

APR 11 2018

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

Docket Numbers: 05-18-90041 and 05-18-90042

M E M O R A N D U M

Attorney-complainant has filed a judicial misconduct complaint alleging that the subject United States District Judge's and subject United States Magistrate Judge's rulings, and their conduct in several hearings, demonstrate that they "are looking for a reason to sanction me and make me lose my [B]ar license. . . . I have been and am being set up to be terminated. They are coming after me."

- Case 1

Complainant filed a "Motion to Withdraw as Counsel by All Plaintiffs" and attested that she had served a copy of the motion, via certified mail, on each of the plaintiffs represented by her law firm. A review of docket indicates that some notices were returned to the district court as undeliverable, and the court determined that a further nine plaintiffs listed on the docket as being complainant's clients appeared not to have been served at all. The magistrate judge held a hearing to verify, before dismissing the remaining plaintiffs' claims, that complainant had made every effort to notify them of her motion to withdraw.

It appears from the record that the nine plaintiffs to whom complainant did not initially mail notice of her motion had settled their claims against certain defendants. Noting that "an ethics attorney . . . advised that under the facts disclosed to him, we properly dismissed those cases," complainant submits that the magistrate judge's questions about lack of notice to those plaintiffs were entirely gratuitous, and were aimed at "trying to find some fault with the . . . settlement and to levee [sic] some

serious accusations of misconduct [against me] based on the dismissal of the claims of persons, [sic] who are not prosecuting their cases.”

A review of the audio-recording of the hearing shows that the magistrate judge emphasized several times that his sole concern was that the Court not dismiss from the lawsuit any plaintiffs without first verifying that complainant had made all reasonable efforts to effect service on them. The magistrate judge did not question the settlement agreement itself, or accuse complainant of any misconduct, let alone “serious misconduct.”

The allegations are therefore subject to dismissal as frivolous under 28 U.S.C. § 352(b)(1)(A)(iii).

Complainant further alleges that the magistrate judge unduly delayed ruling on her July 2017 “renewed motion to withdraw for the remainder of the claimants, who cannot be located.” The docket records that the motion was promptly referred to the magistrate judge, the defendant filed a memorandum in opposition in July 2017, and the motion was transferred to, and denied by, the presiding United States District Judge in February 2018.

Delay in ruling on a motion does not in itself constitute evidence of judicial misconduct. *See* Rule 3(h)(3)(B), Rules for Judicial-Conduct and Judicial-Disability Proceedings. To the extent that complainant implies that the delay was intentional, she points to no evidence, other than the delay itself, that the magistrate judge acted with an improper motive.

The allegation is subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(iii).

- Case 2

On August 31, 2017, complainant notified the magistrate judge that prison officials were intercepting mail sent by complainant’s law firm to the plaintiff, and were improperly confiscating the law firm’s postage-paid, self-addressed envelopes supplied to enable plaintiff to return legal documents. In requesting a conference, complainant reported that opposing counsel had not responded to her firm’s emails

attempting to resolve the issue. The magistrate judge convened a hearing in September 2017, at the commencement of which opposing counsel tendered a copy of his August 24, 2017 response to complainant's associate's emails, a response that was also copied to complainant's email address.

Complainant complains that instead of addressing the prison officials' conduct, the magistrate judge unfairly focused on "why I had said that [opposing counsel] had not responded. ... I floundered on explaining that I had not seen the email. Being that I had not expected an email to be produced, I was not in a studied position to respond." She further protests that the magistrate judge denied her subsequent "Motion to Withdraw and Substitute" the August 31, 2017 letter in which she made the erroneous claim, and also denied her motion to withdraw and substitute a separate pleading in which she misidentified an attorney.

Complainant concludes that the magistrate judge's focus on her inadvertent errors, and his denials of her motions to correct and/or remove those errors from the record, demonstrate personal animus towards her: "[H]e is building a case against me and targeting me for termination."

To the extent that these allegations relate directly to the merits of the magistrate 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 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).

- Case 3

Without offering any evidence in support of the contention, complainant complains that the judge "was actually making up arguments for [the defendant]" during a June 2017 hearing.

A review of the audio-recording of the hearing shows that in response to some of complainant's arguments on behalf of the plaintiff, the judge mentioned counterarguments that might be raised by defense counsel. However, the judge also

offered counterarguments that might be raised by the plaintiff in response to some of defense counsel's arguments. In each instance, the judge gave counsel the opportunity to rebut the counterargument.

Complainant further claims that the judge's demeanor during the hearing was "rude, hostile, and condescending." Contrary to this claim, the audio-recording demonstrates that the judge was unfailingly polite, his tone in addressing counsel was neutral, and he expressed no opinions about complainant's arguments on behalf of her client.

These allegations are clearly contradicted by the record, and are therefore subject to dismissal as frivolous under 28 U.S.C. § 352(b)(1)(A)(iii).

