United States Court of Appeals
Fifth Circuit
FILED
April 5, 2023
Lyle W. Cayce
Clerk

Judicial Council for the Fifth Circuit

Complaint Number: 05-22-90101

MEMORANDUM

Complainant, an attorney, alleges that the subject United States Bankruptcy Judge violated the Rules for Judicial-Conduct and Judicial-Disability Proceedings[1] and the Code of Conduct for United States Judges[2] in a bankruptcy matter and a related adversary proceeding.

Background

Complainant represented Ms. X in a divorce proceeding. While the divorce proceeding was pending, Ms. X, represented by complainant, filed a Chapter 13 bankruptcy petition. The subject judge imposed an automatic stay. Almost two years later, Ms. X substituted complainant with Attorney A in the bankruptcy proceeding.

Ms. X then filed an adversary proceeding seeking to recover certain payments made to complainant, turnover of estate property, damages for alleged willful violation of the automatic stay, and attorney's fees and pre- and post-judgment interest. Six months later, Ms. X filed the second adversary proceeding seeking a determination of non-dischargeability in complainant's personal Chapter 13 bankruptcy proceeding of funds which Ms. X alleged complainant obtained from her "through the use of false

[1] Guide to Judiciary Policy, Vol. 2, Pt. E, Ch. 3.
[2] Guide to Judiciary Policy, Vol. 2, Pt. A, Ch. 2.

pretenses, false representation, and actual fraud.[3] Complainant was represented by Attorney B.

The judge ultimately determined that over the course of the bankruptcy and adversary proceedings, complainant had intentionally misappropriated estate property, filed false statements in the bankruptcy court, and facilitated the filing of fraudulent criminal charges against Ms. X to conceal complainant's own misconduct. The judge referred complainant to the chief judge of the federal district court and to the State Bar for possible disciplinary proceedings, awarded punitive and compensatory damages and attorney's fees to Ms. X, and referred complainant to the United States Attorney's Office for investigation and potential prosecution of complainant for bankruptcy fraud and embezzlement.

Allegations

I. Violations of Canons 2B and 3C(1) and Rule 4(a)(1)(A): Failing to disqualify. Entering rulings and conducting proceedings to favor a friend. Using judicial office to obtain special treatment for a friend.

Canon 2B provides that a judge should not allow social or other relationships to influence judicial conduct or judgment. Canon 3C(1) provides that a judge "shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned." Rule 4(a)(1)(A) provides that cognizable misconduct includes "using the judge's office to obtain special treatment for friends or relatives."

Complainant complains that the judge failed to disqualify himself in proceedings in which his "close personal friend" Attorney A appeared as counsel. In support of her claim of a close relationship, complainant has submitted several undated photographs, two of which appear to show the judge participating in a community service project with members of Attorney

[3] Complainant makes no separate allegations of misconduct in the second adversary case, which appears to have been consolidated with the first adversary case.

A's law firm, and one that shows him at a social function with a group of people including two members of Attorney A's law firm.

The three photographs from one or two events over an unspecified period do not evidence a close personal relationship warranting disqualification under Canons 2B and 3C(1).

To the extent, if any, that this allegation relates directly to the merits of the judge's implicit decision not to disqualify himself sua sponte, it is subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(ii). In other respects, there is insufficient evidence 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).

Complainant further asserts that "because of" his (purportedly) close friendship with Attorney A, the judge entered rulings and otherwise conducted proceedings in a way to favor Ms. X and Attorney A. For example, complainant alleges that before any "trial on the merits" in the adversary proceeding, the judge "decided" that she was "guilty" of the allegations made against her by Ms. X. In support of this claim, complainant references remarks made by the judge during an April 2017 hearing in the bankruptcy proceeding after Attorney A's law partner informed the court that the parties might have reached a settlement. The judge expressed reservations about the fairness of any settlement agreement given that the adversary proceeding was still pending. He assured Ms. X that he wanted to know what happened and commented that, regardless of whether he allowed the parties to settle, if Ms. X's allegations against complainant were true then the resolution of disciplinary issues was his province alone.

It appears that the judge took great care not to express any opinion as to complainant's "guilt" and, instead, sought to verify that Ms. X did not feel pressured into the settlement and to reassure her that the court intended to examine closely the facts surrounding complainant's conduct.

Complainant further complains that at an August 2017 hearing in the adversary proceeding, the judge "refused to approve" the parties' settlement because Attorney A "would not have been adequately compensated." A review of record indicates that during a July 2017 hearing, the judge advised the parties that he would not approve a settlement without first making sure that both Ms. X and complainant had an opportunity to speak to the fairness of the agreement. During the discussion of the terms of the settlement agreement at the August 2017 hearing, the judge again expressed his intention to ensure that the agreement was fair. As to Attorney A's fees, the judge asked whether the agreement addressed Attorney A's fees and costs, and Attorney B replied that they were covered by a court-approved contingency fee agreement.

