

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

U. S. COURT OF APPEALS  
**FILED**

AUG 01 2017

FIFTH CIRCUIT  
LYLE W. CAYCE, CLERK

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Docket Number: 05-17-90078

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MEMORANDUM

Attorney-complainant has filed a judicial misconduct complaint, and several supplemental complaints, against the subject United States Bankruptcy Judge who presided over multiple adversary proceedings arising out of bankruptcy proceedings filed by complainant, his wife, and their company. Complainant complains about the judge's conduct in several of those proceedings. He further complains about the judge's conduct in testifying in an attorney disciplinary action filed by the State Bar after the judge notified the Bar of complainant's conduct before the bankruptcy court. For the reasons set forth below, the complaint is dismissed.

- **Bankruptcy Proceedings**

Complainant alleges that in Case A, the judge "articulate[d] his disdain for me and what he apparently perceived to be the manner in which I conduct business" when he said that complainant's conduct in the litigation "embarrass[ed] the Court." Complainant further asserts that the judge's "tone and physical manner ... made known to all in the courtroom his intense dislike [of] me, what he perceived to be my unacceptable character and my unethical practice."

To the extent that complainant is complaining about the judge's tone and demeanor during the hearing, the Supreme Court has held that judicial bias is not established by a judge's "expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display." *Liteky v. U.S.*, 510 U.S. 540, 555-56 (1994). The allegation is therefore subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(iii).

Complainant also complains that the judge's comments in Case A demonstrate the judge had "predetermined opinions about me."

In *Liteky*, the Supreme Court further held that "[t]he judge who presides at a trial may, upon completion of the evidence, be exceedingly ill disposed towards [a litigant] ... But the judge is not thereby recusable for bias or prejudice, since his knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings ...."<sup>1</sup> While complainant refers to various adversary proceedings over which the judge presided, he makes no allegations of an extrajudicial source that would support a claim that any negative opinion formed by the judge arose outside of his judicial functions. These allegations are therefore also subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(iii).

Complainant further alleges that the judge's memorandum opinion denying discharge in Case B "was written as a result of the judge's hostility" and "personal bias" against him. The judge found that complainant and his wife engaged in fraudulent omissions, improperly transferred assets of the estate, made false oaths in connection with their bankruptcy cases, refused to comply with lawful court orders, failed to keep adequate records, and fraudulently withheld information from the Trustee. The judge indicated that he would provide a copy of the opinion to the State Bar recommending an investigation into complainant's conduct, and in which he recommended that the Chief District Judge consider removing complainant from the roll of attorneys licensed to practice in that court.<sup>2</sup>

Complainant provides no evidence that any criticism articulated by the judge were the product of an extrajudicial source and/or an "improper personal" desire to "punish" complainant for perceived "character flaws," as opposed to being "properly and necessarily acquired in the course of the proceedings."<sup>3</sup> The allegation is therefore subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(iii).

Complainant claims that he was not given prior notice of a hearing in Case C and that he was "castigated" for being inappropriately dressed when he arrived at the hearing. A review of the docket shows that a notice of hearing was electronically served and/or mailed

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<sup>1</sup> *Liteky*, 510 U.S. at 551.

<sup>2</sup> Complainant promptly filed an appeal, but four months later filed an unopposed motion to dismiss which the district court granted.

<sup>3</sup> *See Liteky*, 510 U.S. at 551.

by the Trustee's office to complainant, his attorney, and the defendant two days before the hearing. Even if complainant did not see the notice prior to the hearing, there is no evidence that the judge was responsible for any lack of or delay in notification, let alone that he intended that complainant be deprived of notice. This aspect of the complaint is therefore subject to dismissal as frivolous under 28 U.S.C. § 352(b)(1)(A)(iii).

To the extent that complainant is objecting that the judge "castigated" him for being inappropriately dressed for a court appearance, the allegation is subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(iii).<sup>4</sup>

Complainant alleges that the judge engaged in *ex parte* communication with the Trustee regarding a proposed release of lien because the Trustee arrived, prepared, for the scheduled and noticed hearing requested on the Trustee's motion. The allegation that the Trustee's presence at and preparation for the scheduled hearing constitutes evidence of *ex parte* communication with the judge is subject to dismissal as frivolous under 28 U.S.C. § 352(b)(1)(A)(iii).

