

OCT 23 2019

FIFTH CIRCUIT
LYLE W. GAYCE, CLERK

JUDICIAL COUNCIL
FOR THE FIFTH CIRCUIT

Complaint Number: 05-19-90153

MEMORANDUM

In 2016 and 2017, complainant, a federal criminal defendant, filed judicial misconduct complaints against the subject United States District Judge presiding over complainant's criminal trial. In a third complaint regarding the same proceeding, complainant now accuses the judge of: "(1) [t]reating [me] in a demonstrably egregious and hostile manner; (2) conspiring with the government to deprive [me] of clearly established rights; (3) [i]mproper motive in delaying a particular decision; . . . (4) judicial disability or impairment"; and (5) other improper or erroneous rulings.

1. Treating a litigant in a demonstrably egregious and hostile manner

Complainant alleges that during February and July 2018 motions hearings, the judge "displayed his displeasure . . . [and] in a hostile and belligerent manner . . . harshly criticized and condemned [me] for filing" the 2017 judicial misconduct complaint. He submits that the comments about the judicial misconduct complaint were "retaliatory" and displayed "personal enmity and deep-seated hatred."

- February 2018 hearing

Complainant complains that during the February 2018 hearing on his motion to represent himself, the judge "harshly condemned" him for filing the 2017 judicial misconduct complaint, and "angrily and falsely accused" complainant of alleging "that you requested an attorney, and I have not appointed an attorney for you." Complainant protests that he made no such claims in the complaint, however a review of the complaint file shows complainant explicitly stated he had "been begging [the judge] for an attorney for over two years."

The docket in the underlying criminal proceeding indicates that the judge appointed counsel to represent complainant in December 2015, and the judge was clearly vexed at what he interpreted as complainant's contradictory allegation. Even if the judge misinterpreted complainant's allegation (which seems to have been aimed at the judge's purported failure to act on complainant's letters expressing dissatisfaction with court-appointed defense counsel's performance and asking the court to replace that attorney), complainant provides no evidence that the judge's error resulted in any prejudice, i.e. the judge granted complainant's motion to represent himself.

Complainant asserts that the judge demonstrated further prejudicial hostility by falsely accusing him of "mean mugging" or "trying to stare down" the court. However, complainant is being disingenuous because he responded to the judge's "accusation" by admitting that he *was* angry but at someone in the courtroom other than the judge. Even if the judge misread complainant's conduct as being aimed at the court, the judge's stern admonishment was brief and he promptly moved on to other matters.

Complainant further objects that later in the hearing, the judge again mentioned the 2017 complaint and again falsely accused him "of doing something I did not do," i.e., the judge said: "Now, you say you haven't made accusations against me." Complainant protests that "at no time did [I] ever state . . . that [I] hadn't made accusations against [the judge.]" A review of the audio-recording of the hearing shows that, in self-serving fashion, complainant has omitted the judge's full remarks and the context in which they were made. Based on the record, it is apparent that the judge was not commenting that complainant denied making *any* allegations at all, rather he was alluding to complainant's earlier claim that the judge was "misrepresenting" his allegations.

- July 2018 hearing

Complainant complains that "in the middle of [a discussion about] the validity of [the] arrest warrant," the judge "surprisingly referenced" the 2017 misconduct complaint. Reviews of the audio-recording and transcript of the hearing show that the judge advised complainant several times that his hypothesis about a prosecutorial and judicial conspiracy to create and enforce a false warrant was misguided. Rather than

accepting the judge's advice and moving on to address issues that would be helpful to the court, complainant persisted with his hypothesis, resulting in the judge remarking that complainant's similar accusations in the 2017 complaint—i.e., that the judge and a United States Magistrate Judge intentionally disregarded the false arrest warrant and criminally assisted the government's "ruthless malicious prosecution"—had been dismissed.

Given the context of the surrounding discussion about the validity of the arrest warrant, the judge's comment does not appear to have been gratuitous. Regardless, judges are given wide latitude to express their views—even strong views—as to the merits of a case (see *Implementation of the Judicial Conduct and Disability Act of 1980: A Report to the Chief Justice*, 64 (2006)), and complainant provides no evidence that the passing remark about the 2017 complaint resulted in any prejudice to him.

Complainant further alleges that later in the hearing the judge "completely lost control of his temper and harshly condemned [me] for questioning a witness out of turn in an explosive epithet. . . . [The judge's] diatribe against [me] as having an 'anger issue' and not 'respecting anybody' was unwarranted for a Pro Se Defendant simply asking a question out of turn." Reviews of the audio-recording and transcript of the almost seven-hour long hearing indicate that the judge's very stern admonishment did not include an "epithet" and he "did not completely lose control of his temper." The record further shows that there were multiple instances before and after the comments at issue wherein the judge had cause to instruct complainant not to interrupt the court, opposing counsel, or witnesses, to direct him to calm down, and warn him against being disrespectful to the court.