Contrary to complainant's claim, it is clear from the record that the judge's primary concern was a fair outcome for Ms. X, not whether Attorney A would receive adequate compensation.

Complainant also contends that the judge's close friendship with Attorney A resulted in his awarding additional fees not provided for in the court-approved contingency agreement. However, a review of the record indicates that complainant has misrepresented the basis on which the additional fees were requested and approved. The judge awarded Ms. X fees incurred in the adversary and criminal proceedings as part of sanctions imposed against complainant for what he found to be severe misconduct. Attorney A filed a fees and costs statement for $38,437.74 and complainant did not file any objections. In the instant complaint, complainant presents no evidence that the fees and costs outlined by Attorney A were unwarranted.

In addition, complainant protests that the judge failed to sanction Attorney A for violating the court's instruction not to discuss the case with Ms. X during a recess on the last day of trial in the adversary case, and erroneously and improperly denied Attorney B's motion to dismiss the case for "witness tampering." She further submits that the judge "assisted" Attorney A "throughout [that] entire proceeding" by rephrasing a question

asked by Attorney A, advising Attorney B to be more specific in his questioning, pointing out when Attorney B misquoted earlier testimony by Ms. X, and overruling an objection by Attorney A.

Based on Ms. X's trial testimony, complainant complains that the judge improperly "told [Ms. X] that she did not owe me . . . the $2675 I had paid her." It is unclear from Ms. X's testimony when the judge purportedly made the statement at issue, and complainant provides no further information. Regardless, complainant does not explain why it would have been improper for the judge to advise Ms. X that she did not personally owe the $2,675 to complainant given that it belonged to the bankruptcy estate and the distribution of those monies would, ultimately, be determined by the court.

Complainant also complains that after Ms. X deposited the $2,675 into the Registry of the Court, the judge improperly granted her "motion to withdraw the funds."

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 prejudice, bias, and improper motive 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."

Finally, complainant claims that the judge used "his influence" to get Attorney A, his "mentee," appointed as a Subchapter V Trustee. She presents no evidence in support of this allegation. However, even if the judge did support Attorney A's application for a trustee position, Advisory Opinion No. 73 specifically addresses judges providing letters of recommendation, and states that when a judge is personally aware of facts or circumstances regarding an applicant's suitability for a position, the judge may

communicate such knowledge to those making the hiring decision.[4] PACER lists Attorney A as counsel in forty-four matters assigned to the judge's docket prior to Attorney A's appointment as a Subchapter V Trustee, providing ample opportunity to develop an opinion of Attorney A's suitability for the trustee position.

The conclusory assertion that the judge used his judicial office to obtain special treatment for Attorney A in applying for a trustee position is 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."

II. Violation of Canon 3A(6): While the adversary proceeding was pending, it was "discussed and used for teaching purposes" in an "evidence class" taught by the judge and attended by Attorney A. Students in the class attended the trial.

Complainant reports that the judge conducts an "evidence class" that is "open to members of the bankruptcy bar" and, based on information from unnamed "colleagues, she believes that the adversary case was "discussed for teaching purposes all while [Attorney A], my opposing counsel in the matter, was attending the evidence class." Complainant states that Attorney B informed her that other students from the class were present "in the back of the courtroom" during the trial. She does not specify which hearing(s) the students attended, and she identifies only two students who were present, i.e., Attorney A's law partners, who would already be familiar with the case.

According to an online interview, the judge meets for an hour once a week with young attorneys to talk about how to be better lawyers and about legal problems and issues they are facing. Canon 3(A)(6) provides that a judge should not make public comment on the merits of a matter pending in any court, but the prohibition on public comment on the merits does not extend to scholarly presentations made for purposes of legal education.

[4] Guide to Judiciary Policy, Vol. 2B, Ch. 2, § 220, pp. 108-109.

Complainant states that the adversary proceedings was "discussed and used for teaching purposes," and she does not explain why it would be improper for students of the class to attend a public court hearing. This aspect of the complaint is therefore subject to dismissal pursuant to 28 U.S.C. § 352(b)(1)(A)(iii) as "lacking sufficient evidence to raise an inference that misconduct has occurred."

III. Violation of Canon 2B: Use of judicial office to advance the private interests of Ms. X.

Canon 2B provides that a judge should not lend the prestige of office to advance the private interests of others. Complainant complains that on the last day of trial in the adversary proceeding, the judge improperly "directed [Attorney A] to draft an Order requesting that the [county district attorney's office] dismiss their case against [Ms. X]." It appears that complainant is alleging that the judge was lending the prestige of his office to advance the private interests of Ms. X.

