

and her client to show cause why they should not be found to have violated Rule 11. At the conclusion of the show cause hearing, the district judge reserved judgment on whether there was a Rule 11 violation, stated that a written order would follow, and warned complainant against making any future filings for an improper purpose or that would unnecessarily multiply the proceedings.

Complainant subsequently filed this judicial complaint and attached the transcript of the show cause hearing and the district court docket report. Complainant alleges that the district judge has violated the Code of Conduct for United States Judges by demonstrating clear bias in favor of defendants and by exhibiting hostility, anger, and disrespect towards complainant.

Under 28 U.S.C. § 352(b)(1)(A)(ii), judicial misconduct claims that are "[d]irectly related to the merits of a decision or procedural ruling" are not subject to review under the Judicial Conduct and Disability Act. The Act bars misconduct review of merits-related claims because such review would interfere with both judicial independence and the effective and expeditious operation of the courts. "Judges should render decisions according to their conscientiously held views of prevailing law without fear of provoking a misconduct investigation." In re Memorandum of Decision of Judicial

Conference Committee on Judicial Conduct and Disability, 517 F.3d 558, 561 (U.S. Jud. Conf. 2008).

The merits-related bar does not prevent review of a claim that the judge's decision was motivated by racial or ethnic bias or other improper motive, but the claim must be supported by sufficient evidence to raise an inference that misconduct has occurred and cannot be based on speculation. See 28 U.S.C. § 352(b)(1)(A)(iii); Rule 3(h)(3)(A), Rules for Judicial-Conduct and Judicial-Disability Proceedings; In re Doe, 2 F.3d 308 (8th Cir. 1993). Dissatisfaction or disagreement with the judge's rulings is not evidence of improper bias. See In re Doe, 640 F.3d 869, 873 (8th Cir. 2011).

The merits-related bar also does not prevent review of a claim that a judge has treated litigants, attorneys, or others in a demonstrably egregious and hostile manner. See Rule 3(h)(1)(D), Rules for Judicial-Conduct and Judicial-Disability Proceedings. However, the judge's choice of language in court proceedings and rulings is presumptively merits-related and excluded from coverage if the language is relevant to the case at hand. See Commentary on Rule 3, Rules for Judicial-Conduct and Judicial-Disability Proceedings, at 6; Petition of Lauer, 788 F.2d 135, 138 (8th Cir. 1985) ("A trial judge should not fear that because of comments he or she makes from the bench, which in good faith the judge feels are related to the

proceeding before the court, he or she ultimately may be subject to a disciplinary sanction by the Judicial Council.").

In support of her allegations of bias and hostility, complainant points to the judge's attacks on her character and ability during the hearing, which she claims exceeded the limited scope of the show cause notice and unfairly damaged her reputation. Among the comments objected to by complainant were the following:

- "It is hard for me to think of - the only innocent explanation I can think of is, incompetence by the lawyer and irrational reliance by the client." (Tr. at 27).
- "The only thing that I noted in the Rule 11 show cause, of course, was the one legal argument, because that seemed to me to be the simplist [sic] thing to focus on and because I had hoped that it would be a way to cause everybody to step back and just by its issuance, one of the things that I thought might happen was, that it would deter some of the gamesmanship I was starting to see on the part of the Plaintiff." (Tr. at 87).
- "If it were a criminal case, I would be talking to the defendant about ineffective assistance of counsel, and whether, you know, if counsel were appointed, I would be changing lawyers, but of course there is no right to effective assistance of counsel in civil cases." (Tr. at 88).
- "If there are any further motions, briefings, or other actions taken in this case by the Plaintiff or by Plaintiff's counsel, you will be back in front of me. I don't know if it will be Rule 11. I don't know if it will be the Court's inherent authority." (Tr. at 91).

Under Rule 11(b), Federal Rules of Civil Procedure, an attorney certifies that papers filed with the court are "not

being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation," and that "claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law." Fed. R. Civ. P. 11(b)(1) & (2). Under Rule 11(c)(3), a court "may order an attorney, party, or law firm to show cause why conduct specifically described in the order has not violated Rule 11(b)."

The purpose of the show cause hearing conducted by the judge was to hear evidence and argument on whether complainant had an improper purpose in filing the motion to exclude testimony or whether the arguments presented in the motion were unwarranted under existing law or under any nonfrivolous argument for the extension of existing law. The transcript of the hearing reflects that the judge appropriately focused on these issues and that her language, including the comments objected to by complainant, was relevant to the case at hand and neither abusive nor outside the scope of hearing. Complainant may disagree with the judge's view of her competence and motivation, but the transcript refutes complainant's assertions that the judge exhibited hostility or anger, that she treated complainant with disrespect, or that she went outside the scope of the proceeding.

Complainant also contends that the judge's warning that complainant should not file any further motions, briefings, or other actions in the case prevents her from pursuing her client's legal claims. The transcript of the hearing fails to support this contention, however, since the judge prefaced her warning with the statement that she wanted to "deal with the merits of this litigation," to "hear from the parties about the underlying dispute in this case," and to "put aside these distractions" that have cost everybody money. (Tr. at 91). The judge again emphasized at the close of the hearing that she did not want to see "any evidence of multiplying the proceedings or improper purpose or harassment or increasing expenses for no real reason." (Tr. at 93). The transcript clearly reflects that the judge's warning was directed at improper filings in violation of Rule 11, not at proper litigation of the case.

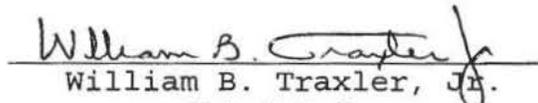
In further support of her bias allegation, complainant contends that the judge has demonstrated bias in favor of defendants throughout the proceeding by routinely ruling in their favor, by relieving them of the need to file responses while shortening complainant's response periods, and by giving them legal advice. The record fails to show any bias on the part of the judge. The judge's ability to rule on a motion without requiring a response does not give rise to an inference of bias, nor does the ruling itself. Complainant may disagree with the judge's rulings, with the amount of time afforded her

to respond, or with the failure to require responses from the defendants, but her disagreement is not evidence of bias.

The record also fails to support complainant's allegation that the judge displayed bias in favor of the defendants by giving them legal advice in violation of the Code of Conduct. Complainant objects to the judge's comment that the defendants could file a motion for summary judgment if their arguments were as strong on the merits as they represented and to the judge's comment that a Rule 11 letter might be filed in response to a complaint filed by complainant in another jurisdiction. The comments made by the judge related to the matter before her and did not constitute legal advice in violation of the Code of Conduct or suggest bias in favor of defendants.

As complainant's allegations are merits related and fail to provide factual support for her misconduct claims, her judicial complaint must be dismissed pursuant to 28 U.S.C. § 352(b)(1)(A)(ii) & (iii).

IT IS SO ORDERED.



William B. Traxler, Jr.
Chief Judge