

JUDICIAL COUNCIL  
OF THE FIRST CIRCUIT

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IN RE  
COMPLAINT NO. 01-15-90012

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BEFORE  
Howard, Chief Circuit Judge

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ORDER

ENTERED: OCTOBER 7, 2015

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Complainant, the brother of a criminal defendant, has filed a complaint of misconduct, under 28 U.S.C. § 351(a), alleging that the district judge who presided over his brother's criminal case exhibited bias and engaged in other wrongdoing.<sup>1</sup> The misconduct complaint is baseless and is not cognizable.

Most of complainant's allegations concern the sentencing phase of his brother's case. Complainant alleges that, during the sentencing hearing, the judge wrongfully neglected to order the security personnel to desist from using excessive force in a "takedown" of the defendant. Complainant maintains that the judge witnessed this

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<sup>1</sup> This is complainant's second misconduct complaint filed in connection with his brother's legal matters. In 2010, complainant filed a complaint against another district judge alleging that the judge mishandled a civil case filed by his brother. Then Chief Judge Lynch dismissed the complaint, pursuant to 28 U.S.C. §§ 352(b)(1)(A)(ii) and 352(b)(1)(B). See Lynch, C.C.J., Order, In Re Complaint No. 01-10-90023, March 23, 2011. See also Judicial Council of the First Circuit, Order, In Re Complaint No. 01-10-90023, June 21, 2011.

assault but "did nothing to stop the [u]se of [f]orce," though there was "no cause for the takedown," as the defendant was allegedly "merely standing and was not physical, was not belligerent, and was not even talking at the time."

Complainant adds that the judge overheard "a second physical altercation" between the security officers and the defendant that took place moments later "in the adjoining hallway." Complainant contends that the judge again failed to intervene, despite the defendant's "[c]ries of pain and pleas." Complainant notes that, although both incidents were recorded by video, the judge falsely stated in open court that "NO use of excessive force had occurred (emphasis in original)," and suggested that the defendant might be charged with criminal contempt, without providing any facts to support such a charge.

Complainant next alleges that the judge improperly rescheduled the continuation of the defendant's sentencing to an earlier date, in order to prevent the defendant's family from attending and prevent the defendant from having needed "paperwork" that he had yet to receive in the mail from his former counsel.

Complainant further objects to the length of the sentence imposed on his brother. He asserts that it is "outrageous," far in excess of the maximum authorized by the sentencing guidelines, and further evidence of the judge's "cover up, . . . lack of honesty . . . and [] lack of concern for the health, welfare and rights of [the defendant]."

Finally, complainant contends that the judge twice interfered with the defendant's right to counsel - first in a pretrial ruling, by giving the defendant "a false option" of

representing himself or continuing with his existing inexperienced and incompetent counsel, and later, during the sentencing hearing, by improperly assigning new counsel to represent the defendant, causing him to lose touch with his attorney. Complainant concludes that the judge exhibited "bias, prejudice, a lack of fairness, and a lack of appearance of propriety."<sup>2</sup>

The misconduct complaint and the reviewed record of the proceeding - including the docket, pleadings, transcripts, orders and video of the courtroom incident - are devoid of any facts suggestive of bias or wrongdoing by the judge. The transcript of the sentencing hearing indicates that the judge heard from the prosecution and from the defendant at length before offering the court's view of the defendant's conduct. The defendant interrupted the judge, stating, in part: "let's just leave. Let's call this off, I mean . . . ." The transcript suggests that the defendant continued to interrupt the judge. The security officer requested assistance and the judge ordered a recess. The video of the incident, which has no accompanying audio, shows the defendant standing up abruptly before he is restrained on the floor and removed from the courtroom. Contrary to complainant's allegation, the court declined to consider the defendant's outbursts as criminal contempt.

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<sup>2</sup> Complainant includes claims of wrongdoing by the prosecutor in the case, by the security personnel involved in the courtroom incident and by counsel in the civil case at issue in the earlier misconduct complaint. *See* note 1, *supra*. Complainant also asserts that his brother was denied needed medical information and treatment. He presents a myriad of allegations related to another incident in which his brother was allegedly wrongfully charged with resisting arrest. These claims are not cognizable under the judicial conduct and disability statute. *See* 28 U.S.C. § 351, and Rules for Judicial-Conduct and Judicial-Disability Proceedings (Rules of Judicial-Conduct), Rule 4. Any claims of wrongdoing by the judge who was the subject of the earlier misconduct complaint are not presently at issue.