The judge did not direct Attorney A to draft an order requesting that the district attorney dismiss charges against Ms. X. A review of the record shows that complainant has failed to acknowledge the context surrounding the judge's direction to Attorney A. During an August 2017 hearing, Attorney B advised the court that, as part of the settlement agreement, complainant agreed to file an affidavit of non-prosecution and to contact the county district attorney's office "to get them to dismiss the [criminal] case." Attorney A and Attorney B agreed that it would be very beneficial for the parties—including complainant—if the criminal case was dismissed before any evidentiary hearing was held on the settlement agreement.

At the December 2017 trial proceeding, the judge asked Attorney B if complainant had filed the affidavit or taken any other action to contact the county district attorney. Attorney B said he could not provide the court with anything "in writing" but complainant had told him she had "reached out" to the district attorney, and Attorney B and/or complainant had notified

Attorney A that complainant was "willing to make herself available to help Ms. X." The judge expressed frustration with complainant's inaction.

At the conclusion of the hearing, the judge made two preliminary findings: that complainant had no legal or equitable interest in the $10,000 that was the subject of the county criminal proceeding, and that she had filed a false criminal complaint as a defensive mechanism to obtain an advantage in a civil dispute. The judge directed Attorney A to prepare a draft ruling as to the preliminary findings, and to provide a copy of the signed order to the county district attorney. The judge acknowledged that he had no authority over the county district attorney's office but stated that he hoped that office would read his findings and do "the right thing." The final order included a statement added by the judge, requesting that the county district attorney consider the court's findings in exercising its discretion to proceed with the pending criminal case.

It appears that complainant's allegation is not aimed at the judge's directing Attorney A to draft the order, but at his directing Attorney A to provide a copy of the final order to the county district attorney. To the extent that the explicit request in the order might be interpreted as the judge lending the prestige of judicial office to advance the private interests of Ms. X, it does not rise to the level of misconduct meriting disciplinary action. Even without the judge's direction, Attorney A would have been free to provide a copy of the order to the district attorney on his own.

The allegation is 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."

IV. Violations of Rule 4(a)(1)(C) and Canon 3A(4): Permitting improper ex parte communication between Attorney A and chambers staff.

Rule 4(a)(1)(C) states that cognizable misconduct includes "engaging in improper ex parte communication with parties or counsel for one side in a case." Canon 3A(4) provides that "a judge should not initiate, permit, or

consider ex parte communications or consider other communications concerning a pending or impending matter that are made outside the presence of the parties of their lawyers." The Commentary to Canon 3A(4) opines that "a judge should make reasonable efforts to ensure that law clerks and other court personnel comply with this provision."

Complainant states that due to his close friendship with the judge, Attorney A violated the judge's published Court Procedures without fear of repercussions. In support of this claim, complainant recounts that the August 2017 settlement conference concluded "after 5pm, but [Attorney A] was able to reach [the judge's] Court Clerk on his cell phone to let him know we had reached a settlement." She submits that this telephone call between Attorney A and the case manager violated Procedure 1(b) which strictly prohibits ex parte communication with [the judge] about pending cases.

Complainant appears to imply that the judge violated Canon 3A(4) by failing "to make reasonable efforts to ensure" that his case manager (and Attorney A) complied with Procedure 1(b). However, the procedure applicable to settlements which explicitly instructs parties to "immediately" notify the court's case manager if a matter settles, and the document lists the case manager's email address and his office telephone and cell phone numbers. As complainant admits in an unfiled Declaration attached as an exhibit to the instant complaint, Attorney A contacted the case manager "to provide an update on the outcome of the mediation and to request that the [scheduled trial date] be changed to a status conference."

The allegation that the judge permitted his case manager and Attorney A to engage in improper ex parte communication is subject to dismissal as frivolous under 28 U.S.C. § 352(b)(1)(A)(iii).

V. Violations of Rule 4(a)(2)(B): Treating complainant in a demonstrably egregious and hostile manner.

Rule 4(a)(2)(B) states that cognizable misconduct includes "treating litigants, attorneys, judicial employees, or others in a demonstrably egregious

and hostile manner." Complainant asserts that the judge violated Rule 4(a)(2)(B) by "allowing" Attorney A to file "an illegal garnishment action" against her,[5] and by awarding "38K" in attorney's fees as part of sanctions imposed against her.

To the extent that the allegation relates directly to the merits of decisions or procedural rulings, it is subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(ii). In other respects, any assertion of improper motive appears entirely derivative of the merits-related charges, but to the extent the allegation is separate, it is wholly unsupported, and is 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."

Complainant further alleges that the judge treated her in a demonstrably egregious and hostile manner by issuing a "scathing" 26-page Opinion in which he unwarrantedly and maliciously "attacked" her reputation by mischaracterizing and manipulating trial testimony "to frame a narrative of guilt on my part," including irrelevant "information about my personal bankruptcy filings," and referring complainant for possible attorney disciplinary proceedings and federal criminal prosecution.

