

JUDICIAL COUNCIL
OF THE FIRST CIRCUIT

IN RE
COMPLAINT NO. 01-20-90001

BEFORE
Howard, Chief Circuit Judge

ORDER

ENTERED: NOVEMBER 30, 2020

Complainant, an incarcerated defendant and pro se litigant, has filed a complaint, under 28 U.S.C. § 351(a), against a district judge in the First Circuit in connection with complainant's two criminal cases and related civil case over which the judge has presided. The misconduct complaint is baseless and is not cognizable.

Complainant alleges that, in presiding over complainant's cases, the judge was biased against and hostile toward complainant, "advocat[ed] on behalf of the prosecution" in the criminal proceedings, in violation of Canons 3 and 3A of the Code of Conduct for United States Judges (Code of Conduct)¹, prejudged the merits of the cases, and denied complainant due process.

¹ Canon 3 provides, in part, that "a judge should perform the duties of the office fairly, impartially and diligently." Canon 3A and its subparts set forth standards to which a judge should adhere while performing adjudicative responsibilities. See Code of Conduct for United States Judges (Code of Conduct), Canon 3.

Specifically, complainant asserts that the judge improperly interfered in plea negotiations by urging complainant to consider a plea, despite complainant's objection to the judge's involvement. Complainant also alleges that the judge did not address complainant's claims of ineffective assistance of counsel included in letters that complainant purportedly submitted to the court despite counsel's alleged statement during a hearing that he "hope[d] that [complainant] rot[s] in jail."

Complainant contends that the judge improperly dismissed complainant's first criminal case without ruling on pending motions and violated complainant's "First Amendment Right to Redress and . . . Fourth Amendment Right regarding the Suppression Hearing." Complainant adds that the judge improperly refused to consider additional Fourth Amendment claims and wrongfully dismissed complainant's tort claim without a hearing.

Complainant concludes that the judge should have recused from complainant's cases and requests that the judge be removed from his cases.²

As a preliminary matter, the judicial misconduct process does not provide an avenue for obtaining relief in a case, including the removal of a judge from pending litigation. See 28 U.S.C. § 351, et seq., and Rules for Judicial-Conduct and Judicial-Disability Proceedings (Rules of Judicial-Conduct), Rules 11, 19, and 20.

² Complainant includes apparent allegations against the prosecutors in his criminal cases which are not addressed, as the judicial misconduct complaint process only provides an avenue for addressing complaints against current federal judges. See 28 U.S.C. § 351, et seq., and Rules for Judicial-Conduct and Judicial-Disability Proceedings (Rules of Judicial-Conduct), Rule 1(b).

Further, the reviewed record, including the misconduct complaint and the dockets of the relevant proceedings, is devoid of any information suggesting that the judge was biased or otherwise engaged in misconduct in presiding over complainant's cases.

The record indicates that, after being indicted, complainant, who was represented by an Assistant Federal Public Defender, filed a motion to suppress evidence, which the government opposed. The judge granted complainant's motion to file a reply, and complainant did so. The judge subsequently held a multiple-day hearing on the motion, during which prosecution and defense witnesses, including complainant, testified, counsel for the parties argued extensively, and the judge took the matter under advisement.

Complainant's attorney filed a motion to withdraw at complainant's request, on which the court held a hearing, a portion of which was held *ex parte* over the government's objection. At the hearing, the judge heard from complainant in full. The judge allowed complainant's attorney to withdraw and authorized complainant to supplement his motion to suppress once new counsel was appointed. Despite the appointment of new counsel to represent complainant, complainant did not supplement the motion to suppress, which the judge denied on multiple grounds in a lengthy opinion.

Over the next several months, complainant filed, *pro se*,³ over a dozen motions. The judge held a hearing on the motions and denied them, explaining that they were

³ The court allowed complainant's second attorney to withdraw, appointed standby counsel, and subsequently allowed standby counsel to withdraw.

based on the same underlying facts that the court determined in denying the motion to suppress.

Approximately a week later, the judge held a hearing at which the judge reappointed standby counsel for complainant, see supra note 3, and the government offered a plea agreement. The judge explained the charges and applicable maximum penalties, the terms of the agreement, and that the court would not engage in plea negotiations in any criminal case. Complainant indicated that he objected to a provision in the plea agreement, which the government subsequently offered to remove. The judge explained that, in the court's opinion, it was in complainant's best interest to accept the plea agreement, but that it was complainant's choice whether to do so.

Complainant indicated that he would accept a plea agreement if the prosecution agreed on the record that law enforcement officers committed common law trespass. The judge responded that the court had tried appointing attorneys for complainant, that complainant had a right to go forward with trial, but that, in the court's opinion, it was not in complainant's best interest to do so. Complainant objected to the judge's remarks and did not accept the plea agreement. After the case was scheduled for trial, complainant filed, pro se, multiple pleadings, including, but not limited to, motions to dismiss the indictment.

The government subsequently filed a separate indictment against complainant involving mostly the same charges and a motion to dismiss the first criminal case, which the judge allowed.

