

JUDICIAL COUNCIL  
OF THE FIRST CIRCUIT

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IN RE  
COMPLAINTS NOS. 01-11-90031 and 01-11-90032

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BEFORE  
Lynch, Chief Circuit Judge

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ORDER

ENTERED: NOVEMBER 1, 2011

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Complainant, a pro se litigant, has filed a complaint, under 28 U.S.C. § 351(a), alleging that a magistrate judge and a district judge engaged in misconduct in presiding over the complainant's civil case against numerous defendants. The complainant's allegations fall into two categories: those pertaining to a telephone conference and several supplementary claims. They are addressed sequentially below.

With regard to the telephone conference, the complainant alleges that the magistrate judge engaged in improper ex parte communication with defense counsel in discussions before he joined the conference, that he was emotionally abused and treated in a hostile manner.

The complainant faults other factual and legal statements allegedly made by the magistrate judge during this conference regarding the plausibility of the complainant's

claims and criminal law. The complainant further asserts that the magistrate judge improperly denied the complainant's motion for permission to use an out-of-state attorney, without allowing the complainant to present his position on the issue.

Finally, complainant contends that the notice he had of the conference failed to state that the conference would address issues that would affect the outcome of complainant's case. The complainant also complains that this conference was not transcribed.

First, the conference was electronically recorded, and complainant may obtain a transcript in accordance with court procedure. As part of a limited inquiry, conducted under Rule 11(b) of the Rules for Judicial-Conduct and Judicial-Disability Proceedings (Rules of Judicial-Conduct), my staff and I have reviewed the misconduct complaint, the docket, relevant pleadings and court orders, and listened to the recorded conference in its entirety. These materials thoroughly dispel complainant's allegations of wrongdoing by either the magistrate judge or the district judge.

The conference was convened, at defense counsel's request, to obtain the court's assistance with understanding the complainant's pleadings. Defense counsel stated that complainant had filed an incessant stream of pleadings that failed to specify, in accordance with the rules of procedure, the party or parties to whom they were directed and the nature of the relief sought, at great expense to the many defendants sued in the case. For the majority of the conference, the magistrate judge sought to identify the procedural status of the myriad of pending matters, and decide those that were amenable

to resolution. This process involved asking complainant and defendants questions concerning their positions on the pending matters, which included motions to dismiss and for summary judgment filed by the defendants, as well as complainant's motions to amend the complaint, for summary judgment and numerous additional pleadings (identified as motions, responses, replies, attachments, and affidavits).

During the conference, the magistrate judge ordered complainant to file each motion in a separate document and to submit it to the court for preliminary review before the defendants would be obligated to respond. The magistrate judge explained motion practice to complainant, and told complainant that he would be treated like everyone else and held to the same rules. The magistrate judge explained to complainant that a proposed amended complaint needed to be filed with the motion to amend the complaint, allowed complainant additional time in which to reply to another pending matter, and informed complainant about the procedure for out-of-state counsel to be admitted pro hac vice. Despite complainant's assertion to the contrary, the magistrate judge gave complainant as much time as he wanted to respond to the court's inquiries concerning the pending matters.

There is no evidence whatsoever - in the misconduct complaint or in the audio recording of the conference - of bias, animosity, or other illicit motivation on the part of the magistrate judge. There was no indication at the beginning of the recorded conference, or elsewhere in the record, that the conference had "been underway" before

the complainant was included. The claim of improper ex parte communication is presented without any basis in fact and is dismissed pursuant to 28 U.S.C. § 352(b)(1)(B). See also Rules for Judicial-Conduct, Rule 11(c)(1)(D).

The same holds true for the allegation that the judge was "hostile" and "taunted" complainant. The magistrate judge's tone was stern toward all of the parties, and was in no way rude or hostile. The charge of "egregious hostility" is dismissed as conclusively refuted, pursuant to 28 U.S.C. § 352(b)(1)(B). See also Rules for Judicial-Conduct, Rule 11(c)(1)(D). Furthermore, absent extraordinary circumstances - which are not evident in the present matter - the tone maintained by a judge is not indicative of misconduct. See 28 U.S.C. § 352(b)(1)(A)(i), and Rules for Judicial-Conduct, Rule 11(c)(1)(A). See also Boudin, C.C.J., Order, In Re: Complaint No. 444, January 23, 2007, at 4.

With respect to the notice issue, the complainant does not dispute that he was notified of and participated in the hearing. While the complainant was not entitled to a hearing as a matter of right on any of the pending matters, it was both reasonable and foreseeable that complainant would be asked to explain the many pleadings he had filed. The magistrate judge was not obligated - either legally or ethically - to provide the complainant with advance notice of every issue that would be addressed during the conference. Accordingly, the allegation concerning insufficient notice is dismissed as not indicative of misconduct. See 28 U.S.C. § 352(b)(1)(A)(i). See also Rules for Judicial-Conduct, Rule 11(c)(1)(A).