To the extent that this aspect of the complaint relates directly to the merits of the judge's decision, it is subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(ii).

To the extent that complainant asserts that the published decision constituted an unwarranted prejudicial and public "attack" on her professional reputation, the Supreme Court of the United States has held that "[t]he judge who presides at a trial may, upon completion of the evidence, be exceedingly ill disposed towards [a party] … 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 …." *Liteky v. United States*, 510 U.S. 540, 551 (1994). *See also*

[5] This decision was reviewed and upheld on appeal in the district court.

Judicial Conference Committee on Codes of Conduct, Advisory Opinion 66, June 2009 ("Opinions formed by a judge on the basis of facts introduced or events occurring in the course of current or prior proceedings ordinarily do not constitute a basis to show bias or partiality.") This allegation is 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."

In other respects, complainant's protestation that the judge erroneously and improperly referred her for possible attorney disciplinary proceedings and criminal prosecution, Canon 3B(6) provides that a 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(6) provides that "[a]ppropriate action may include … reporting the conduct to the appropriate authorities …." Given that the 26-page Opinion included a detailed explanation as to why the judge concluded there was reliable evidence indicating that complainant's conduct towards her client and the bankruptcy court violated the rules of professional conduct and federal law, there appears to have been ample basis for his decision that it was appropriate to refer complainant for possible disciplinary proceedings and criminal prosecution. This allegation is 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."

Without providing any support for the claim, complainant states that she "strongly believes" that after the adversary proceeding concluded, the judge continued to "torment" and "retaliate against" her by being "involved and/or aware of" someone contacting her employer to try to get her teaching contract terminated.

Such a vague insinuation does not provide the kind of objectively verifiable proof necessary to raise an inference that misconduct has occurred and is therefore subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(iii).

VI. Violation of Rule 4(a)(4): Retaliation for reporting misconduct.

Rule 4(a)(4) provides that "cognizable misconduct includes retaliating against complainants … for participating in this complaint process." Complainant states that she "fears" that the judge will retaliate against her "in criminal court for the very filing of this complaint."

Such a speculative accusation does not provide the kind of objectively verifiable proof necessary to raise an inference that misconduct has occurred

VII. Violation of Rule 4(a)(3): Intentional discrimination.

Rule 4(a)(3) provides that cognizable misconduct includes "intentional discrimination on the basis of race, color, sex, gender, gender identity, pregnancy, sexual orientation, religion, national origin, age, or disability."

Complainant states that she is "a female, African-American attorney in a field which is dominated by White men" and she has "often felt powerless against the microaggressions, the systemic racism and the disparate treatment that I have experienced." She complains that the judge discriminated against her by failing to afford her the same treatment that he would have given to "any other member of the bankruptcy bar," and this misconduct "is just another example of racial disparity in our justice system and inappropriate use of power and privilege."

The sole example of "disparate treatment" complainant cites is the judge's decision not to sanction Attorney A for his non-compliance with the court's instructions during the December 2017 proceeding. However, the judge's finding that Attorney A failed to comply with a single court instruction is markedly different from his finding that complainant engaged in extensive misconduct, and the allegation is 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."

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.

Extensive research and record review were required to evaluate complainant's copious unsupported allegations. As an attorney, complainant should know "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). The instant complaint falls well short of these standards.

An order dismissing the complaint is entered simultaneously herewith.

/s/ *Priscilla Richman*
Priscilla Richman
Chief United States Circuit Judge

April 3, 2023

United States Court of Appeals
Fifth Circuit
FILED
November 30, 2023
Lyle W. Cayce
Clerk

Judicial Council for the Fifth Circuit

Complaint Number: 05-22-90101

MEMORANDUM

Complainant, an attorney, filed a complaint alleging misconduct by the subject United States Bankruptcy Judge in two proceedings.

In an order entered on April 5, 2023, complainant's allegations were dismissed under 28 U.S.C. §§ 352(b)(1)(A)(ii) and (iii) as merits-related, conclusory, and frivolous. Complainant filed a petition for review in which she submitted that the dismissal order did not adequately address and/or mischaracterized certain allegations. The Clerk construed the petition as a request for reconsideration and transmitted it to me for consideration.

Complainant's request for reconsideration is DENIED AS MOOT. The Judicial Improvements Act of 2002 (the "Act") defines "judge" as "a circuit judge, district judge, bankruptcy judge, or magistrate judge." 28 U.S.C. § 351(d)(1). Because the judge has resigned from office, he no longer falls within the scope of persons who are subject to the disciplinary procedures of the Act.

An order concluding the complaint pursuant to 28 U.S.C. § 352(b)(2) is entered simultaneously herewith.

Priscilla Richman
Chief United States Circuit Judge

November 17, 2023