

JUDICIAL COUNCIL
OF THE FIRST CIRCUIT

IN RE
COMPLAINT NO. 01-20-90003

BEFORE
Lynch and Kayatta, Circuit Judges
Laplante, Walker, and McElroy, District Judges

ORDER

ENTERED: APRIL 14, 2021

Petitioner, an attorney and pro se litigant, has filed a petition for review of Chief Judge Howard's order dismissing his misconduct complaint, under 28 U.S.C. § 351(a), against a magistrate judge in the First Circuit. Petitioner alleged judicial misconduct in connection with the magistrate judge's handling of a voluntary mediation held in a case petitioner had brought pro se on his own behalf alleging a former employer had retaliated against him. Chief Judge Howard dismissed the complaint as baseless and as not indicative of misconduct.

In the original complaint, petitioner alleged that the magistrate judge engaged in misconduct while serving as a mediator in petitioner's civil proceeding against his former employer. Petitioner asserted that the magistrate judge "pressure[d]" petitioner to accept a settlement offer, and "threat[ened]" that if he did not settle, defense counsel "would plead

him to death." Petitioner contended that, by suggesting that an allegedly retaliatory citation could be removed from petitioner's employee file, the magistrate judge advocated an unlawful "subterfuge" and an "unfair and deceptive practice." Petitioner further alleged that the magistrate judge "chided" him by questioning the explanation petitioner provided for leaving his former position during employment interviews and advised petitioner to commit "perjury" by offering an alternative explanation. Finally, petitioner alleged that the magistrate judge "unethical[ly]" and "inappropriate[ly]" attempted to elicit petitioner's promise that he would not exercise his right to rescind the settlement agreement executed during the mediation. Petitioner requested a jury trial.

In dismissing the complaint, Chief Judge Howard first explained that the judicial misconduct complaint procedure does not provide an avenue for ordering a jury trial. 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.

Chief Judge Howard determined that petitioner's claims against the magistrate judge presented no basis for further inquiry, as the alleged conduct did not amount to judicial misconduct under the statute. See 28 U.S.C. § 351, et seq. See also Rules of Judicial-Conduct, Rule 11 Commentary ("Essentially, the standard [governing the chief judge's inquiry into allegations of judicial misconduct] is that used to decide motions for summary judgment pursuant to Fed. R. Civ. P. 56. Genuine issues of material fact are not resolved at the summary judgment stage. A material fact is one that 'might affect the outcome of the suit under the governing law,' and a dispute is 'genuine' if 'the evidence is

such that a reasonable jury could return a verdict for the nonmoving party.' Anderson v. Liberty Lobby, 477 U.S. 242, 248 (1986).").

Chief Judge Howard determined that the record, including the misconduct complaint, the transcript of a hearing held after the confidential mediation, and the dockets of the federal case and related state court proceedings, provided no support for petitioner's allegations that the magistrate judge engaged in judicial misconduct while serving as a mediator. Chief Judge Howard observed that petitioner filed a pro se whistleblower retaliation lawsuit against his former employer in a state trial court. The parties negotiated a settlement, but petitioner subsequently revoked his consent to the agreement, and the case was dismissed. Petitioner filed a second lawsuit in another state trial court, raising the same claims as in the first state court proceeding. The defendants removed the case to federal district court, and the parties jointly requested a referral for mediation with the subject magistrate judge.

Chief Judge Howard further observed that, following a lengthy confidential mediation with the magistrate judge, of which there is no recording or transcript, all parties affirmed on the record that they had negotiated a settlement agreement, reviewed the agreement, signed it voluntarily, and indicated that they understood that the settlement agreement terminated the litigation. The agreement included a provision allowing petitioner to revoke the agreement within a specified number of days by delivering a letter in-hand or by first-class mail to defense counsel.

