

JUDICIAL COUNCIL
OF THE FIRST CIRCUIT

IN RE
COMPLAINT NO. 01-15-90028

BEFORE
Howard, Chief Circuit Judge

ORDER

ENTERED: APRIL 5, 2016

Complainant, a pro se litigant, has filed a complaint of misconduct, under 28 U.S.C. § 351(a), against a First Circuit magistrate judge. Complainant alleges that the magistrate judge engaged in improper ex parte communication and conspiracy in connection with the court's review of complainant's motion to proceed *in forma pauperis* (IFP). The misconduct complaint is baseless and not cognizable.

Complainant alleges that the magistrate judge's memorandum and order requiring complainant to submit supplementary financial information in support of his IFP motion demonstrates that the magistrate judge engaged in improper ex parte communication with unidentified representatives of the United States Attorney's Office and the Federal Bureau of Investigation (FBI). Identifying numerous "instances of false statements, misstatements, false innuendos and misguided purpose" in the memorandum and order,

complainant asserts it is "impractical to think" that these misstatements resulted from "clerical error, negligence or excusable neglect."¹ Complainant maintains that, to the contrary, "these instances of judicial misconduct by [the magistrate judge] were premeditated and calculated, conducted as a result of ex parte communications . . . perpetuated to . . . assist the FBI and US Attorney" in obtaining information about complainant and the companies with which he was involved. Complainant surmises that the magistrate judge "would not have known" the specific information requested in the memorandum and order without having had ex parte communications with these agencies.² Complainant maintains that the law enforcement agencies had illegally obtained related information on complainant and that the magistrate judge was endeavoring to obtain it again in order to "set this Complainant up for a perjury investigation [and allow] these third parties another bite of the apple"

Complainant concludes that the magistrate judge has violated Rule 3(h)(2) of the Rules for Judicial-Conduct and Judicial-Disability Proceedings (Rules of Judicial-Conduct), by engaging in conduct that has a "prejudicial effect on the administration of the business of the courts, including a substantial and widespread lowering of public confidence in the courts among reasonable people," and Canon 2A of the Code of

¹ Complainant takes issue with the magistrate judge's portrayal of complainant's lawsuit, role in the plaintiff company, level of financial sophistication, statement of net worth, and financial affidavit. Complainant adds that the magistrate judge failed to recognize that the civil complaint and financial affidavit addressed two different time frames and, thus, included different information.

² Complainant contends that, without ex parte information, the magistrate judge would not have known to request specific information on complainant's employment with and ownership interest in the relevant companies, the companies' financial statements, the value of stock tendered in a related bankruptcy proceeding, as well as additional information on complainant's assets, offices, residences, expenses and debts.

Conduct for United States Judges, by creating an "appearance of impropriety."

Complainant asserts that the magistrate judge is obligated to recuse, under 28 U.S.C. § 455(a), and asks the Chief Judge to appoint a judge from another district to hear the case or to transfer the case to a district court in another circuit where complainant is involved in other litigation.

As an initial matter, the judicial misconduct complaint process does not provide an avenue for obtaining an order in a pending or closed case, including the recusal of a judge or the reassignment of a case. See 28 U.S.C. § 351, *et seq.*, and Rules of Judicial-Conduct, Rules 11, 19 and 20.

Moreover, the misconduct complaint is baseless. There is no evidence suggesting that the magistrate judge violated the Code of Conduct let alone engaged in misconduct.³ The record indicates that complainant filed suit against the several corporate entities alleging libel, slander and other causes of action arising from their publication of false information about complainant and his business. In response to complainant's IFP motion, the magistrate judge issued the referenced memorandum and order requiring complainant to supplement his financial information in order to be considered for IFP status. See nte. 2, *supra*. The presiding district judge approved this order, over complainant's objection, and when he failed to comply or submit the requisite fee, the judge dismissed the case.

³ While the Code of Conduct for United States Judges may be informative to the consideration of a misconduct complaint, a violation of the Code does not necessarily constitute judicial misconduct under the governing statute. See Rules of Judicial-Conduct, Commentary on Rule 3.

The IFP statute requires a court to be satisfied that an IFP motion is sufficiently supported and offered in good faith before exercising its discretion to allow a civil litigant to proceed without prepayment of fees. See 28 U.S.C. § 1915. Despite complainant's contention to the contrary, there is nothing in the magistrate judge's memorandum and order, or elsewhere in the record, that supports complainant's inference of ex parte communication. The public record provided ample basis for the additional information requested by the court. If there were "misstatements of fact" in the memorandum and order, of which there is no indication, they do not suggest improper communication between the judge and others or any other wrongdoing.⁴

As there is no evidence of improper ex parte communication or other judicial impropriety, the misconduct complaint is dismissed as baseless, pursuant to 28 U.S.C. § 352(b)(1)(A)(iii). See also Rules of Judicial-Conduct, Rule 11(c)(1)(D). Insofar as the misconduct complaint is based exclusively on complainant's disagreement with the memorandum and order requiring additional information in support of complainant's IFP motion, it is dismissed as directly related to the merits. See 28 U.S.C. § 352(b)(1)(A)(ii) and Rules of Judicial-Conduct, Rule 11(c)(1)(B). See also id., Rule 3(h)(3)(A) ("Cognizable misconduct . . . does not include . . . an allegation that is directly related to

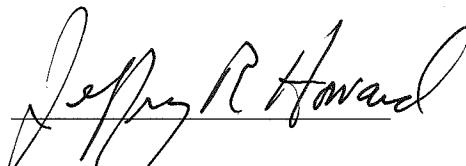
⁴ Although not relevant to the resolution of the present matter, the magistrate judge in fact allowed complainant's motion to file an appeal *in forma pauperis*, noting that complainant had supplied additional financial information, under oath, in connection with the appeal that he had not provided with his initial IFP motion or subsequent submissions.

the merits of a decision or procedural ruling. An allegation that calls into question the correctness of a judge's ruling . . . , without more, is merits-related.").

For the reasons stated, Complaint No. 01-15-90028 is dismissed, pursuant to 28 U.S.C. §§ 352(b)(1)(A)(ii) and 352(b)(1)(A)(iii). See also Rules of Judicial-Conduct, Rules 11(c)(1)(B) and 11(c)(1)(D), respectively.

4-5-16

Date


Chief Judge Howard