



the attorney-client relationship. The motion was granted, and new counsel was appointed.

Complainant subsequently filed a motion to replace her new attorney based on ineffective assistance. Following a hearing on this motion, the district judge found no grounds for ineffective assistance but granted counsel's alternate motion to withdraw based on a breakdown in the attorney-client relationship. New counsel was again appointed to represent complainant, and trial was scheduled to begin four months later.

A month before the scheduled trial, counsel notified the court that complainant wished to plead guilty, and a plea hearing was scheduled. On the date of hearing, counsel notified the court that complainant no longer wished to plead guilty, and the trial date was continued by two weeks.

One week before trial, complainant and all three of her appointed attorneys appeared before the district judge for a hearing pursuant to Missouri v. Frye, 132 S. Ct. 1399 (2012), to ensure that complainant had been fully informed of all plea offers. The plea negotiations and offer were placed on the record. A recess was taken for complainant to confer with counsel to confirm her understanding of and response to the final plea offer. The complainant thereafter confirmed her rejection of the plea agreement.

Complainant's four-day jury trial began a week later, and complainant testified on the last two days of trial. The judge conducted an inquiry prior to complainant's testimony to ensure that complainant understood that she was relinquishing her Fifth Amendment right to silence by testifying and subjecting herself to cross-examination, that she had received the advice of counsel on the issue, and that she wished to testify against advice of counsel. Again, a recess was taken to ensure that complainant had a full opportunity to confer with counsel on the question, and complainant confirmed, after returning to court, that she wished to testify.

The jury convicted complainant on 14 counts of her superseding indictment and found her not guilty on 6 counts. Three weeks prior to the scheduled sentencing date, retained counsel entered an appearance on behalf of complainant, and appointed counsel moved to withdraw from further representation. The motion to withdraw was heard four days prior to the scheduled sentencing. In light of appointed counsel's familiarity with the case, the district judge asked him to remain as standby counsel to assist retained counsel at sentencing, and a two-week continuance was granted for sentencing. Complainant filed this judicial complaint prior to sentencing, and the district judge continued the sentencing for an additional three months.

## II.

Complainant alleges in her judicial complaint that the district judge failed to comply with her ethical obligations to be "patient, dignified, respectful, and courteous to litigants," and to "accord to every person who has a legal interest in a proceeding, and that person's lawyer, the full right to be heard according to law." Canon 3A(3) & (4), Code of Conduct for United States Judges. Instead, complainant maintains that the judge:

- yelled at her;
- did not allow her to speak;
- treated her contemptuously;
- told her to stand up;
- told her to sit;
- cut her off while she was speaking;
- accused her of lying;
- asked her why she could not just agree;
- told her that her bond would be revoked if she were found guilty;
- made a gesture as if she were cutting someone's throat;
- commented, in a sarcastic manner, that the saga continues;
- opined that complainant would likely file a habeas corpus petition against retained counsel; and
- created an uncomfortable and hostile atmosphere that made complainant afraid to address the court.

The complaint stated that transcripts of the hearings in the case would establish the judge's misconduct.

Draft transcripts of the hearings were obtained for review, and copies were forwarded to complainant so that she could make

any additional statement in light of the transcripts. Complainant made the following points in her additional statement:

- Where the transcript reflects that the judge said "You made the motions so please speak up," the judge actually yelled, "You should have been ready, you made the motion." (March 12, 2015, transcript at 1).
- The transcript omits the judge's yelling at complainant that she was to stand when speaking. (March 12, 2015, transcript at 1).
- The transcript does not reflect that the judge was yelling when speaking to complainant. (March 12, 2015, transcript at 2-4).
- Where the transcript reflects that the judge said, "So you can be seated," the judge actually said, "Sit." (March 12, 2015, transcript at 4).
- Complainant's attempt to communicate the reasons for her dissatisfaction with counsel fell on deaf ears and was met with contempt. (March 12, 2015 transcript at 14).
- The transcript does not include the judge's statement, "call the probation officer to court now so I can look at her bond to see if it needs to be revoked." (March 12, 2015, transcript at 6).
- Where the transcript reflects that the judge said, "You need to stand up when you address the court," the judge, in fact, yelled "You stand when you address the court." (March 12, 2015 transcript at 7).
- Where the transcript reflects that the judge said, "You may be seated," she actually yelled, "Sit down." (March 12, 2015, transcript at 7).
- The transcript does not reflect the judge's statement, "Why can't you ever come and just agree with your attorney." (July 20, 2015, transcript at 18).
- The transcript does not reflect the judge's statement that complainant was always trying to do things the way she wanted. (July 20, 2015, transcript, at 27).
- Where the transcript reflects that the judge said that she would be subject to a revocation of her bond if convicted, the judge, in fact, said that her bond would be revoked if she were convicted. (July 20, 2015, transcript at 34).

- Where the transcript reflects that the judge said, "This is really," the judge actually said she did not believe complainant and called her a liar. (July 29, 2015, transcript at 13).
- When complainant tried to explain that her attorney had not advised her against testifying until that morning, the judge made a motion with her hand like cutting someone's throat and ordered her out of the courtroom to speak with her lawyer. (July 29, 2015, transcript at 138).
- The transcript does not reflect the judge's comment, "The saga continues," before she summarized the history of the case. (Oct. 26, 2015, transcript at 1).
- The judge predicted that complainant would file a habeas corpus petition and again referred to the case as a "strung-out saga." (Oct. 26, 2015, transcript at 7-8).
- The transcript does not reflect that the judge did not allow complainant to explain the issues she had with trial counsel. (Oct. 26, 2015, transcript at 7).

