

JUDICIAL COUNCIL  
OF THE FIRST CIRCUIT

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IN RE  
COMPLAINT NO. 01-10-90013

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BEFORE

Torruella, Lipez and Thompson, Circuit Judges,  
Lisi and Gelpi, District Judges

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ORDER

ENTERED: MARCH 3, 2011

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Petitioner, a litigant, has filed a petition for review of Chief Judge Lynch's order dismissing a complaint under the Judicial Conduct and Disability Act, 28 U.S.C. § 351(a), against a district judge in the First Circuit. The petitioner originally alleged that the judge engaged in misconduct while presiding over the petitioner's civil action.

The petitioner claimed that the judge exhibited bias by unlawfully bifurcating the petitioner's claim of discrimination from a claim of retaliation. The petitioner asserted that, at a non-recorded pre-trial hearing, the judge gave defendant's counsel the choice whether to bifurcate the claims. The petitioner concluded that, by wrongfully leaving the decision whether to bifurcate the claims up to the defendant's attorney, the judge intended to both evade the law and to deny the petitioner a fair trial. The petitioner requested "rectification of this wrong."

Chief Judge Lynch dismissed the complaint. The Chief Judge first noted that the judicial conduct statute does not provide a mechanism for altering a court order or for seeking review of a

court order. 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.

Chief Judge Lynch further determined that the reviewed record -- including the misconduct complaint, the docket, the relevant pleadings, and the court's orders -- contained no evidence of bias. The Chief Judge explained that the complaint was based exclusively on the petitioner's disagreement with order(s) denying requests to amend the complaint. The Chief Judge observed that, both before and after trial, the petitioner filed motions to amend the complaint to add a count for retaliation based upon the petitioner's discharge from employment. The case already included a claim for retaliation related to the original discrimination charges. Chief Judge Lynch noted that the judge denied the requests because of delay and the facts that the new claim was not clearly related, either temporally and substantively, to the original charge. Because the petitioner presented no evidence that the judge was biased in issuing the relevant rulings, the complaint was dismissed as directly related to the merits, pursuant to 28 U.S.C. § 352(b)(1)(A)(ii), and as unfounded, pursuant to 28 U.S.C. § 352(b)(1)(A)(iii). See also Rules of Judicial-Conduct, Rules 11(c)(1)(B) and (C).

The Chief Judge also determined that the remaining claim -- that the judge left the decision whether to allow the additional retaliation claim to the defendant -- was both unsupported and, on the present facts, not indicative of misconduct. See 28 U.S.C. § 352(b)(1)(A)(i), and Rules of Judicial-Conduct, Rules 11(c)(1)(A).

In the petition for review, the petitioner reiterates the claim that the judge improperly prevented the jury from hearing the petitioner's additional retaliation claim. The petitioner contends that the misconduct complaint does not dispute the substance of the court's orders, but

asserts that the judge exhibited bias when he intentionally "violated his duty to [conduct] an impartial and fair proceeding by not complying with the law. . . ." The petitioner includes evidence in alleged support of the retaliation claim, cites caselaw, and concludes that the judge's mishandling of the case caused the petitioner's livelihood to be "stripped away."

The petitioner further restates the claim that the judge intentionally neglected to record the pre-trial hearing in order to conceal his bias against the petitioner. The petitioner claims (for the first time) that the judge was biased because the judge and the defendant's law firm subscribe to a different political party than the petitioner. The petitioner adds that the judge "used intimidating facial expressions and hostile body language" during the pre-trial hearing, raised his voice, and pointed his finger at the petitioner. Finally, the petitioner claims that the judge improperly reduced the jury size from 12 to 8 persons.

The petition for review is without merit. While the petitioner states that the misconduct complaint does not dispute the substance of the court's decision, the charges derive exclusively from a disagreement with the court's denial of the petitioner's requests to pursue the additional claim of retaliation. As noted by Chief Judge Lynch, the judge explained the reasons for the court's decision under applicable caselaw (disruption of trial schedule and a claim that was substantively and temporally removed from the petitioner's original claims). The petitioner's contention that the judge's alleged bias was politically motivated is made without any basis in fact. As determined by Chief Judge Lynch, the petitioner provides no evidence of illicit judicial motivation, either in connection with the judge's rulings, or otherwise. Accordingly, the petitioner's primary claim -- that the judge exhibited bias against the petitioner by denying requests to add another retaliation claim -- was properly dismissed as directly related to the

merits, pursuant to 28 U.S.C. § 352(b)(1)(A)(ii), and as unfounded, pursuant to 28 U.S.C. § 352(b)(1)(A)(iii). See also Rules of Judicial-Conduct, Rules 11(c)(1)(B), and 11(c)(1)(C), respectively.

There is likewise no support for the petitioner's remaining claims. The applicable local rules do not provide for the recording of pretrial conferences, unless a party is pro se, absent advance request. Further, the number of jurors in a civil trial is within the court's discretion. Moreover, as explained, judicial error alone would not suggest misconduct. See Rules of Judicial-Conduct, Rule 3(h)(3)(A).

Finally, the judge's tone of voice and body language would not, as alleged, be remotely indicative of misconduct. See 28 U.S.C. § 352(b)(1)(A)(i), Rules of Judicial-Conduct, Rule 11(c)(1)(A). See also Boudin, C.C.J., Order, In Re: Complaint No. 444, January 23, 2007, at 4 ("[A]bsent extraordinary circumstances, the tone maintained by the judge during a proceeding is not a basis for a finding of misconduct."); and Boudin, C.C.J., Order, In Re: Complaint No. 385, September 27, 2004, at 3 (Nonverbal, impolite gesture is not judicial misconduct.).

For the reasons stated herein, the orders of dismissal issued in Judicial Misconduct Complaint No. 01-10-90013 is affirmed. See Rules of Judicial-Conduct, Rule 19(b)(1).



Susan Goldberg, Acting Secretary