Several hours later, the judge briefly reconvened the proceeding. However, at that time, the judge decided to postpone the continuation of the sentencing hearing, and rescheduled it for one week later. The judge observed that, in his opinion, security personnel acted reasonably under the circumstances and did not use excessive force to restrain the defendant, who was acting in an "obstructionist fashion."

"A judge must exercise reasonable discretion over his or her courtroom environment." Boudin, C.C.J., Order, In Re Complaint No. 429, June 12, 2006, at 4. There is no evidence that, in managing the courtroom during the proceeding at issue, the judge "acted for any inappropriate reason or improperly exercised his judgment." See id. To the contrary, the record demonstrates that the judge endeavored to conduct the proceedings under the least restrictive conditions possible while maintaining courtroom security, as advised by the United States Marshals Service. The claim that the judge improperly neglected to intervene on the defendant's behalf is dismissed as "lacking factual foundation and failing to identify any conduct that falls within the proscription of the statute." See id., *citing* 28 U.S.C. §§ 352(b)(1)(A)(i) and 352(b)(1)(B). See also Rules for Judicial-Conduct and Judicial-Disability Proceedings (Rules of Judicial-Conduct), Rules 11(c)(1)(A) and 11(c)(1)(D), respectively.

Complainant's other claims are not cognizable. With respect to the rescheduling of the sentencing hearing, the record shows that, several days after the initial proceeding was terminated, defense counsel filed a motion for a continuance of the sentencing scheduled for the following week. The same day, the court issued an electronic order

rescheduling the sentencing for the following day, several days earlier than it had been scheduled. The defendant appeared the following day, asserting that the hearing "came as a surprise" and requesting a further continuance. The judge explained that the hearing was merely a continuation of the sentencing at which the defendant had been heard in full before he interrupted the court. Nonetheless, the court allowed the defendant additional time in order to address matters that were not part of his original allocution.

Complainant offers no facts supporting the assertion that the judge was improperly motivated when the court moved the continuation of the sentencing hearing to an earlier date. Complainant's objection to this ruling and to the court's denial of the defendant's oral pro se request to continue the hearing are dismissed as directly related to the merits of judicial rulings, pursuant to 28 U.S.C. § 352(b)(1)(A)(ii). See also Rules of Judicial-Conduct, Rule 11(c)(1)(B).

The same holds true for complainant's objection to the sentence. When the sentencing hearing resumed, the court reviewed the relevant factors in detail before imposing the defendant's sentence.<sup>3</sup> As there is no information in the complaint or in the reviewed record indicating that the judge harbored any animus in determining the sentence, this claim is not cognizable. See 28 U.S.C. § 352(b)(1)(A)(ii), and Rules of Judicial-Conduct, Rule 11(c)(1)(B).

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<sup>3</sup> Contrary to complainant's allegation, the judge imposed a shorter sentence than that provided by the guidelines and requested by the prosecution.

Finally, with respect to the defendant's access to counsel, the record indicates that, shortly before the scheduled trial, the defendant's appointed counsel filed a motion to withdraw, citing an irretrievable breakdown, and the defendant likewise sought to discharge his attorney. At a lengthy pretrial conference, the judge explained to the defendant the risks of dismissing counsel on the eve of trial and heard from counsel and the defendant in full concerning the issues with their relationship. It was agreed that the defendant would proceed with appointed counsel. The court did not force the defendant to retain his attorney or exhibit any improper animus in adjudicating the issues with defense counsel.

After the courtroom incident that precipitated the postponement of the sentencing hearing, the judge initially indicated that the proceeding would resume later that afternoon and assigned a duty attorney to advise the defendant because his standby counsel<sup>4</sup> had another obligation. Nonetheless, as noted, the court did not resume the sentencing that day and standby counsel appeared with the defendant when the sentencing subsequently reconvened. Complainant's objections to the judge's orders concerning counsel - denying counsel's motion to withdraw, with the defendant's consent, and appointing the duty attorney - do nothing more than call into question the correctness of judicial rulings. See Rules of Judicial-Conduct, Rule 3(h)(3). As such,

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<sup>4</sup> The record indicates that, at the defendant's request, defense counsel assumed standby status after the trial but before the sentencing.

they are 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, Complaint No. 01-15-90012 is 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), respectively.

10/7/15

Date

  
Chief Judge Howard