

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U. S. COURT OF APPEALS
FILED

DEC 20 2016

FIFTH CIRCUIT
LYLE W. GAYCE, CLERK

Complaint Number: 05-16-90147

MEMORANDUM

Complainant, an African-American *pro se* litigant, complains that the subject United States District Judge engaged in “discriminative and unfair” conduct towards African-Americans in two hearings. For example, complainant claims that during a hearing prior to the commencement of a pre-motion conference in his own civil case, he witnessed the judge tell “a black attorney ... that he had not pled effectively,” and “asked the lawyer questions that the average attorney could not proficiently answer on the spot. He made the attorney appear incompetent.” He surmises that the judge “has a problem with race” because he did not “make white attorneys look incompetent.”

A review of the audio-recordings of all hearings held on the morning of complainant’s pre-motion conference, shows that the judge was unfailingly respectful and kind to everyone who appeared before him. Such a conclusory allegation of racial animus 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 recounts that at the commencement of his own pre-motion conference, the judge “immediately with haste brought up that I was allegedly declared a vexatious litigant in a federal court ... I went on to express to [the judge] that there is no such thing in [the state’s] federal courts.” The judge then asked complainant if he recalled another federal district court declaring he was a vexatious litigant, to which complainant

responded that the order simply said he must seek permission before proceeding *in forma pauperis* in that court.¹ The judge confirmed that he had read the order.

Complainant submits that given that the judge read the other court's order, and given that he knew that complainant was not proceeding *in forma pauperis* in the instant lawsuit, the judge's inquiry demonstrates that he was "conspiring with the defense or had communicated with some other persons about me before I came before him. This was apparent from the judge's behavior and it showed immediate discrimination, biased [sic], and prejudice towards me. Without question [the judge] knew what the order said, but he was trying to use the order against me, to harm me and my claim against [the defendants]."

Complainant further protests that the judge "told" defense counsel to file a Rule 12(b)(6) motion, and "appear[ed] to be trying to sabotage my case ... saying to the defense, file your 12b motions and I will grant them."

A review of the docket shows that in motions filed prior to the pre-motion conference, both defendants advised the court and complainant that they would be filing Rule 12(b)(6) motions. A review of the audio-recording shows that the judge did not solicit the filing of Rule 12(b)(6) motions by the defendants and, indeed, he explicitly and repeatedly encouraged the parties to attempt to settle the matter.

Such conclusory assertions of bias, conspiracy, and *ex parte* communication are insufficient to support a finding of judicial misconduct, and are therefore also subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(iii).

Complainant also complains that the judge "set a hearing on the matter, though he knows that I have a medical issue, he would not allow me the option of participating by telephone even though he allowed white attorneys to do so for a schedule [sic] conference." The undersigned notes that it appears from the audio-recording that both defense counsel appeared in person at the pre-motion conference (the only hearing held

¹ The undersigned notes that in an order entered in three civil proceedings in 2012, complainant was explicitly declared a vexatious litigant, and is required to seek permission before proceeding *in forma pauperis* with any civil action in that federal district court.

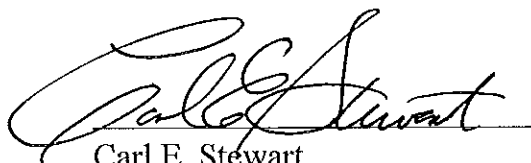
in the case), and therefore complainant seems to be referring to “white attorneys” who appeared by telephone in other cases that morning.

To the extent that these allegations relate directly to the merits of the judge’s decision not to permit complainant to appear by telephone at a hearing, they are subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(ii). In other respects, such conclusory assertions of discriminatory treatment 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.

This is complainant’s third judicial misconduct complaint in less than six months, and his fourth judicial misconduct complaint in less than four years. Complainant is warned that should he file a further merits-related, conclusory or frivolous complaint, his right to file complaints may be suspended and, unless he is able to show cause why he 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.

An order dismissing the complaint is entered simultaneously herewith.


Carl E. Stewart
Chief Judge

September 30, 2016