While his first criminal case was pending, complainant filed, pro se, a civil rights case challenging his arrest. Defendants filed a motion to dismiss, to which complainant objected, and the judge held a hearing on the motion at which the judge allowed certain claims to proceed and dismissed complainant's remaining claims based, in part, on collateral estoppel.

Complainant filed amended complaints, and defendants moved to dismiss. The judge granted the motion to dismiss in a multiple-page order, dismissing several claims pursuant to collateral estoppel, as they had been dismissed in complainant's criminal case, and dismissing complainant's remaining claim for failure to state a claim upon which relief can be granted.

The misconduct complaint is without merit. There is no evidence that the judge was biased or improperly motivated in presiding over complainant's cases, violated the Code of Conduct⁴, advocated on behalf of the prosecution, was hostile to complainant, inappropriately prejudged the merits of the case, denied complainant's Constitutional rights, or engaged in any other wrongdoing.

⁴ See Code of Conduct, Rule 1 Commentary (While the Code of Conduct may "provide standards of conduct for application in proceedings under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 (28 U.S.C. §§ 332(d)(1), 351-364), [n]ot every violation of the Code should lead to disciplinary action."), and Rules of Judicial-Conduct, Commentary to Rule 4 ("While the Code[of Conduct's] Canons are instructive, ultimately the responsibility for determining what constitutes cognizable misconduct is determined by the [Judicial Conduct and Disability] Act and these Rules . . ."). In the present matter, there is no indication that the judge violated the Code of Conduct, let alone engaged in misconduct.

To the contrary, the record indicates that the judge held multiple hearings, considered the substance of complainant's claims and defenses, and issued extensive, reasoned rulings, including some in complainant's favor. See supra pp. 3-5.

Further, the record does not support the claim that the judge improperly interfered in complainant's plea negotiations. The hearing transcript reflects that the judge explicitly confirmed that complainant understood the charges against him and their maximum penalties, the terms of the prosecution's proffered plea agreement, and that the decision to accept or the reject the plea agreement was complainant's alone. On the present record, the judge's advice to complainant to consider seriously the plea agreement and expression of views of the merits of the case are in no way indicative of bias or other wrongdoing. See Boudin, C.C.J., Order, In re Judicial Misconduct Complaint No. 444, January 23, 2007, at pp. 3-4, citing In re Marisol Martinez-Catala, 129 F.3d 213 (1st Cir. 1997) ("It is well settled that judges are entitled to form views about the merits, and to express them, during the course of the case so long as the judgements rest on the evidence and arguments in the proceeding itself Leaving aside extraordinary circumstances, the expression of views by the judge on the merits . . . [does not] constitute bias.").

Nor is there any evidence of judicial "hostility." See Rules of Judicial-Conduct, Rule 4(a)(2)(B) ("Cognizable misconduct . . . includes . . . treating litigants . . . in a demonstrably egregious and hostile manner"). To the contrary, the record indicates that, throughout the multiple hearings in complainant's cases, the judge was polite and respectful. See supra pp. 3-5. There is nothing in the record suggesting improper judicial

motivation or "the sort of deep-seated unequivocal antagonism that may constitute misconduct." See Lynch, C.C.J., Order, In re Judicial Misconduct Complaint No. 01-12-90015, July 11, 2012, at p. 6, quoting In Re: Jane Doe, 640 F.3d 861, 863 (Judicial Council of the Eighth Circuit, February 4, 2011).

Further, complainant's allegation that the judge did not address complainant's ineffective assistance of counsel claim is belied by the record, which does not reflect complainant's submission of any letters complaining about his counsel, let alone counsel's purported statement that he "hope[d] that [complainant] rot[s] in jail."⁵ Accordingly, the misconduct complaint is dismissed as baseless, pursuant to 28 U.S.C. § 352(b)(1)(A)(iii). See also Rules of Judicial-Conduct, Rules 11(c)(1)(D).

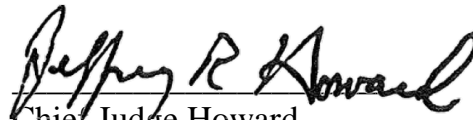
Where, as here, there is no evidence of bias or improper judicial motive, complainant's challenges to the court's orders - including, but not limited to, the dismissal of his first criminal case without ruling on pending motions and the dismissal of complainant's civil rights case without a hearing - are not cognizable. See Rules of Judicial-Conduct, Rule 4(b)(1) ("Cognizable misconduct does not include an allegation that calls into question the correctness of a judge's ruling If the decision or ruling is alleged to be the result of an improper motive . . . the complaint is not cognizable to the extent that it calls into question the merits of the decision."); id. Commentary to Rule 4 ("Any allegation that calls into question the correctness of an official decision or

⁵ Notably, at the ex parte hearing, complainant expressed his concerns with his counsel, and the judge allowed counsel to withdraw at complainant's request. See supra p. 3.

procedural ruling of a judge — without more — is merits-related."). Therefore, the complaint is 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 above, the misconduct complaint 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.

November 30, 2020
Date


Chief Judge Howard