- Judge's demeanor during the hearings

Regarding the judge's allegedly "hostile and belligerent" demeanor, the audio-recordings of the hearings demonstrate that the judge occasionally displayed impatience, exasperation, and anger. While Canon 3A(d) of the Code of Conduct for United States Judges provides that a judge "should be patient, dignified, respectful, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity," the judge's occasional "displays of displeasure" were understandable given

that the audio-recordings also show that complainant was a combative pro se litigant who often raised his voice and repeatedly talked over the court, the prosecutor, and witnesses. Nothing in the record indicates that the judge's conduct was undignified, or that he was disrespectful towards complainant.

The U.S. Supreme Court 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. A judge's ordinary efforts at courtroom administration—even a stern and short-tempered judge's ordinary efforts at courtroom administration—remain immune." *Liteky v. U.S.*, 510 U.S. 540, 555-556 (1994).

- Judge displayed "personal enmity and deep-seated hatred"

Complainant submits that the judge's comments about the 2017 misconduct complaint were "retaliatory" and evinced "a personal enmity and deep-seated hatred for [me] because of [my] participation in the complaint process."

To the extent that this assertion might be construed as alleging that the judge should have recused himself sua sponte because complainant had filed judicial misconduct complaints against him, Ethics Advisory Opinion No. 103, Guide to Judiciary Policy, Vol. 28, Ch. 2 provides:

When a complaint is filed against a judge under the [Judicial Conduct and Disability Act of 1980], he or she is not required to recuse from a case involving the complainant unless, under the general principles of Canon 3C(1), the circumstances raise a reasonable question about the judge's impartiality. Such a reasonable question about the judge's impartiality arises if there is a realistic potential for the complaint to lead to adverse consequences for the judge.

The record shows that the 2017 complaint was dismissed before the February 2018 hearing, and complainant's petition for review was denied several months before the July 2018 hearing. As such, the judge might reasonably have concluded there was no "realistic potential" that he would be subject to adverse consequences based on

complainant's misconduct allegations, and therefore he need not recuse himself sua sponte.

To the extent that these allegations relate directly to the merits of the judge's decisions, including any implicit 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 assertions of bias, retaliation, and personal animus appear entirely derivative of the merits-related charges, but to the extent the allegations are separate, they are wholly unsupported, and are therefore subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(iii).

2. Conspiring with the government to deprive [me] of clearly established rights

Complainant asserts that "based on [the judge's] irrational assessment of the evidence, support of facially invalid and false documents, and his deliberate indifference to [my] federally protected rights, enough facts and evidence exist to show [the judge] conspired with the government in his decisions and rulings to deprive [me] of my rights." In support of this claim, complainant alleges that the judge permitted the government to prosecute him based on "an invalid arrest warrant," "a false and counterfeit search and seizure warrant," an "illegal state grand jury indictment," and "an uncertified felony judgment," and the judge also "prohibited a discussion of" a Special Agent's "false nexus report."

To the extent that these allegations relate directly to the merits of the judge's decisions or procedural rulings, they are subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(ii). To the extent that these allegations are repetitive of those raised and dismissed in prior complaints, they are subject to dismissal as frivolous under 28 U.S.C. § 352(b)(1)(A)(iii). In other respects, such conclusory assertions of conspiracy 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).

3. Delay indicative of improper motive and conspiracy

In December 2018, the judge vacated a January 2019 sentencing hearing date "to ensure the court has sufficient time to carefully consider and resolve" complainant's

motion for acquittal and motion for recusal. The judge ordered the government to file responses to the motions, and the government sought an extension of the briefing schedule to a period of one week after the trial transcripts were filed with the court because the transcripts were necessary to rebut claims made in complainant's motions. Citing the government's reasons and noting the federal government shutdown, the judge found that the continuance of the response deadline was well-taken and that complainant would not be legally prejudiced by the extension.

A week later, complainant filed a motion for leave to respond to the government's extension motion, complaining that "the government has been given extraordinary leeway by the court." In denying the motion, the judge noted that the court had been extremely accommodating of complainant's pro se status, the court-reporter was absent for a two-week period following her father's recent death and the transcripts were therefore not ready, and complainant suffered no legal prejudice as a result of the extension. Complainant then filed a motion asking the court to direct the court reporter "to transcribe the trial by a reasonable deadline." The judge denied the motion.

