



judge gave him legal advice at the hearing and therefore should be disqualified from presiding over the case. He alleges that the judge is biased in favor of opposing counsel from the U.S. Attorney's Office and, in fact, has engaged in ex parte communication with the U.S. Attorney's Office in another case. Complainant asks that his case be reassigned to a judge who is impartial and does not participate in ex parte communications with the U.S. Attorney's Office.

Under 28 U.S.C. § 352(b)(1)(A)(ii), judicial misconduct claims that are "directly related to the merits of a decision or procedural ruling" are not subject to review under the Judicial Conduct and Disability Act. Language used by a judge in court proceedings and rulings that is relevant to the case at hand is presumptively merits-related and excluded from coverage under the Act. 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). 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.

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. "When the only support for the allegation of bad acts or motive is the merits of the judge's rulings," the complaint must be dismissed as merits related. In re Doe, 640 F.3d 869, 873 (8th Cir. 2011).

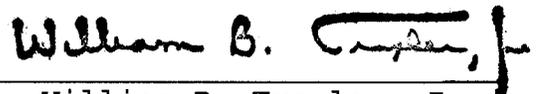
As evidence of improper bias on the part of the judge, complainant points to the judge's statements at the preliminary injunction hearing that complainant was not entitled to oral argument, that oral argument generally was not held on pro se motions, and that she scheduled the hearing to help focus the litigation - though it was entirely up to complainant how to proceed. These statements do not reflect any improper bias against complainant or pro se litigants. After setting out her reasons for denying preliminary injunctive relief, the judge encouraged complainant to focus his complaint on his strongest claims. The judge afforded complainant an opportunity to amend his complaint but did not act as his attorney or otherwise take any action warranting recusal from the case. The judge did not hear argument from either side, and her comments displayed no bias for or against either side.

In support of his allegation of ex parte contact, complainant references a late night phone call made by the U.S. Attorney to the judge in a prior, unrelated case to alert her to

the fact that information had been leaked in that case and would appear on the front page of the paper. The Code of Conduct permits non-substantive communication for emergency or administrative purposes. See Canon 3(A)(4)(b), Code of Conduct for United States Judges. The U.S. Attorney's call to the judge on this prior occasion did not constitute improper ex parte contact or give rise to an inference that the judge would engage in such contact with the U.S. Attorney's Office in the future or be biased in their favor.

Accordingly, this judicial complaint is dismissed pursuant to 28 U.S.C. § 352(b)(1)(A)(ii) & (iii) as directly related to the merits of the judge's rulings and as lacking evidence of misconduct.

IT IS SO ORDERED.

  
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William B. Traxler, Jr.  
Chief Judge