

JUDICIAL COUNCIL
OF THE FIRST CIRCUIT

IN RE
COMPLAINT NO. 01-20-90003

BEFORE
Howard, Chief Circuit Judge

ORDER

ENTERED: MAY 21, 2020

Complainant, an attorney and pro se litigant, has filed a complaint under 28 U.S.C. § 351(a) against a magistrate judge in the First Circuit. Complainant alleges judicial misconduct in connection with the magistrate judge's handling of a voluntary mediation held in complainant's employment retaliation proceeding. The misconduct complaint is without merit.

Complainant alleges that the magistrate judge engaged in misconduct while serving as a mediator in complainant's suit against complainant's former employer. Complainant asserts that the magistrate judge pressured complainant to accept a settlement offer, and "threat[ened]" that if complainant did not settle the case, defense counsel would likely litigate the case aggressively. Complainant contends that the magistrate judge suggested that complainant's employment file could be manipulated and thus advocated for an unlawful "subterfuge" and an unfair and deceptive practice. Complainant further alleges that the magistrate judge "chided" complainant by

questioning the explanation complainant provided to potential employers for leaving complainant's former position and advised complainant to commit "perjury" by offering an alternative explanation. Finally, complainant alleges that the magistrate judge unethically attempted to elicit complainant's promise not to exercise complainant's right to rescind the settlement agreement. Complainant requests that "this matter" be scheduled for a jury trial.

As an initial matter, the misconduct complaint procedure does not provide an avenue for ordering a jury trial either in a misconduct proceeding or in the underlying case. 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.

Complainant's claims against the magistrate judge, considered in the context of the record as a whole, present no basis for further inquiry, as the alleged conduct does 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).").

The reviewed record, including the misconduct complaint, the transcript of the hearing following the confidential mediation, and the dockets of the federal case and

related state court proceedings, do not support complainant's allegations that the magistrate judge engaged in judicial misconduct while serving as a mediator in the matter. The record indicates that complainant filed a pro se whistleblower retaliation suit against complainant's former employer in a state trial court. The parties¹ negotiated a settlement, but complainant subsequently revoked consent to the settlement agreement, and the case was dismissed. Complainant then filed a second suit in another state trial court, raising the same claims as in the initial proceeding. The defendants removed the case to federal district court, and the parties jointly requested a referral for mediation with the subject magistrate judge.

The record reflects that the parties appeared for a multi-hour confidential mediation with the magistrate judge, of which there is no recording or transcript. After the mediation was completed, the parties affirmed on the record that they had negotiated a settlement agreement, reviewed the agreement, signed it voluntarily, and understood that the settlement agreement terminated the litigation. The agreement included a provision allowing complainant to revoke the agreement within a specified number of days by delivering a letter in-hand or by first-class mail to defense counsel.

The record further reflects 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, complainant attempted to rescind the agreement, but not in accordance with the terms

¹ The defendants were represented by counsel in the state and federal court proceedings.

agreed upon by the parties. The defendants moved to reopen and dismiss the case, and sought enforcement of the settlement agreement. Complainant opposed the motion for enforcement, raising many of the same allegations against the magistrate judge that are included in complainant's misconduct complaint. The district judge enforced the settlement agreement, explaining that complainant had failed to exercise properly the right to revoke the agreement, and dismissed the case with prejudice. Shortly thereafter, complainant filed the instant misconduct complaint.

"Cognizable Misconduct is conduct prejudicial to the effective and expeditious administration of the business of the courts." Rules of Judicial-Conduct, Rule 4(a). As a general matter, "[j]udicial misconduct[] connotes an 'illicit or improper motive' on the part of the judge [citing id. Commentary on Rule 3]." Lynch, C.C.J., Order, Complaint No. 01-13-9001, March 26, 2013, at 4.² Further, as then Chief Judge Lynch explained, a mediator's characterization of the merits of a legal claim and surrounding circumstances is frequently used "as a tool to promote compromise where possible." Id. As in the cited proceeding, complainant in the present matter "does not suggest, much less provide any evidence, that the magistrate judge was illicitly motivated in conducting the mediation." Id. To the contrary, the record demonstrates that complainant, an experienced attorney admitted to the state bar for many years, sought mediation with the magistrate judge in question, participated in lengthy settlement discussions, voluntarily agreed to the terms of the settlement agreement on the record, and failed to rescind the agreement in accordance

² 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, after the issuance of the cited order. The cited language now appears in the Commentary to Rule 4.

with the terms agreed upon by the parties.³ Only after complainant's attempt to rescind the settlement was again unsuccessful, see note 3, supra, did complainant raise the claims against the magistrate judge, first in court and then in the present proceeding.⁴

Neither the complaint nor the reviewed record contains any facts supporting complainant's conclusory allegations that the magistrate judge advised or suggested that complainant commit a crime, treated complainant improperly, or engaged in any other wrongdoing. Complainant's claims that the magistrate judge urged complainant to accept a settlement, pointed out the potential drawbacks of litigation, or questioned complainant's handling of complainant's employment pursuits do not suggest that the magistrate judge was improperly motivated in mediating the proceeding or otherwise present a genuine issue of material fact warranting further inquiry. See Rules of Judicial-Conduct, Rule 11 Commentary. Accordingly, the misconduct complaint is dismissed as baseless, pursuant to 28 U.S.C. § 352(b)(1)(A)(iii), and as not indicative of misconduct, pursuant to 28 U.S.C. § 352(b)(1)(A)(i). See also Rules of Judicial-Conduct, Rules 11(c)(1)(D) and 11(c)(1)(A), respectively.

³ Nor was this complainant's first attempt to rescind a settlement of the same claims. See supra, at 3.

⁴ Although not necessary to the determination of the present matter, complainant's claims concerning the magistrate judge's handling of the mediation were equally unpersuasive to the district court.

For the reasons stated, Complaint No. 01-20-90003 is dismissed, pursuant to 28 U.S.C. §§ 352(b)(1)(A)(i) and 352(b)(1)(A)(iii). See also Rules of Judicial-Conduct, Rules 11(c)(1)(A) and 11(c)(1)(D).

May 21, 2020
Date



Chief Judge Howard