Complainant asserts that the judge threatened that if complainant did not sign a release of a lis pendens, he would be taken into custody by the United States Marshals present in the courtroom. He "surmise[s] that this was done so that the Trustee could make a fee and in my humble but well-reasoned opinion split the proceeds with [the judge], as a bribe."

To the extent that the allegations relate directly to the merits of the judge's decisions during the hearing, they are subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(ii). Complainant's completely unsupported assertion that the judge accepted a bribe is subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(iii).

Complainant submits that the judge should have recused from his adversary proceedings because of the judge's bias against him. In particular, complainant contends that after "reveal[ing] the deep rooted extent of his bias against me" in a deposition in the state court disciplinary proceedings, the judge should have recused himself *sua sponte* from presiding over the two pending adversary proceedings. He further alleges that the judge

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<sup>4</sup> See *Id.*, at 555-56.

intentionally delayed ruling for “6 months” on two recusal motions complainant filed in those proceedings.

A review of the dockets in the two proceedings shows that the “delay” in ruling on complainant’s two recusal motions was a mere two months.

To the extent that complainant is proposing that because the judge formed negative opinions of him in one or more adversarial proceedings, the judge should have recused himself *sua sponte* from subsequent proceedings, the allegation relates directly to the merits of the judge’s implicit decision not to recuse *sua sponte* and is subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(ii). In other respects, conclusory assertions of “intentional delay” in ruling on complainant’s recusal motions are insufficient to support a finding of judicial misconduct and are therefore subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(iii).

- **State Disciplinary Proceeding**

Complainant alleges numerous improprieties associated with the judge’s referral of his memorandum opinion to the State Bar with a recommendation to investigate complainant’s conduct, and with the judge’s testifying as a witness in the state court disciplinary proceeding.

Complainant protests that the judge’s referral of the memorandum opinion to the State Bar was based on “his personal improper motive that I be disbarred.”

In the state court disciplinary proceeding, the judge testified that, as a member of the State Bar, he was required to report complainant’s conduct to the Bar pursuant to the state’s rules of professional conduct. Those rules require a lawyer to inform the appropriate authority if he knows that another lawyer’s violation of rules of professional conduct calls into question the other lawyer’s fitness to remain a member of the bar. Canon 3B(5) of the Code of Conduct for United States Judges (“the Code”) provides that a federal judge “should take appropriate action upon learning of reliable evidence indicating the likelihood that ... a lawyer violated applicable rules of professional conduct.” The Commentary to Canon 3B(5) provides that: “Appropriate action may include ... reporting the conduct to the appropriate authorities ....”

The judge's reliance on the state's rules of professional conduct in support of his decision to notify the State Bar of complainant's conduct in the bankruptcy proceeding is supported by Canon 3B(5). Complainant's conclusory allegation of improper motive is insufficient to raise an inference that misconduct has occurred, and is therefore subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(iii).

Complainant objects that in testifying in the disciplinary proceeding, the judge "came down ... on Federal payroll to testify against me which I believe is unethical and unprofessional. ... Moreover, his trial testimony was given on a Wednesday on which he usually has court and for which he did not request a vacation day."

Under 28 U.S.C. § 153(d), bankruptcy judges are exempted from Subchapter I of Chapter 63 of Title 5 (5 U.S.C. §§ 6301-12), the government employee leave provisions. *See also* Guide to Judiciary Policy, Vol. 12, Ch. 9, § 920.10.30. The allegation is subject to dismissal as frivolous under 28 U.S.C. § 352(b)(1)(A)(iii).

Complainant complains that the judge improperly permitted the State Bar to pay for "his flight, hotel, car rental and possibly meals and other matters" for appearing as a witness.

Canon 4H of the Code provides that a judge may accept reimbursement for "the actual cost of travel, food, and lodging reasonably incurred by the judge" for "law-related and extrajudicial activities permitted by this Code if the source of the payments does not give the appearance of influencing the judge in the judge's judicial duties or otherwise give the appearance of impropriety."

