

OCT 25 2017

FIFTH CIRCUIT
LYLE W. CAYCE, CLERKIN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Complaint Number: 05-17-90125

MEMORANDUM

Complainant, an attorney, has filed a judicial misconduct complaint against the United States District Judge presiding over a civil case in which complainant is counsel for plaintiffs (“the federal case”).

Complainant’s allegations of bias and failure to recuse arise out of two separate state court lawsuits: in the first, complainant represented plaintiffs suing the judge’s former law firm for malpractice (“the first malpractice case”), and in the second, complainant currently represents the same plaintiffs now suing the judge for malpractice (“the second malpractice case”).

Background

The parties in the first malpractice case reached a settlement in April of 2016, around the same time the federal case was assigned to the judge. Complainant asserts that as soon as he learned of the judge’s assignment to the federal case, he called her chambers to discuss whether he should file a motion to recuse. Complainant states that he spoke multiple times with the judge’s secretary over the course of a few weeks, and claims that the secretary told him that she had discussed the issue with the judge in detail, and that the judge said complainant did not need to file a motion to recuse.

Earlier this year, the judge dismissed most of plaintiffs’ claims. Shortly thereafter, complainant moved to recuse the judge, alleging that his lawsuit against her former firm would affect her impartiality, and that she had already demonstrated her partiality in dismissing plaintiffs’ claims and in her “tone . . . of anger and/or frustration” toward complainant in a telephone conference with the parties. The judge denied the motions to

recuse. Shortly thereafter, based on documents obtained by complainant on after the motions to recuse were denied, complainant filed the second malpractice case against the judge. Complainant asserts that he faxed a copy of the petition to the judge's office immediately after he filed it. The judge subsequently denied the motion for new trial, and complainant then filed a further motion to recuse, based on the judge's alleged bias against him for suing her in the second malpractice case.

The latter motion for recusal remains pending.¹

Complaint

Complainant complains that the judge used her "office to obtain special treatment for friends, including retaliation for her former firm," that she engaged "in partisan political activity by aiding the defendants and hurting the plaintiffs," and that she engaged "in the performance of outside official duties that have a prejudicial effect on the administration of the business of the courts" Complainant offers no explanation of how any actions taken by the judge in the federal case are political in nature or what "outside official duties" the judge allegedly performed.

Complainant's contention that the judge's dismissal of his client's claims was intended as retaliation on behalf of her former firm is entirely unsupported by evidence; his allegations that her decisions were "partisan" and "political" or that she inappropriately engaged in extrajudicial activities are frivolous. These allegations are therefore subject to dismissal pursuant to 28 U.S.C. § 352(b)(1)(A)(iii). To the extent these allegations relate directly to the merits of the judge's decisions in the federal case, they are also subject to dismissal pursuant to 28 U.S.C. § 352(b)(1)(A)(ii).

Complainant also complains that the judge treated litigants and their attorneys in an "egregious and hostile manner," based on the judge's allegedly "rude" and "frustrated" tone at the telephone conference. A judge's "expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect

¹ Normally, because the motion for recusal raises many of the same issues that are raised in the complaint, the undersigned would hold the complaint in abeyance until disposition of the motion and any related appeals. However, complainant expressly requested expedited processing of the complaint.

men and women, even after having been confirmed as federal judges,” do not establish bias or partiality. *Liteky v. U.S.*, 510 U.S. 540, 555-56 (1994). This claim is subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(iii) because it is frivolous and/or lacks sufficient evidence to raise an inference that misconduct has occurred.

Complainant further complains that the judge retaliated against him for requesting her recusal and for making this complaint, and that she intended to hurt the plaintiffs in the federal case out of anger toward complainant. However, the judge’s order dismissing most of plaintiffs’ claims was entered prior to complainant’s first motion to recuse. While the order denying the motion for new trial was entered shortly after the second malpractice suit was filed, complainant offers no support for his conclusory assertion that the timing was inappropriate. Complainant also offers no support for his conclusory and implausible assertion that decisions made prior to the filing of the complaint were in retaliation for the complaint. These claims are subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(iii).

Complainant also complains that the judge continuously delayed ruling on motions, especially the motions for recusal, and that she ruled on the motion for new trial after she learned that complainant had filed a lawsuit against her. The alleged delays in ruling on motions (according to the docket, between four and eight months) are not evidence of judicial misconduct. *See* Rule 3(h)(3)(B) of the Rules for Judicial-Conduct and Judicial-Disability Proceedings. Further, complainant’s contention that the timing of the ruling on the motion for new trial was anything other than a coincidence is unsubstantiated, and conclusory assertions of retaliation are insufficient to support an inference that misconduct has occurred. These allegations are subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(iii).

Complainant complains that the judge lied to her client (the plaintiff in the malpractice cases) when she was nominated as a federal judge. However, the documentation submitted by complainant in support of this allegation is insufficient to support an inference that misconduct has occurred, and the allegation is subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(iii).

Complainant also complains that the judge failed to withdraw as lead counsel in connection with her representation of the plaintiff in the malpractice cases when she became a federal judge. Even if complainant is correct, he does not provide support for the proposition that it was anything more than an oversight which could easily have been corrected by the subsequent attorney, and he does not claim that the judge was actually practicing law after she became a federal judge. The allegation lacks sufficient evidence to support an inference that misconduct has occurred, and is subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(iii).

In addition, complainant alleges that the judge lied during the telephone conference, when she said that she did not know that complainant was the lawyer who had sued her former firm. In her order denying the first motion for recusal, the judge notes that complainant's belief that the judge was being dishonest excluded the possibility that the judge did not recall complainant's ex parte communication with the secretary. Even assuming the judge's secretary would confirm complainant's version of events, there is no way to determine whether the judge remembered or did not remember having the conversation with her secretary, which would have occurred many months earlier. This claim is therefore incapable of being established through investigation and is subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(iii).

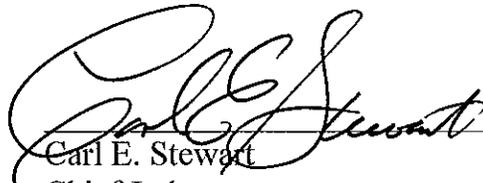
Finally, complainant complains that the judge: "fail[ed] to recuse herself when she was allotted the federal case"; that she "does not deny the allegations in her ruling refusing to recuse herself"; that she "fail[ed] to entertain" an Affidavit to Recuse filed by Complainant because it lacked his client's signature; that she refused "to recuse herself *sua sponte*" when complainant sued her; that she continued to rule on motions after complainant sued her; that she has not yet ruled on complainant's second motion for recusal; and that she will be deposed by complainant in the second malpractice case, "clearly creating a conflict." These claims relate directly to the merits of the judge's decisions not to recuse *sua sponte* or in response to complainant's motion and affidavit to recuse.

Complainant also complains that the judge “den[ied] ill-motives towards counsel in rulings where she states the wrong law,” apparently in reference to the judge’s order dismissing plaintiffs’ claims, which complainant contends was “so contrary to the law” that it evidenced the judge’s bias.² All of these allegations are subject to dismissal as merits-related pursuant to 28 U.S.C. § 352(b)(1)(A)(ii).

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.

October 23, 2017


Carl E. Stewart
Chief Judge

² Even if complainant is referring to some other “ruling[] where she states the wrong law,” the claim is still merits-related.