

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U. S. COURT OF APPEALS
FILED
JAN 04 2017
FIFTH CIRCUIT
LYLE W. CAYCE, CLERK

Complaint Number: 05-17-90002

MEMORANDUM

Complainant, an attorney, has filed a judicial misconduct complaint against the subject United States District Judge regarding two criminal proceedings.

Complainant complains that in the first proceeding, the judge failed to sanction the government prosecutor for filing an indictment outside the three-year limitations period for the offense.

The allegation relates directly to the merits of the judge's decision, and is therefore subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(ii).

Complainant further complains that in the second proceeding, the judge: threatened him "with severe sanctions" if he persisted in disobeying the court's instructions to address in the feminine a self-described "transsexual" witness; and, ordered complainant to show cause why he should not be held in contempt and/or be reported to the State Bar for disobeying those instructions.

A review of the transcripts indicates that over the course of several hearings, the judge admonished all counsel to abide by her instruction to use either gender-neutral language or feminine pronouns when addressing or referring to the witness. At trial, when complainant and another defense attorney failed numerous times to abide by the instructions, the judge warned them that further failures might result in a finding of contempt of court. After the trial, the judge ordered complainant and the other defense attorney to show cause why the court should not sanction them for violating her explicit and repeated instructions.

Complainant also complains that the judge held an "ex parte" hearing to determine if he had slept during the trial, and ordered court security officers "to watch me carefully to see if I am sleeping in any of the hearings".

A review of orders and pleadings indicates that, following the trial, the judge received information that complainant might have slept through portions of the proceedings. The judge held a sealed hearing in which her case manager and seven jurors testified that they noticed that complainant had his eyes closed for brief periods at several points during the trial, and appeared to be sleeping. The judge ordered complainant to provide an affidavit addressing the issue. Several months later, the judge held a hearing in which she sought information from prosecution counsel and the other defense attorneys as to whether they witnessed complainant sleeping, or perceived that he might be sleeping, at any time during the trial.

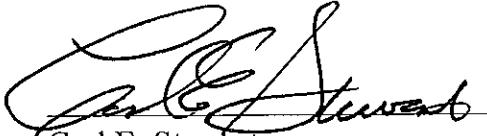
Given the seriousness of the issue, there appears to have been nothing improper in the judge's decision to gather information from individuals present during the trial.

In addition, without providing any evidence in support of the assertion, complainant protests that the judge "over-scrutinized" and "slashed" his CJA voucher.

To the extent that these allegations relate directly to the merits of the judge's decisions, they are subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(ii). In other respects, such conclusory assertions of bias and/or retaliation are insufficient to support a finding of judicial misconduct, and are subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(iii).

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.


Carl E. Stewart
Chief Judge

~~December 28~~
~~October 17~~, 2016

FILED

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FIFTH CIRCUIT
LYLE W. CAYCE, CLERK

BEFORE THE JUDICIAL COUNCIL
OF THE FIFTH CIRCUIT

No. 05-17-90002

Petition for Review by [REDACTED]
of the Final Order Filed January 4, 2017
Dismissing Judicial Misconduct Complaint Against
[REDACTED]

Under the Judicial Improvements Act of 2002.

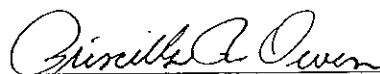
ORDER

An Appellate Review Panel of the Judicial Council for the Fifth Circuit has reviewed the above-captioned petition for review, and all the members of the Panel have voted to affirm the order of Chief Judge Stewart, filed January 4, 2017, dismissing the Complaint of [REDACTED] against [REDACTED] under the Judicial Improvements Act of 2002.

The Order is therefore

AFFIRMED.

March 2, 2017
Date



Priscilla R. Owen
United States Circuit Judge
For the Judicial Council of the Fifth Circuit