

**JUDICIAL COUNCIL
FOR THE FIFTH CIRCUIT**

United States Court of Appeals
Fifth Circuit

FILED

May 7, 2020

Lyle W. Cayce
Clerk

Complaint Number: 05-20-90059

M E M O R A N D U M

Complainant, a pro se litigant, alleges that the subject United States Magistrate Judge has treated her with “disdain, hostility, bias, and discrimination” in her pending employment discrimination lawsuit.

Complainant complains that after noting her pro se status during a January 2019 telephone conference, the magistrate became “hostile” and “aggressively emphasized . . . that there were [local and federal] rules and deadlines.” She asserts further that the magistrate judge demonstrated “implicit bias against pro se litigants” by not also directing his remarks to defense counsel and by assuming that complainant was not familiar with the local and federal rules.

Complainant also claims that during a September 2019 telephone conference, the magistrate judge “chided” her “that he didn’t rule on motions during [telephone conferences], “stat[ed] I had put too much information in my motion to amend,” and “rebuke[d] me . . . on how my motion to amend should have been constructed. He was like a fire-breathing dragon . . . he had clear disdain for my pro se status.” In addition, she complains that instead of “chiding” defense counsel for providing an untimely, unsigned, and unverified answer to her discovery request, the magistrate judge told defense counsel “in a polite and dismissive [sic] way that the documents should have been verified.”

The telephone conferences were not recorded. To the extent that complainant complains about the magistrate judge’s demeanor, the U.S.

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. 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). In other respects, the conclusory assertions that the reported remarks constitute evidence of "disdain, hostility, bias, and discrimination" against complainant in particular, and bias against pro se litigants in general, are insufficient to support a finding that judicial misconduct has occurred.

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

Complainant submits that the magistrate judge's bias against her and favoritism towards the defendants is evident in numerous decisions. For example:

- During the September 2019 telephone conference, the magistrate judge denied her further discovery request "because Defendants would not have 30 days to respond";
- The "tactic" of asking complainant "to jump through hoops for justice"—i.e., asking her to submit additional information and then "chiding" her for providing too much information—"seems like nothing more than the antics people of color were subjected to during the days of the poll tax";
- The magistrate judge "who emphasized the rules and deadlines to this pro se plaintiff" should not have considered the defendants' request for a telephone conference to discuss a deadline for filing, or leave to file, a purportedly "severely delinquent" motion for summary judgment;

— After granting complainant’s motion for leave to file an amended complaint, the magistrate judge entered a case management order setting new deadlines for discovery and motions and resetting the trial date from February 2020 to October 2020 (reset a few days later to November 2020). Complainant submits that the magistrate judge’s decisions afforded the defendants another opportunity to file their purportedly “severely delinquent” motion for summary judgment and to “unnecessarily delay this trial . . . cast a very suspicious light on the amount of favor shown to defendants and a great level of bias against [me].”

To the extent that these allegations relate directly to the merits of decisions or procedural rulings, they are subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(ii). In other respects, any assertions of bias and racial 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) as “lacking sufficient evidence to raise an inference that misconduct has occurred.”

As further evidence of favoritism towards the defendants, complainant objects that whereas chambers responded to defense counsel’s email request for a telephone conference to discuss a deadline for filing, or leave to file, a motion for summary judgment, she received no response to her email advising that, of the two available dates offered by chambers in responding to defense counsel’s request, she would prefer January 8, 2020 at 2:00 p.m.

A review of the record shows a December 27 docket entry setting the telephone conference for January 8, 2020 at 2:00 p.m. The emails complainant submitted in support of her claim show that she was copied on all email correspondence between chambers and defense counsel, and further show that complainant did not send her email until December 30,

three days after the docket entry setting the telephone conference for her preferred date of January 8, 2020 at 2:00 p.m.

Complainant presents no evidence that she suffered any prejudice from chambers staff's lack of response to her email expressing preference for the date already set for the telephone conference, and the allegation is therefore subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(iii).

Complainant also alleges that the magistrate judge and defense counsel engaged in improper ex parte communication. In support of this claim, complainant reports that on January 7, 2020, she advised defense counsel she would file an appeal if, during the January 8 telephone conference, the magistrate judge did not address the defendants' "indiscretions", including a "false" claim that she had filed an untimely motion to extend discovery deadlines. Based on the magistrate judge's decision on January 7 to cancel the telephone conference and complainant's recall of a telephone conversation with chambers staff on January 8, she concludes defense counsel improperly communicated to the magistrate judge her intention to file an appeal if he failed to address the defendants' conduct during the scheduled telephone conference.

To the extent that these allegations relate directly to the merits of decisions or procedural rulings, they are subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(ii). In other respects, nothing in the reported telephone conversation with chambers staff supports complainant's claim, and such a conclusory assertion of ex parte communication 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).

In addition, complainant asserts that the magistrate judge intentionally delayed ruling for nine months on her motions for leave to file an amended complaint.

A review of the docket shows that the magistrate judge ruled on the motions five months after the defendants' final response was filed, and such a conclusory assertion of intentional delay 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).

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.

This is the second judicial misconduct complaint in which complainant has made conclusory allegations of bias, favoritism towards defendants, ex parte communication, and intentional delay. Complainant is WARNED that should she file a further merits-related, conclusory, frivolous, or repetitive 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 and Judicial-Disability Proceedings.

An order dismissing the complaint is entered simultaneously herewith.



Priscilla R. Owen
Chief United States Circuit Judge

May 4, 2020