

16-90069-jm
August 15, 2016
Chief Judge

**JUDICIAL COUNCIL OF THE
SECOND CIRCUIT**

-----X

In re
CHARGE OF JUDICIAL MISCONDUCT

Docket No. 16-90069-jm

-----X

ROBERT A. KATZMANN, *Chief Judge*:

On June 15 and July 11, 2016, the Complainant filed a complaint and a supplemental complaint with the Clerk’s Office of the United States Court of Appeals for the Second Circuit pursuant to the Judicial Conduct and Disability Act of 1980, 28 U.S.C. §§ 351-364 (the “Act”), and the Rules for Judicial-Conduct and Judicial-Disability Proceedings, 249 F.R.D. 662 (U.S. Jud. Conf. 2008) (the “Rules”), charging a district judge of this Circuit (the “Judge”) with misconduct.

BACKGROUND

The Complainant is a defendant in a criminal prosecution that commenced in July 2015. The case is assigned to the Judge. The Complainant has had two attorneys, both appointed under the Criminal Justice Act. Since late 2015, however, the Complainant has filed numerous pro se motions and letters directly

with the district court. In October 2015, the Judge warned the Complainant not to file pro se letters with the court because they constituted improper ex parte communications. In December 2015, the Judge rejected a pro se motion to dismiss, reminding the Complainant that represented parties had no right to file pro se motions. In April 2016, the Judge declined to rule on the Complainant's pro se request for immediate release, finding the letter to be an improper ex parte communication and reminding the Complainant that any communications must be served on the Government and should be filed by counsel.

In May 2016, the Judge held a hearing to address the Complainant's issues with his representation. The Judge first addressed the Complainant's pro se communications with the court:

I'm not your pen pal. I have told you in about four or five orders that I have issued to stop writing me directly. That is illegal conversations with the Court; it's called ex-parte communications. It's the last time I'm going to tell you. There are occasions where I have simply sealed up what you sent to me and sent you back an order telling you to stop. I'm not going to do that anymore. You send me something, it's going on the docket, the government is going to get it, public is going to get it, everybody's going to get it. You want to talk to me, it's got to be in the open and on the public record if you're going to write to me in that regard.

I'm advising you that it's against your interest to do that but you want to keep it up despite my orders, you go right ahead and keep it up and then you suffer the consequences. Do you understand?

The Complainant replied, "Understood."

The Judge then allowed the Complainant to address the court. The Complainant alleged constitutional violations and requested appointment of a referee to look into due process issues. When the Complainant concluded, the Judge made three statements: "let's talk about what the rules are and what they aren't," "I expect you to hear me," and if "you don't comply with the rules, then I'm going to deal with you." The Judge then confirmed that the Complainant was satisfied with his current counsel and reminded him that he had a right to consult with his attorney and be apprised of the proceedings, but that his attorney had a duty not to file frivolous motions.

The Complainant then asked the Judge if he was "a naturally detached judge" and said that he felt the Judge had a "personal interest" in the case because the Judge signed the wiretap warrants. The Judge responded, "Are you done? Or I'm going to finish you." The Judge explained that they were not talking about the warrants, but about the role of counsel and the fact that the

Complainant did not have the right to choose who was appointed to represent him. The Judge rejected any pending pro se filings, but told counsel that she could bring further motions if warranted after consultation with the Complainant. The Judge declined to hear further from the Complainant, who then said, "I'm going to ask to bring it to the judicial committee right now."

In July 2016, the Judge struck the Complainant's pro se letter for failure to provide proof of service, noting the earlier warnings about pro se filings and informing the Complainant that he could ask his attorney to file any appropriate correspondence. The case remains pending before the district court.

The misconduct complaint raises two issues. First, it alleges that the Judge threatened the Complainant by saying "he would take care of" the Complainant, thereby causing him to fear for himself and his family. Second, it alleges bias based on the Judge's denial of a motion to suppress wiretap authorizations.

DISCUSSION

The complaint is dismissed.

The complaint first alleges that the Judge threatened the Complainant during the hearing. While a Judge should be "patient, dignified, respectful, and courteous" to litigants and lawyers, Code of Conduct for United States Judges

Canon 3(A)(3), and while misconduct can include “treating litigants or attorneys in a demonstrably egregious and hostile manner,” Rule 3(h)(1)(D), the behavior at issue must “transcend the expected rough-and-tumble of litigation” in order to “move into the sphere of cognizable misconduct” under the Act, *Implementation of the Judicial Conduct and Disability Act of 1980, A Report to the Chief Justice*, 239 F.R.D. 116, 239 (September 2006); *cf. Liteky v. United States*, 510 U.S. 540, 555-56 (1994) (holding that “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” do not establish bias or partiality).

The hearing transcript reveals the Judge’s frustration with the Complainant’s refusal to follow repeated instruction regarding pro se filings. While the record does not reflect the precise alleged threat identified by the Complainant, it does reveal the statements, “I’m going to deal with you” and “I’m going to finish you.” Read out of context, these statements could be perceived as threats. However, viewed in light of the hearing as a whole, the Judge was pointedly trying to ensure that the Complainant would comply with prior instructions and stop discussing issues extraneous to the hearing’s purpose.

Accordingly, these statements do not “transcend the expected rough-and-tumble of litigation” in order to “move into the sphere of cognizable misconduct” under the Act.

The gravamen of the complaint’s second allegation concerning the Judge’s ruling on wiretap authorizations is that the Judge should have recused from the criminal proceedings. However, the rules and guidance implementing the Act make clear that allegations concerning a failure to recuse are not the proper subject of a judicial misconduct complaint, and should be dismissed as “directly related to the merits of a decision or procedural ruling,” absent a supported allegation of improper motive or purpose. 28 U.S.C. § 352(b)(1)(A)(ii); Rule 3(h)(3)(A) (“An allegation that calls into question the correctness of a judge’s ruling, including a failure to recuse, without more, is merits-related.”); 11(c)(1)(B). Purely merits-related allegations are excluded from the Act to “preserve[] the independence of judges in the exercise of judicial power by ensuring that the complaint procedure is not used to collaterally attack the substance of a judge’s ruling.” Rule 3 cmt. Such challenges can be pursued, to the extent the law allows, only through normal appellate procedures.

The allegation of bias based on the Judge’s ruling on the wiretap motion

appears to be merely a collateral attack on the substance of the Judge's decision not to recuse—i.e., that the Judge should have recused because of this bias and erred in failing to do so. But to the extent the complaint alleges that the Judge's prior decision on the wiretap motion somehow created an improper motive for the Judge's decision not to recuse from the criminal proceedings, the allegation is speculative and wholly unsupported, and is therefore dismissed as "lacking sufficient evidence to raise an inference that misconduct has occurred." 28

U.S.C. § 352(b)(1)(A)(iii); Rule 11(c)(1)(D). A decision for or against a party does not evidence bias.

The Clerk is directed to transmit copies of this order to the Complainant and to the Judge.