Complainant complains that the judge's "refus[al] to rule on [my] motion for acquittal for want of the transcripts" and denial of his motion to order the court report to prepare the transcripts by a reasonable deadline, meant that complainant "egregiously waited for over 7½ months to receive trial transcripts in [my] case. In light of [the judge's] conspiracy with the government, it is seemingly apparent that [the] court intentionally withheld the transcripts to delay ruling on [my] motion for acquittal."

A review of the record shows that before the transcripts were filed, complainant filed a third supplemental memorandum in support of his motion for acquittal. Two days after the final transcript was docketed, the government moved for leave to exceed the page limit in responding to the motion to acquit and supplemental memoranda. The judge granted the motion four weeks later, and the government filed its response the following day. Three weeks later, the judge entered a sixteen-page memorandum opinion and order denying complainant's motion for acquittal.

To the extent, if any, that complainant is complaining that the judge erroneously denied his motion to direct the court reporter "to transcribe the trial by a reasonable

deadline,” 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). In other respects, the allegation that the denial of that motion, a four-week delay in ruling on the government’s motion to exceed the page limit, and a three-week delay in entering an order on the motion for acquittal constitute evidence of improper motive and a conspiracy between the judge and the government is insufficient to raise an inference that misconduct has occurred, and the allegation is therefore subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(iii).

4. Judicial disability or impairment

Complainant asserts that the judge’s rulings “reflect that he is unable to interpret basic concepts that a judge of reasonable intelligence would understand.” In support of this claim, complainant points to a memorandum opinion entered after a pretrial conference during which complainant argued that his arrest was unlawful or not constitutionally valid because: (1) there was an invalid arrest warrant number; and (2) the arrest warrant was not sufficiently specific as it did not include any identifying information other than complainant’s name (i.e. it did not include his date of birth, race, height, or Social Security number). The judge held that because the arrest warrant included complainant’s full name and complainant did not dispute that he was the person named in the warrant, under Fifth Circuit precedent no other description to identify him was required under Federal Rule Criminal Procedure 4.

Complainant submits that the judge’s “conspicuously flawed” ruling “essentially endor[s] the evisceration of the Fourth Amendment’s particularity requirement” and “either . . . was issued in pure malice, or [the judge] is suffering from some underlying mental health issues and should be evaluated for the sake of protecting the public from unreasonable precedents in his court.”

Complainant’s disagreement with the judge’s ruling does not constitute sufficient evidence to support a finding of judicial disability, and the allegation is also subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(iii).

5. Other improper or erroneous rulings

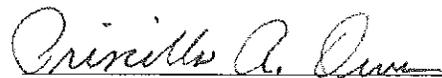
Complainant also complains that the judge: “presided over and facilitated a constitutionally flagrant and arbitrary judicial proceeding while showing a deliberate and callous indifference to the U.S. Constitution and [my] federally protected rights . . . overtly conspired with the government to wrongfully declare [me] incompetent to stand trial, and after failing to do so, permitted the government to prosecute [me] with an illegally procured ‘federal’ indictment”.

To the extent that these allegations are repetitive of those raised and dismissed in complainant’s prior judicial misconduct complaint matters, they subject to dismissal as frivolous under 28 U.S.C. § 352(b)(1)(A)(iii). To the extent that the allegations relate directly to the merits of the judge’s other decisions or procedural rulings, they are subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(ii). In other respects, such conclusory assertions of conspiracy 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).

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.

Complainant has previously been warned against filing a further merits-related, conclusory, frivolous, or repetitive complaint. Complainant’s repetitive allegations are an abuse of the judicial misconduct complaint process, and his right to file complaints is hereby SUSPENDED pursuant to Rule 10(a), Rules For Judicial-Conduct and Judicial-Disability Proceedings. Complainant may show cause, through a petition for review submitted pursuant to Rule 18, why his right to file further complaints should not be so limited.

An order dismissing the complaint is entered simultaneously herewith.



Priscilla R. Owen
Chief Judge

October 22, 2019

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FIFTH CIRCUIT
LYLE W. GAYCE, CLERK

BEFORE THE JUDICIAL COUNCIL
OF THE FIFTH CIRCUIT

No. 05-19-90153

Petition for Review by [REDACTED]
of the Final Order Filed October 23, 2019,
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 Priscilla R. Owen, filed October 23, 2019, dismissing the Complaint of [REDACTED] against [REDACTED] under the Judicial Improvements Act of 2002.

The Order is therefore **AFFIRMED IN ALL RESPECTS.**

Date

February 12, 2020

Jennifer W. Elrod

United States Circuit Judge

For the Judicial Council of the Fifth Circuit