

JUDICIAL COUNCIL
OF THE FIRST CIRCUIT

IN RE
COMPLAINT NO. 01-10-90023

BEFORE

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

ORDER

ENTERED: JUNE 21, 2011

Petitioner, the brother of a pro se litigant in a civil case, 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 original misconduct complaint arose out of the judge's response to an email communication that the plaintiff, petitioner's brother, had sent to an attorney of record and defendant in the case.

The petitioner originally alleged that the judge engaged in improper ex parte communication when the attorney/defendant informed the court of a "threatening communication" that the plaintiff, petitioner's brother, had transmitted to him the previous day. The petitioner charged that the judge then improperly issued a show cause order requiring the plaintiff to demonstrate why the case should not be dismissed for making "threatening communications." The petitioner contended that this order represented an "unfounded criminal accusation," exceeded the judge's authority, and infringed upon the duties of the executive branch. The

petitioner added that the court wrongfully failed to disclose "a description and the source" of the allegedly threatening communication, and subsequently dismissed the case without a "lawful basis." Finally, the petitioner alleged that the judge improperly issued an order amending the appellate record to include the alleged "threatening communication," after the time period for modifying the record had elapsed.

Chief Judge Lynch dismissed the complaint. The Chief Judge determined that the email communication at issue contained threatening language.¹ The Chief Judge noted that defense counsel promptly brought the email to the attention of the court. In response, the judge issued a show cause order directing the plaintiff, petitioner's brother, to appear to show cause why the case should not be dismissed with prejudice as a result of the email and the plaintiff's "abuse of the civil justice system."

Based upon the transcript of the subsequent show cause hearing, Chief Judge Lynch determined that the court heard from both parties in full before dismissing the case solely on the basis of the improper communication. The Chief Judge further noted that, after the plaintiff appealed, the judge allowed the defendant/attorney's motion, under Fed.R.App.P. 10(e), to amend the district court record to include the email that prompted dismissal of the proceeding.

In response to the petitioner's charges, Chief Judge Lynch determined that there was no improper ex parte communication. The Chief Judge noted that the petitioner did not identify the

¹The plaintiff stated, in the email, that the defendant/attorney was playing a "very dangerous game (emphasis in original)" in which "someone is going to get hurt." The Chief Judge noted that the plaintiff made repeated serious threats -- warning the defendant/attorney to "be careful . . . you will get what you deserve. Pow! Bang! Splat! I really, truly and sincerely wish you were dead . . . how I wish a 10-ton I-beam would fall on you . . . be sure to watch your backside . . . I got this feeling someone's going to get hurt REAL BAD. And it ain't gonna be me (emphasis in original)."

communication that he considered to be "ex parte." Presuming that the petitioner was referring to defendant/attorney's communication informing the court of the email, the Chief Judge explained that this was counsel's appropriate response to receiving an overtly threatening email from the opposing party in the case. Chief Judge Lynch pointed out that the communication to the court was not initiated by the judge, did not address the "substance" of the case, and was made for "emergency purposes." Code of Conduct for United States Judges (Code of Conduct), Canon 3(A)(4). Furthermore, the Chief Judge observed that the court did not rule on the matter ex parte. See Code of Conduct, Canon 3(A)(4). As there was no evidence that the judge engaged in an improper ex parte communication, Chief Judge Lynch dismissed this allegation pursuant to 28 U.S.C. § 352(b)(1)(B). See also Rules for Judicial-Conduct and Judicial-Disability Proceedings (Rules of Judicial-Conduct), Rule 11(c)(1)(D).

Chief Judge Lynch determined that the second claim -- that the court exceeded its authority in issuing the show cause order, dismissing the case, and allowing the amendment of the record -- was not cognizable. The Chief Judge explained that, where, as here, there was no evidence of improper judicial motive, disagreement with the merits of a court's decisions or rulings does not constitute a cognizable claim of misconduct. See Rules of Judicial-Conduct, Rule 3(h)(3)(A). Thus, Chief Judge Lynch dismissed this charge as directly related to the merits, pursuant to 28 U.S.C. § 352(b)(1)(A)(ii). See also Rules of Judicial-Conduct, Rule 11(c)(1)(B).

Chief Judge Lynch further observed that the claim that the judge improperly failed to disclose the communication at issue was negated by the plaintiff's response to the show cause order. Accordingly, Chief Judge Lynch dismissed this claim as conclusively refuted, pursuant to 28 U.S.C. § 352(b)(1)(B). See also Rules of Judicial-Conduct, Rule 11(c)(1)(D).

