

Judicial Council for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
January 10, 2022
Lyle W. Cayce
Clerk

Complaint Number: 05-21-90152

MEMORANDUM

Complainant, a pro se litigant, alleges misconduct by the subject United States District Judge in complainant's 42 U.S.C. § 1983 proceeding.

Background

African American and Hispanic members of a city police department filed a class action employment discrimination lawsuit over which the subject judge presided. The judge approved the parties' consent decree which provided for remedial promotions of two stipulated classes, including African and Hispanic members. Complainant, an African American, received a remedial promotion in 1994. He retired from the police department in 2004.

In his pending district court proceeding, complainant appears to claim that he was subjected to a hostile work environment and discrimination in connection with the promotion and, since 1992, he has been subjected to ongoing retaliation for filing complaints about the conduct of city attorneys and his fellow police officers. The defendants are former and current mayors, city attorneys, police chiefs, and police officers, a police attorney, and complainant's former wife.

Allegations

Complainant submits that the subject judge monitored the defendant-city's compliance with the consent decree "over [a] 10-year period." He speculates that because the city likely submitted fraudulent reports claiming it complied with the consent decree, the judge cannot be impartial in considering complainant's contrary claim that the city engaged in discriminatory and retaliatory conduct against him during (and after) the monitoring period.

Without presenting any evidence in support of the assertions, complainant further alleges that the judge granted a FED. R. CIV. P. 12(b)(6) motion to dismiss filed by the current city mayor because: (a) "[the Mayor] is being sued in his individual capacity for punitive damages"; and, (b) "as a political favor related to [a 2020 case] this judge presided over." The allegation is unclear, but complainant seems to assert that the judge compensated for the adverse ruling in the 2020 case by granting the mayor's Rule 12(b)(6) motion in complainant's case.

Complainant also complains that the judge: denied his motion to disqualify defense counsel without giving him an opportunity to "question the details of the arrangement" whereby defense counsel is "representing all defendants without charging them (to my knowledge)"; gave the defendants an "unfair advantage" by prematurely ordering that complainant's claims against the John Doe defendants be stricken; denied his motion to sanction defense counsel for committing "fraud upon the court"; and denied as moot his motions for production of documents. Complainant concludes that these adverse rulings constitute evidence of "biasness against me."

To the extent that these allegations relate directly to the merits of decisions or procedural rulings, including any implied decision not to recuse sua sponte, they are subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(ii). In other respects, the conclusory allegations of bias and "political favor" appear entirely derivative of the merits-related charges, but to the extent the

allegations are separate, they are wholly unsupported, and are subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(iii) as “lacking sufficient evidence to raise an inference that misconduct has occurred.”

In addition, complainant claims that during an initial conference, the judge made three remarks that “were taken as offensive, predisposed, prejudicial, and biased.” He further complains that the judge “never addressed or listen[ed] to” some of his central arguments in support of his claims.

A review of the audio-recording of the almost hour-long hearing shows that the judge questioned complainant about the basis for his myriad claims against the defendants. Other than the judge’s occasional expressions of exasperation at complainant’s inability to provide clear and concise answers, and complainant’s occasional displays of frustration at the court’s detailed questions, the discussion was calm and respectful.

Although the judge might have taken greater care in expressing himself, when the remarks at issue are considered in the context of the surrounding discussion, they do not appear to demonstrate prejudice, bias, or intention to cause, or indifference to the possibility of causing, offense. Furthermore, there is nothing improper in a judge’s declining to listen to legal argument during an initial conference. There is insufficient evidence to raise an inference that either the judge’s remarks or his decisions in conducting the initial conference constitute evidence of disrespect for, or prejudice or bias against, complainant and the allegations are therefore subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(iii).

Finally, complainant submits that the judge “is working with [the city-defendant]; I believe he has been consulting with them to give them an unfair advantage in court.”

Such a conclusory allegation of ex parte communication is subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(iii) as “lacking sufficient evidence to raise an inference that misconduct has occurred.”

Judicial misconduct proceedings are not a substitute for the normal appellate review process, nor may they be used to obtain reversal of a decision or a new trial.

An order dismissing the complaint is entered simultaneously herewith.



Priscilla R. Owen
Chief United States Circuit Judge

December 28, 2021