- Case 4

Complainant alleges that the judge improperly "had [Case 4] transferred to himself and to [the magistrate judge]," and states that she did not challenge the transfer because the judge "[might] come after me."

A review of the record indicates that the case was transferred to the judge's docket because it presented common questions of law and fact with Case 3. Complainant's wholly conclusory assertion that the judge engineered the transfer out of animus towards her is insufficient to support a finding of judicial misconduct, and is therefore subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(iii).

Complainant further contends that the judge set a seven-day deadline for her to respond to a show cause order because he intended to "review [the response] with a fine tooth [sic] comb for any possible error, mistake or whatever may be deemed or construed as a misrepresentation ... looking for a reason to sanction me and make me lose my bar license."¹

¹ The record shows that on the same date as complainant signed her initial complaint, the judge granted a ten-day extension of time for her to respond to the show cause order. The undersigned notes that despite not mailing the complaint until three days later, and despite filing a supplemental complaint two weeks later, complainant neither amended nor withdrew this allegation.

To the extent that the allegation relates directly to the merits of the chief judge's decision in setting the deadline, it is subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(ii). In other respects, such a conclusory assertion of improper motive is insufficient to support a finding of judicial misconduct, and is therefore subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(iii).

Complainant also complains that in the order dismissing the lawsuit for failure to state a claim, the judge made unfounded and unethical "personal attack after personal attack on me ... In twenty-seven instances, the opinion ... disparages the attorney, me, as though I brought the suit, when in fact [the plaintiff] brought the suit, and I am acting as his attorney." She protests that the "personal insults and criticism made of me in a case that has drawn national attention" constitute "bullying behavior," and are further evidence that the judge is "targeting me for termination."

A review of the order shows that the judge determined that complainant utterly failed to state a plausible claim for relief against any defendant. The undersigned does not identify a single instance of personal attack in the order, let alone twenty-seven, and it appears that complainant's claim of same concerns the judge's choice to refer to "Plaintiff's Counsel" rather than "Plaintiff" in the order, effectively identifying complainant as the person ultimately responsible for actions taken in the case. It is unclear why complainant maintains that she is not responsible for the legal claims she made on behalf of her client, but it appears from the judge's order addressing the deficiencies of those claims that he concluded there were ample grounds to find that her performance as an attorney was lacking.

In Liteky v. U.S., 510 U.S. 540, 551 (1994), the United States Supreme Court held that "[t]he judge who presides at a trial may, upon completion of the evidence, be exceedingly ill disposed towards the defendant ... 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" A judge who presides at trial might also form a negative opinion of counsel's performance.

Complainant makes no allegations of an extrajudicial source that would support a claim that the judge's negative opinion arose outside of his judicial functions, and the allegations of bias and "bullying behavior" are therefore subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(iii). Further, to the extent complainant complains about the substance of the order, the allegations are subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(ii).

- Other allegations

Without identifying a specific case or cases, complainant alleges that after the June 2017 hearing in Case 1, she "began to notice that when calling on discovery matters, [the magistrate judge] would turn the issues around and against my client and suggest that I was doing something wrong."

Such a conclusory assertion of bias is insufficient to support a finding of judicial misconduct, and is therefore subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(iii).

Complainant further complains that "it is very difficult ... to obtain an extension of time to amend a complaint" in cases before the magistrate judge, and that his practice of "limit[ing] that time period to sixty (60) days ... places pressure on my law firm to fight to obtain immediate deposition dates and to press for responses to discovery."

Complainant provides no examples of the magistrate judge's treating the extension requests of other litigants/attorneys more favorably than her requests. As such, the allegation appears to relate directly to the merits of the magistrate judge's decisions not to grant extensions of time to amend complaints, and is therefore subject to dismissal under 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.

The undersigned notes that this is complainant's second judicial misconduct alleging that she has been "bullied" by the judge, allegations which are, again, clearly contradicted by the record. Despite complaining about four cases in which any mild judicial admonishments were the result of her own errors, complainant casts herself as the victim of a judicial conspiracy to suspend or disbar her from the practice of law in the United States District Court. As a lawyer "practicing law for over twenty-five (25) years," complainant knows or should know "of the standards for stating a viable claim of judicial misconduct," and should also be "well aware that any court filing must be based on good faith and a proper factual foundation." *See In re Complaint of Judicial Misconduct*, 550 F.3d 769 (9th Cir. 2008). Complainant's complaint, which contains a number of self-serving misrepresentations, falls well short of these standards.

Complainant is WARNED that should she file a further merits-related, conclusory, or frivolous complaint, her right to file complaints may be suspended and, unless she is able to show cause why she should not be barred from filing future complaints, the suspension will continue indefinitely. See Rule 10(a), Rules For Judicial-Conduct or Judicial-Disability Proceedings.

The complaint is DISMISSED.


Carl E. Stewart
Chief Judge

April 10, 2018