Finally, Chief Judge Lynch concluded that the allegation that the judge made unfounded and prejudicial criminal accusations against the plaintiff was also refuted by the facts. The Chief Judge observed that the court's orders and the transcript of the hearing contained no criminal accusations by the judge. To the contrary, the judge had noted during the hearing that, while the court was aware of related criminal proceedings arising out of the same communication, it neither initiated them nor expressed any opinion about them. Thus, Chief Judge Lynch dismissed this claim as lacking factual foundation, pursuant to 28 U.S.C. § 352(b)(1)(B). See also Rules of Judicial-Conduct, Rule 11(c)(1)(D).

In the petition for review, the petitioner states that, in the order of dismissal, Chief Judge Lynch misstated the relevant facts. First, the petitioner reiterates the claim that the court neglected to inform his brother, the plaintiff, of the communication to the court that prompted the show cause order. Second, the petitioner contends that the court did not "hear from both parties in full" before dismissing the case, and that the record demonstrates that defense counsel did not make "any statement ever . . . about abuses or threats." The petitioner next asserts that there were "court initiated emails withheld," the communication at issue addressed the substance of the case (attorney misconduct), and the term "emergency" was not defined.

The petitioner further charges that, in addition to misrepresenting the facts, Chief Judge Lynch conducted an inadequate review of the misconduct complaint. The petitioner continues that the judge's "connection to one of the . . . defendants" was apparent in the "so-called threatening email," and evidenced the judge's improper motivation. Finally, the petitioner reasons that the judge's "accusation" that the plaintiff issued a "threatening communication" was criminal by definition.

The petition for review is baseless. Chief Judge Lynch aptly determined that the misconduct complaint and the reviewed record were devoid of evidence of an improper ex parte communication, let alone evidence of bias or improper animus on the part of the judge. With respect to the petitioner's specific claims, the communication by which defense counsel brought the threatening email to the court's attention was not an improper ex parte communication. It did not address the substance of the petitioner's underlying claims, was not initiated by the judge, was not ruled on ex parte, and was intended to inform the court of an emergency situation.²

The petitioner's contention that the judge did not "hear from both parties in full" before dismissing the case was dispelled by the record. As Chief Judge Lynch observed, at the show cause hearing, the judge described the "undisputed" threatening communication, and allowed the plaintiff to offer an uninterrupted response. This is what it means to be "heard in full." The petitioner's assertion that defense counsel did not make "any statement ever . . . about abuses or threats" is irrelevant; at no time did the plaintiff deny sending defense counsel the overtly threatening communication.

The claim that Chief Judge Lynch neglected to adequately investigate the petitioner's charges is equally baseless. The Chief Judge's review of the misconduct complaint, the docket, and relevant pleadings and court orders was more than sufficient to dispel the petitioner's claims. There was and is no evidence of "court initiated emails withheld," or illicit animus on the part of the judge. The reference in the threatening email to the judge's "friend and associate" was not

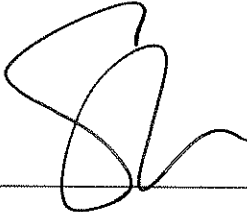
²The petitioner erroneously contends that the ex parte communication pertained to the "substance" of the underlying case - attorney misconduct. The fact that the plaintiff sent defense counsel a personally threatening email was the subject of the alleged ex parte communication, not the subject of the plaintiff's underlying civil claims. The petitioner's related contention that it was necessary to define the term "emergency" is equally unfounded.

remotely indicative of improper judicial motivation.

Finally, the fact that the conduct in question - sending an overtly threatening communication to an opposing party in the course of civil litigation - may constitute criminal behavior does not mean that the judge charged the plaintiff with a crime. As indicated by Chief Judge Lynch, there was no evidence that the judge initiated criminal proceedings against the plaintiff. (That is not to say that the initiation of criminal proceedings by the court against the plaintiff would have provided grounds for a claim of misconduct.)

Accordingly, the complaint was appropriately dismissed, as unfounded and as conclusively refuted, pursuant to 28 U.S.C. § 352(b)(1)(B). See also Rules of Judicial-Conduct, Rule 11(c)(1)(D). Insofar as the complaint was based exclusively on the petitioner's disagreement with orders issued in the case, it was also properly dismissed as not cognizable, 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 herein, the orders of dismissal issued in Judicial Misconduct Complaint No. 01-10-90023 is affirmed. See Rules of Judicial-Conduct, Rule 19(b)(1).



Susan Goldberg, Acting Secretary