In conclusion, complainant submitted that the transcripts, in conjunction with her additional statement, established the judge's gross misconduct and bias.

### III.

The Judicial Conduct and Disability Act provides a means to review claims relating to a judge's conduct, including "treating litigants, attorneys, or others in a demonstrably egregious and hostile manner." Rule 3(h)(1)(D), Rules for Judicial-Conduct and Judicial-Disability Proceedings.

The Act does not permit review of a judge's decisions. The purpose of the Act is to further "the effective and expeditious administration of the business of the courts." 28 U.S.C.

§ 351(a). Using "a misconduct proceeding to obtain redress for—or even criticism of—the merits of a decision" would be entirely contrary to that purpose. In re Memorandum of Decision, 558 F.3d. 558, 561 (U.S. Jud. Conf. 2008). Allegations that are "[d]irectly related to the merits of a decision or procedural ruling," 28 U.S.C. § 352(b)(1)(A)(ii), cannot be reviewed except to the extent they allege that a judicial decision was "the result of an improper motive, e.g., a bribe, ex parte contact, racial or ethnic bias, or improper conduct in rendering a decision or ruling." Rule 3(h)(3)(A), Rules for Judicial-Conduct and Judicial-Disability Proceedings.

Claims of misconduct must be supported by "sufficient evidence to raise an inference that misconduct has occurred." 28 U.S.C. § 352(b)(1)(A)(iii). If "the only support for the allegation of bad acts or motive is the merits of the judge's ruling," the complaint must be dismissed. In re Doe, 640 F.3d 869, 873 (8th Cir. 2011). Likewise, a misconduct claim cannot be based solely on comments made by the judge that are directly related to the proceedings before the court.

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. Disenchanted litigants or other citizens should not be able to attempt to influence a federal judge about a judicial

decision through the threat of disciplinary sanction.

Petition of Lauer, 788 F.2d 135, 138 (8th Cir. 1985).

In determining what action to take on a judicial complaint, the chief judge may conduct a limited inquiry, including obtaining and reviewing transcripts and other relevant documents. See Rule 11(b), Rules for Judicial-Conduct and Judicial-Disability Proceedings. The complaint is subject to dismissal if a limited inquiry "demonstrates that the allegations in the complaint lack any factual foundation or are conclusively refuted by objective evidence." 28 U.S.C. § 352(b)(1)(B). The chief judge may not, however, "undertake to make findings of fact about any matter that is reasonably in dispute." 28 U.S.C. § 352(a)(2).

#### IV.

The transcribed record, considered in light of complainant's allegations and additional statement, fails to support complainant's claims of hostility, bias, and unfairness. Rather, the judge went to great lengths to ensure the fairness of the proceedings - appointing three different attorneys to represent complainant, ensuring that complainant was fully and accurately advised regarding the precise terms of the final plea offer, verifying that complainant had adequate opportunity to

confer with counsel regarding her decision to testify at trial, and continuing appointed counsel on standby status to assist complainant's newly retained counsel at sentencing. During the hearings, the judge appropriately solicited complainant's views and afforded her a full and fair opportunity to be heard. On this record, complainant's desire for more cordial proceedings at which she would be better able to present her positions fails to state a misconduct claim.

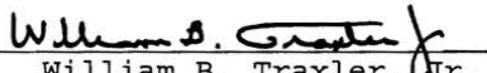
Complainant's objections to the accuracy of the transcripts also fail to give rise to an inference of misconduct. Complainant maintains that the court reporter left out of the transcripts the judge's inquiry about revoking complainant's bond, the judge's statement that complainant was always trying to do things her way, the judge's question why complainant could not just agree with her attorney, and the judge's comment that she believed complainant was lying. Assuming such statements were made, the comments were directly related to the proceedings before the court. Moreover, complainant remained on bond following the judge's inquiry, made her own informed decisions at each stage of the case, presented her disagreements with counsel, and consulted further with counsel in order to resolve their differing perceptions regarding the adequacy of prior consultation.

Complainant's claims that the judge ordered her to sit or stand, informed her that her bond would be revoked upon conviction, described her proceedings as a "saga," and commented on the potential filing of a habeas corpus petition are likewise objections to judicial comments that are directly related to the proceedings. The treatment afforded to complainant throughout these proceedings was fair and careful, not egregious and hostile.

Given the fair and balanced nature of the judge's words and actions, complainant's objections to the judge's tone of voice and facial expressions also fail to give rise to an inference of misconduct. Accepting, for purpose of discussion, complainant's allegation that the judge made a gesture like cutting someone's throat, the context suggests only that the judge did not need to hear more until complainant had consulted with counsel - not that the judge was signaling her hostility towards complainant.

Complainant's claims of misconduct being conclusively refuted by the record, this judicial complaint is dismissed pursuant to 28 U.S.C. § 352(b)(1)(B).

IT IS SO ORDERED.

  
William B. Traxler, Jr.  
Chief Judge