explained that governing caselaw would protect complainant from perjury charges based on questions he was compelled to answer. Subsequently, the court allowed complainant's counsel to leave the hearing.

When the hearing resumed, the judge reiterated the agreed upon terms of complainant's testimony. While the record suggests that this statement may have been misunderstood by some as indicating that the judge was changing the terms of complainant's testimony, the record establishes that the judge was reminding complainant of the arrangement that was intended to prevent perjury charges.

Thereafter, plaintiff's lead attorney left the hearing and, although the judge urged the parties to take a recess, co-counsel stated that he would like to conclude cross-examination. At plaintiff's request, the judge continued the hearing for a number of days. Subsequently, the judge denied plaintiff's motion for a further continuance due to lead counsel's absence, explaining that plaintiff's available counsel was qualified to handle the hearing.

At the conclusion of the hearing, defendants filed motions in limine to exclude complainant's testimony, to which plaintiff objected. The judge issued a lengthy order excluding complainant entirely as an expert witness from the trial, finding that plaintiff failed to provide the requisite disclosures regarding expert testimony and that complainant's expert testimony was not reliable.

The lengthy record of the proceeding lends no support to complainant's allegations that the judge "threatened" complainant with prosecution for perjury, was prejudiced against or tried to "intimidate" complainant, made "disparaging remarks" about complainant, was "abusive" toward complainant, or was otherwise improperly motivated in presiding over the hearing. To the contrary, the record indicates that the judge informed complainant of the allegations in response to defense counsel's repeated and specific claims that complainant's testimony amounted to perjury. See supra pp. 3-4. The record further establishes that the judge repeatedly took measures to protect complainant's interests, including advising him to hire an attorney, indicating that the court would not refer any perjury allegations to the U.S. Attorney, advising him to refrain

from talking to plaintiff's counsel due to a potential conflict of interest, and preserving his assertion of the Fifth Amendment while ordering him to answer questions. See supra pp. 4-5. Contrary to allowing counsel to "abus[e]" complainant, the court warned all parties to treat each other with civility or be subject to sanctions. See supra p. 5. There is nothing in the record suggesting improper judicial motivation of any kind, let alone "the sort of deep-seated 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 p. 6, quoting In Re: Jane Doe, 640 F.3d 861, 863 (Judicial Council of the Eighth Circuit, February 4, 2011).

There is likewise no support for complainant's allegation that the judge "attempted to withdraw [the court's] standing order" that complainant answer all questions without having to assert his Fifth Amendment right. See supra p. 5. 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).

As there is no evidence of improper conduct or motive, complainant's objections to the court's rulings, including the denial of counsel's motion to continue further the hearing and the order excluding complainant's testimony, 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 If the decision or ruling is alleged to be the result of an improper motive . . . or improper conduct . . . the complaint is not cognizable to the extent that it calls into question the merits of the decision."); see


also id. Commentary on Rule 4 ("Rule 4(b)(1) . . . preserves the independence of judges in the exercise of judicial authority by ensuring that the complaint procedure is not used to collaterally call into question the substance of a judge's decision or procedural ruling."). Accordingly, 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).

Further, complainant's remaining claims - that the judge improperly excluded him from the courtroom during portions of argument or "misinformed" him about judicial immunity -- do not evidence misconduct. With respect to the former, the record establishes that complainant was offered a full opportunity to hear the claims against him and to retain counsel. As complainant offers no basis for questioning the judge's motivation with respect to the offer of immunity, an error in this regard would not be suggestive of wrongdoing. See supra pp. 4-5.

Likewise, complainant's allegation that court staff failed to contact him regarding scheduling (which is unsupported by the record) would not suggest judicial wrongdoing. See Lynch, C.C.J., Order, In Re: Judicial Misconduct Complaint No. 01-13-90015 (December 18, 2013), at pp. 3-4 (concluding that possible clerical error of court staff not attributable to presiding judge nor indicative of misconduct), citing Boudin, C.C.J., Amended Order, In Re: Judicial Misconduct Complaint No. 406 (September 5, 2005), at p. 3. Accordingly, the complaint is dismissed as not indicative of misconduct, pursuant to 28 U.S.C. § 352(b)(1)(A)(i). See also Rules of Judicial-Conduct, Rule 11(c)(1)(A).

For the reasons stated, the misconduct complaint is dismissed, pursuant to 28 U.S.C. §§ 352(b)(1)(A)(i), 352(b)(1)(A)(ii), and 352(b)(1)(A)(iii). See also Rules of Judicial-Conduct, Rules 11(c)(1)(A), 11(c)(1)(B), and 11(c)(1)(D).

January 31, 2022
Date


Chief Judge Howard