Where, as here, there is no evidence of improper judicial motivation, any claim that the magistrate judge made erroneous statements of fact or law during the course of the status conference or otherwise during the litigation (which has not been demonstrated) is not cognizable under the judicial misconduct statute. See 28 U.S.C. § 352(b)(1)(A)(ii). See also Rules for Judicial-Conduct, Rule 11(c)(1)(B).

Finally, with regard to the other statements to which complainant objects, it is not misconduct for a judge to voice an opinion regarding the reasonableness of a party's claim so long as the opinion is based on the available record. See 28 U.S.C. § 352(b)(1)(A)(i), and Rules for Judicial-Conduct, Rule 11(c)(1)(A). See also Order, In Re: Complaint No. 444, *supra*, and *case cited*.

Aside from the claims arising from the telephone conference, complainant alleges that the magistrate judge wrongfully penalized the complainant for following the judge's directions. Complainant states that, although the magistrate judge directed the complainant not to "take too much out of the original complaint" and to include any relevant exhibits, the court, nevertheless, labeled the complainant a "hostile litigant" for complying with this directive in a proposed amended complaint.

Complainant further alleges that both the district judge and the magistrate judge intentionally issued orders directed at multiple defendants simultaneously in order to burden the complainant. The complainant concludes that the judge and the magistrate judge are ignorant of state law, and asks that the magistrate judge's recommended

decision in complainant's prior case, as well as two related state court decisions, be "set aside."

Finally, the complainant includes allegations of wrongdoing by defense counsel - that they engaged in a "coordinated gang response" to complainant's pleadings - and by district court staff - by misleading the complainant concerning the dates judgments were entered, in order to prevent complainant from successfully filing appeals.

As an initial matter, the judicial misconduct complaint procedure, 28 U.S.C. § 351, *et. seq.*, does not provide an avenue for modifying or "setting aside" a court order. See Rules for Judicial-Conduct, Rules 11 and 19. It also does not provide a mechanism for addressing claims of impropriety by counsel or by court staff. See id., Rule 4 That said, however, the reviewed record provides no facts corroborating the claim that staff mis-docketed the court's orders, either intentionally or otherwise.

The record is devoid of any evidence that the district judge or the magistrate judge sought to frustrate the complainant's ability to challenge the court's orders by issuing rulings simultaneously. The complainant sued over 20 defendants who, along with the complainant, filed a number of dispositive motions. These motions were referred to the magistrate judge who, on a single day, issued three recommended decisions addressing these motions. After complainant filed multiple objections, the district judge issued three orders, also on a single day, affirming the magistrate judge's recommended decisions.

The issues that these motions raised necessarily overlapped. Complainant's claim

that either the magistrate judge or the judge intentionally issued these rulings simultaneously in order to undermine complainant's ability to object to them is presented without a scintilla of factual support and is dismissed. See 28 U.S.C. § 352(b)(1)(B). See also Rules for Judicial-Conduct, Rule 11(c)(1)(D).

Complainant's allegation - that the magistrate judge "penalized" the complainant for complying with the court's instruction in amending his complaint - is equally baseless. The magistrate judge explained and the reviewed record establishes that the complainant was labeled an "abusive litigant" because he failed to comply with the court's mandate to conform the size, number and manner of his filings to established procedures.

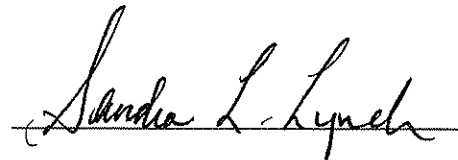
Accordingly, this allegation is dismissed as conclusively refuted, pursuant to 28 U.S.C. § 352(b)(1)(B). See also Rules for Judicial-Conduct, Rule 11(c)(1)(D).

Finally, as there is no evidence of improper judicial motivation, the allegation that the magistrate judge and/or the district judge made an error of law is not cognizable. See 28 U.S.C. § 352(b)(1)(A)(ii). See also Rules for Judicial-Conduct, Rule 11(c)(1)(B).

For the reasons stated, Complaints Nos. 01-11-90031 and 01-11-90032 are dismissed, pursuant to 28 U.S.C. 352(b)(1)(A)(i), 352(b)(1)(A)(ii), and 352(b)(1)(B). See also Rules of Judicial-Conduct, Rules 11(c)(1)(A), 11(c)(1)(B) and 11(c)(1)(D).

November 1, 2011

Date



Chief Judge Lynch