The judge's decision to testify in response to a subpoena was permitted under Canon 3B(5), and complainant does not provide any evidence to suggest that the judge was reimbursed for any expenses other than "actual cost of travel, food, and lodging." Reimbursement of the judge's expenses was therefore permissible under Canon 4H, and the allegation is therefore subject to dismissal as frivolous under 28 U.S.C. § 352(b)(1)(A)(iii).

Complainant initially claims that because the judge did not bring the subpoena to the trial, the judge committed perjury when he testified he was appearing subject to a subpoena. In a supplemental complaint, complainant refers to the state trial subpoena being "mysteriously filed" several weeks after the judge testified at the disciplinary hearing. With no evidentiary support, he surmises that the judge engaged in "criminal collusion and

criminal conspiracy” via “several phone calls” with the State Bar and the Chapter 7 Trustee to file the subpoena.

Complainant cites no authority for the implied proposition that the judge was required to produce the subpoena at trial, or to file a copy in the state court, and the conclusory allegations of criminal conduct lack evidentiary support to raise an inference that misconduct occurred. All of these allegations are subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(iii).

Complainant asserts that the judge improperly permitted the process server to serve the subpoena in a federal building because of “his personal improper motive that I be disbarred.” Complainant claims that the process server “informed me that when he approached the U.S. Marshals [in the courthouse], he was advised ... that he could not legally serve a subpoena in a Federal building.” Complainant further claims that the judge engaged in “unethical conduct” in bypassing court security procedures and accepting service of the subpoena despite the (purported) ban on subpoena service in a federal building.

Complainant has provided no authority for his claim that accepting service of process in the federal courthouse is improper, and the undersigned has found none. These allegations are therefore subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(iii).

Complainant contends that the judge’s desire that the complainant be disbarred was evident in the judge’s decision not to decline to testify pursuant to the subpoena even though he did not have to under certain provisions of state law, and because he did not have to testify under *United States ex rel. Touhy v. Regan*, 340 U.S. 462 (1951). Complainant has provided no authority for the proposition that the judge was required to decline to testify. The regulations set forth in Volume 20 Chapter 8 of the Guide to Judiciary Policy (“Chapter 8”) provide that the judge had the discretion to decide whether to honor the subpoena.<sup>5</sup>

This aspect of complainant’s complaint lacks sufficient evidence to raise an inference that misconduct occurred, and is therefore subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(iii).

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<sup>5</sup> See Guide to Judiciary Policy, Vol. 20, Ch. 8.

Complainant submits that even if the subpoena had been served properly, the judge's testimony in the state disciplinary proceeding was improper because the judge chose to testify out of improper motives, i.e., personal antipathy towards complainant and the "ultimate goal of having me disbarred."


The judge indicated during his trial testimony that while he harbors some ill will towards a person who violates court orders, he bore complainant no hostility. There is no evidence to suggest that the judge's opinions are based on anything other than complainant's behavior in the bankruptcy proceedings.<sup>6</sup> There is likewise no evidence to suggest that the judge chose to testify as part of a "goal" to have complainant disbarred. Further, the judge's decision to testify is consistent with Canon 3B(5) and Chapter 8.

Conclusory assertions of improper motives are insufficient to support an inference that misconduct has occurred 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.

The complaint is DISMISSED.

 July 29, 2017

  
Carl E. Stewart  
Chief Judge

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<sup>6</sup> See *Liteky*, 510 U.S. at 550-51.

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FIFTH CIRCUIT  
LYLE W. CAYCE, CLERK

BEFORE THE JUDICIAL COUNCIL  
OF THE FIFTH CIRCUIT

No. 05-17-90078

Petition for Review by [REDACTED]  
of the Final Order Filed August 1, 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 August 1, 2017, dismissing the Complaint of [REDACTED] against [REDACTED] under the Judicial Improvements Act of 2002.

The Order is therefore

**AFFIRMED.**

October 3, 2017  
Date

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