Chief Judge Howard next observed that, the day after the mediation, the presiding district judge entered an order dismissing the case and giving the parties 30 days to request that the action be reopened if the settlement was not perfected. Several days later, petitioner attempted to rescind the agreement, but not in accordance with the revocation provision agreed upon by the parties. The defendants moved to reopen and dismiss the case, and to enforce the settlement agreement. Petitioner opposed the motion for enforcement, raising many of the same allegations against the magistrate judge that he included in his misconduct complaint. The district judge enforced the settlement agreement, explaining that petitioner had failed to exercise properly the right to revoke the agreement, and dismissed the case with prejudice. Shortly thereafter, petitioner filed this misconduct complaint.

In dismissing the complaint, Chief Judge Howard explained that cognizable misconduct is "conduct prejudicial to the effective and expeditious administration of the business of the courts," and that, as a general matter, "[j]udicial misconduct . . . connotes an 'illicit or improper motive' on the part of the judge." Rules of Judicial-Conduct, Rule 4(a); and Lynch, C.C.J., Order, In Re: Judicial Misconduct Complaint No. 01-13-90001 (March 26, 2013) at p. 4 (citing Rules of Judicial-Conduct, Commentary on Rule 3).¹ The Chief Judge also explained that a mediator's characterization of the merits of a legal claim and surrounding circumstances is frequently used "as a tool to promote compromise

¹ The Judicial Conference of the United States amended the Rules for Judicial-Conduct and Judicial-Disability Proceedings (Rules of Judicial-Conduct) on September 17, 2015 and on March 12, 2019. The cited language now appears in the Commentary to Rule 4.

where possible." Lynch, C.C.J., Order, In Re: Judicial Misconduct Complaint No. 01-13-90001 (March 26, 2013) at p. 4. The Chief Judge determined that, as in the misconduct proceeding at issue in the cited order, petitioner "d[id] not suggest, much less provide any evidence, that the magistrate judge was illicitly motivated in conducting the mediation." Id. To the contrary, petitioner, an experienced attorney, sought mediation with the magistrate judge, participated in a lengthy mediation session, voluntarily agreed to the terms of a settlement agreement on the record, and failed to rescind the agreement in accordance with the terms agreed upon by the parties.²

The Chief Judge further stated that, only after petitioner's attempt to rescind the settlement was unsuccessful did petitioner raise his claims against the magistrate judge, first in court and then in the present proceeding. Although not necessary to the dismissal of the misconduct complaint, Chief Judge Howard noted that petitioner's claims concerning the magistrate judge's handling of the mediation were equally unpersuasive to the district court. The presiding district judge rejected petitioner's assertions that the magistrate judge pressured him during the mediation, as petitioner, an experienced attorney, did not support his claims in accordance with the applicable local rule, and contradicted these claims when he stated on the record at the mediation hearing that he voluntarily entered into the settlement agreement.

In the petition for review, petitioner asserts that, in dismissing his misconduct complaint, "the Judicial Council of the First Circuit concentrated heavily upon . . .

² Nor was this petitioner's first attempt to rescind a settlement of the same claims. See supra p. 3.

[petitioner's] . . . failure to exercise his right of rescission," and that, through his petition, he would "place that issue into perspective."³ Petitioner reiterates that he rescinded his consent to the settlement agreement and asserts that the magistrate judge "premature[ly]" reported to the district judge that the case was settled, although, under the terms of the confidential settlement agreement, petitioner had a specified number of days to exercise his right to rescind. Petitioner adds that the magistrate judge improperly attempted to contact him after he indicated his intent to rescind the agreement, for the purpose of expressing "displeas[ure]." Petitioner requests that the dismissal of his case be "rescinded."⁴

The petition for review is meritless. As an initial matter, the judicial misconduct complaint procedure does not provide for relief in a case, including the vacatur of an order of dismissal. See 28 U.S.C. § 351, et seq., and Rules of Judicial-Conduct, Rules 11, 19, and 20.

Petitioner has provided no support for his original allegations that the magistrate judge "pressure[d]" petitioner to accept the settlement agreement, "threat[ened]" him during the mediation, or otherwise "unethical[ly]" and "inappropriate[ly]" sought to elicit petitioner's promise that he would not exercise his right to rescind the agreement.⁵ The

³ Petitioner also includes allegations against opposing counsel, 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 of Judicial-Conduct, Rule 1(b).

