

JUDICIAL COUNCIL
OF THE FIRST CIRCUIT

IN RE
COMPLAINT NO. 01-10-90023

BEFORE
Lynch, Chief Circuit Judge

ORDER

ENTERED: MARCH 23, 2011

The complainant is the brother of the pro se plaintiff in a civil case. The misconduct complaint stems from the presiding judge's actions in response to an email communication that the plaintiff sent to a defendant and attorney in the case. The plaintiff sent the email to the defendant and attorney in apparent response to a motion to dismiss that the defendant and attorney had filed several days earlier.

The reviewed record indicates that the email communication at issue contained threatening language, much of which will not be repeated here. In the email, the plaintiff referred to the recently filed Rule 12 motion, and stated that the defendant and attorney was playing a "very dangerous game (emphasis in original)" in which "someone is going to get hurt." 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)."

Upon receipt of this email, counsel promptly and entirely appropriately, brought it to the attention of the court. In response, the judge issued a show cause order directing the plaintiff, complainant's brother, to appear at a scheduled hearing 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." At the hearing, the court heard from both parties in full before dismissing the case solely on the basis of the improper communication. 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. The district court's dismissal of the case was affirmed on appeal.

The complainant levies a number of charges. The complainant first alleges that the judge engaged in improper ex parte communication. The complainant secondly alleges that the court exceeded its authority when it issued the show cause order, dismissed the case, and improperly allowed counsel's motion to amend the district court record to include the email at issue, after the time period for modifying the record had elapsed. Third, the complainant contends that the judge failed to identify the "source" of the allegedly threatening communication, and asserts that the source was not discovered by the plaintiff until several months later. Finally, the complainant asserts that, in issuing

the show cause order and dismissing the case, the judge made unfounded criminal accusations that would prejudice any subsequent criminal prosecution of his brother.

The misconduct complaint is baseless. My staff and I have reviewed the record -- including the misconduct complaint, the docket, relevant pleadings, court orders, and the transcript of the show cause hearing -- in full. It provides no evidence of judicial wrongdoing.

First, there was no improper ex parte communication. The complainant fails to identify the communication that was allegedly "ex parte." Presumably, he refers to defendant/attorney's communication informing the judge of the email he received from the plaintiff. But this was not an improper ex parte communication; it was counsel's completely appropriate response to receiving an overtly threatening email from the opposing party in the case. The communication 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).¹ Nor did the court rule on the matter ex parte; it promptly informed the parties of the subject matter of the communication and offered them an opportunity to respond See Code of Conduct, Canon 3(A)(4). As there is no evidence that the judge engaged in an improper ex parte communication, the allegation is dismissed pursuant to 28 U.S.C. § 352(b)(1)(B). See

¹While not every violation of the Code of Conduct warrants discipline under the judicial conduct statute, 28 U.S.C. § 351, et. seq., the Code of Conduct provides standards applicable for consideration in judicial misconduct matters. See Code of Conduct, Canon 1 *Commentary*.

also Rules for Judicial-Conduct and Judicial-Disability Proceedings (Rules of Judicial-Conduct), Rule 11(c)(1)(D).

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 -- is not cognizable. Absent evidence of improper motive or bias -- of which there is none -- complainant's 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) ("Cognizable misconduct . . . does not include . . . an allegation that is directly related to the merits of a decision or . . . ruling. An allegation that calls into question the correctness of a judge's ruling, . . . without more, is merits-related."). Where, as here, there is no evidence of illicit judicial motivation, whether the district court's rulings exceeded its legal authority is an issue for appeal, not one of judicial misconduct. The claim is dismissed pursuant to 28 U.S.C. § 352(b)(1)(A)(ii). See also Rules of Judicial-Conduct, Rule 11(c)(1)(B).

The complainant's remaining claims are unsupported by the record. The assertion that, because the judge failed to identify the subject or source of the communication, the plaintiff did not discover it until some months later is directly contradicted by the plaintiff's response to the show cause order. This pleading, filed shortly after the show cause order issued and before the hearing at which the email was expressly discussed, indicates that the plaintiff was fully aware of the communication at issue. Accordingly, the claim is dismissed as conclusively refuted, pursuant to 28 U.S.C. § 352(b)(1)(B). See

also Rules of Judicial-Conduct, Rule 11(c)(1)(D).

The allegation that the judge made unfounded and prejudicial criminal accusations against the plaintiff is also refuted on its facts. The court's orders and the transcript of the hearing contain no criminal accusations by the judge. To the contrary, the judge explicitly stated, during the show cause hearing, that the court was aware of related criminal proceedings arising out of the same communication but did not initiate them and expresses no opinion about them. The factual premise for the claim being refuted, there is no need to address whether any claim would otherwise be stated. Thus, this claim is dismissed 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).

For the reasons stated, Complaint No. 01-10-90023 is dismissed, pursuant to 28 U.S.C. §§ 352(b)(1)(A)(ii), and 352(b)(1)(B). See also Rules of Judicial Misconduct, Rules 11(c)(1)(B), and 11(c)(1)(D).

3/24/11
Date

Sandra L. Lynch
Chief Judge Lynch