⁴ In his petition for review, petitioner includes for the first time, allegations against the presiding district judge, including that the judge improperly denied petitioner a jury trial and dismissed the case in order to "back[] up" the magistrate judge. While petitioner's claims against the district judge are not at issue in the present proceeding, since the district judge was not a subject of the underlying complaint, neither petitioner nor the record provides any support for the conclusory allegation that the district judge was improperly motivated in dismissing petitioner's case. See supra pp. 3-6.

⁵ There is no transcript or recording of the mediation.

district court rejected these claims because petitioner failed to support his allegations properly and because petitioner's previous, on-the-record statement that he voluntarily assented to the settlement agreement directly contradicted the allegations. See supra p. 5. Petitioner offered no facts in the misconduct complaint that undercut the court's determination or otherwise lend support to these claims.

Moreover, the only fact that petitioner alleged in support of the claims that he was pressured or intimidated -- that the magistrate judge said that defense counsel would "plead [petitioner] to death" if he pursued the litigation -- would not be indicative of misconduct even if true.

[A] judge's characterization of the merits of a legal claim does not itself suggest an improper motive or misconduct, even if . . . done so harshly. . . . This is particularly true where, as here, the magistrate judge was acting as a mediator who, unlike a fact-finder, often shares his or her views of the case as a tool to promote compromise where possible.

Lynch, C.C.J., Order, In Re: Judicial Misconduct Complaint No. 01-13-90001 (March 26, 2013), at p. 4.

Accordingly, the Chief Judge appropriately determined that petitioner "d[id] not suggest, much less provide any evidence, that the magistrate judge was illicitly motivated in conducting the mediation." See Lynch, C.C.J., Order, In Re: Judicial Misconduct Complaint No. 01-13-90001 (March 26, 2013), at p. 4. In the absence of any claim or evidence of improper judicial motive, there remains no material dispute that would warrant further inquiry, as the alleged conduct did not amount to judicial misconduct under the statute. See 28 U.S.C. § 351, et seq. See also Rules of Judicial-Conduct, Rule 11 Commentary.

Petitioner's assertion that the magistrate judge prematurely or improperly reported the case as settled to the district judge is contravened by the record. As Chief Judge Howard observed, directly following the mediation, all parties affirmed on the record that they had negotiated a settlement agreement, reviewed the agreement, signed it voluntarily, and indicated that they understood that the settlement agreement terminated the litigation. See supra p. 3. The record confirms that, as alleged, the agreement provided for rescission within a specified number of days, see id. and that, in fact, the magistrate judge requested that the district court order the case to be reopened if the settlement was not perfected. The presiding district judge, whose conduct is not at issue in this matter, see supra note 4, enforced the settlement agreement because the court determined that petitioner did not comply with the terms of the rescission provision. See supra p. 4.

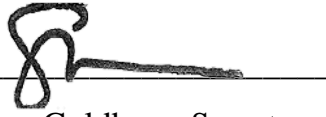
Further, petitioner's assertion that the magistrate judge was improperly motivated in contacting him after petitioner indicated his intent to revoke the agreement is unsupported by the record or by any evidence provided by petitioner. Defense counsel averred on the record that the magistrate judge called petitioner in an attempt to determine why petitioner intended to rescind the settlement agreement and whether settlement was possible, and petitioner provides no information to the contrary. Further, any "displeasure" that the magistrate judge may have communicated in attempting to contact petitioner would not be indicative of misconduct. Therefore, Chief Judge Howard properly dismissed the complaint as baseless and as not indicative of misconduct. See 28

U.S.C. §§ 352(b)(1)(A)(iii) and 352(b)(1)(A)(i). See also Rules of Judicial-Conduct, Rules 11(c)(1)(D) and 11(c)(1)(A).

For the reasons stated, the order of dismissal issued in Judicial Misconduct Complaint No. 01-20-90003 is affirmed. See Rules of Judicial-Conduct, Rule 19(b)(1).

April 14, 2021

Date


Susan Goldberg, Secretary