

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

In the Matter of a	*	
Judicial Complaint	*	No. 04-16-90085
Under 28 U.S.C. § 351	*	

MEMORANDUM AND ORDER

Complainant brings this judicial complaint against a federal district judge pursuant to the Judicial Conduct and Disability Act, 28 U.S.C. §§ 351-364. The complaint is before me for review pursuant to 28 U.S.C. § 352(a) to determine "(1) whether appropriate corrective action has been or can be taken without the necessity for a formal investigation; and (2) whether the facts stated in the complaint are either plainly untrue or are incapable of being established through investigation." 28 U.S.C. § 352(a). For the reasons stated below, the complaint is concluded in part based on corrective action and dismissed in part because the facts fail to support a claim of misconduct 28 U.S.C. § 352(b)(1)(B) & (b)(2).

I.

The subject judge presided over a criminal action filed against complainant in 2007 and a civil enforcement action filed by the Securities and Exchange Commission against complainant in the same year. Complainant pled guilty to mail fraud and was

sentenced to 292 months' imprisonment, supervised release and restitution. His sentence was affirmed on appeal. In the civil enforcement action, complainant consented to appointment of a receiver and to a disgorgement and sale of assets.

In 2016, complainant filed this judicial complaint in which he alleged that the subject judge attended an auction conducted by the receiver in the civil enforcement action. Complainant attached a 2007 entry from a local newspaper blog that reported the judge's purchase of cufflinks at the auction and speculated on whether the judge would wear them at the complainant's next hearing. The complaint further alleged that complainant's attorney had dinner with the subject judge the night before sentencing and told counsel that a 6-7 year sentence would be appropriate in the case. Finally, the complaint alleged that defense counsel and the judge are godfathers to each other's children, and that this relationship created an appearance of bias.

Inquiry was made of the judge regarding complainant's allegation that the judge's participation in the auction created an appearance of impropriety. Inquiry was also made of the judge and defense counsel regarding complainant's allegation that they engaged in ex parte discussion about the case the

night before sentencing and that their close relationship created an appearance of bias.¹

The judge responded as follows:

In July 2007 I attended the first day of a public auction conducted by the Receiver The auction resulted in approximately \$2.6 million being credited to the Receiver Estate. During the public auction I did bid on and buy a box of miscellaneous cufflinks. Although I try to keep current on all ethical rules and take the yearly ethics test prepared by the Administrative office, I was unaware of how [this provision] could be interpreted. Now that I have been made aware of this, my actions will not be repeated.

As for the second allegation, I never told [defense counsel] that a 6-7 year sentence would be appropriate. I have never discussed any sentence with him or any lawyer on an ex parte basis.

[Defense counsel's] late wife and my late wife were grade school friends. Many years ago, [defense counsel and his wife] asked my wife and me to be the godparents of their son We, in turn, asked [defense counsel and his wife] to be godparents of our daughter. . . . I have had little or no contact with [my godson] since he graduated from Medical School in 2002.

¹ The Act provides for inquiry of the complainant, the judge, and others who may have knowledge of the matter to determine whether the allegations lack any factual foundation or are conclusively refuted by objective evidence or whether appropriate corrective action has been or can be taken. See 28 U.S.C. § 352(a); Rule 11(b), Rules for Judicial-Conduct and Judicial-Disability Proceedings.

(No. 04-16-90085, Nov. 21, 2016, Letter from Subject Judge).

Defense counsel stated in his response that:

During the time-frame alleged, I cannot say that I did or did not have dinner with [the judge]. I doubt that I did but may have run into him at a restaurant and joined him and his new wife. I can say, however, that we NEVER discussed a case and certainly did not discuss sentencing in [complainant's] case.

(No. 04-16-90085, Oct. 18, 2016, Letter from Defense Counsel).

In reply, complainant stated he was willing to accept that he was misinformed about the alleged ex parte conversation between the judge and defense counsel. With respect to the judge's participation in the auction, complainant replied as follows:

I find the fact that [the judge] attended the auction that he ordered and then proceeded to participate very troubling. I know little about the law, but this seems like a clear conflict of interest in appearance. My concern is whether or not I received a harsher sentence than I would have otherwise received were it not for the Judge's attendance and participation at the auction and the public's notice of this fact. Please see the enclosed copy of a blog in . . . the local . . . newspaper that extensively covered my case. As you can see, the public did take note of his attendance and did seem to collectively wonder if I would receive a light sentence. One can only consider the possibility that I received [an] unusually heavy sentence to counter this impression in the public.

(No. 04-16-90085, Jan. 3, 2017, Letter from Complainant). Complainant attached two comments posted to the blog at the time he entered his guilty plea (three months after the public auction) that made reference to the judge's participation in the auction.²

Upon further inquiry, the judge responded as follows:

I was not aware of any public coverage of my participation in the auction, nor did my participation in the auction or the coverage thereof have any effect on the sentence I imposed. My reasons for imposing the 292 month sentence were fully set forth in a Sentencing Memorandum which was filed on July 9, 2008, a copy of which is attached hereto.

(No. 04-16-90085, Jan. 27, 2017, Letter from Subject Judge).

II.

The Judicial Conduct and Disability Act creates an administrative proceeding and remedy for judicial "conduct

² The blog references were:

"[A]lso, what is with [the judge] purchasing cufflinks at the big sale this past summer. I read he purchased more than \$700 worth. Where I come from, this is a conflict of interest and very unethical."

"[Let's] hope [the judge] wears those cuff links on the day of sentence and gives [complainant] a stiff one that sends a clear message to all the folks who are [entrusted] with other [people's] money."

(No. 04-16-90085, Attachment to Jan. 3, 2017, Letter).

prejudicial to the effective and expeditious administration of the business of the courts." 28 U.S.C. § 351(a). The Act provides for initial review of a judicial misconduct complaint by the chief judge of the circuit. If a limited inquiry conducted by the chief judge "demonstrates that the allegations in the complaint lack any factual foundation or are conclusively refuted by objective evidence," the complaint is subject to dismissal. 28 U.S.C. § 352(b)(1)(B); see Rule 11(c)(1)(C) & (D), Rules for Judicial-Conduct and Judicial-Disability Proceedings.

A misconduct inquiry is informed by the Code of Conduct for United States Judges, but a final determination regarding misconduct must be made in each individual case pursuant to the standards and procedures of the Judicial Conduct and Disability Act. Thus, an inadvertent, minor violation of the Code of Conduct, "promptly remedied when called to the attention of the judge, might still be a violation but might not rise to the level of misconduct under the statute." Commentary to Rule 3, Rules for Judicial-Conduct and Judicial-Disability Proceedings, at 8. In addition, a misconduct complaint may be concluded on the basis of "appropriate voluntary corrective action that acknowledges and remedies the problems raised by the complaint." Rule 11(d)(2), Rules for Judicial-Conduct and Judicial-Disability Proceedings. See 28 U.S.C. § 352(b)(2).

Acknowledgment of error and a "pledge to refrain from similar conduct in the future" are among the corrective actions contemplated by the governing rules. Commentary on Rule 11, Rules for Judicial-Conduct and Judicial-Disability Proceedings, at 23.

Canon 2 of the Code of Conduct provides that "[a] judge should avoid impropriety and the appearance of impropriety in all activities." Although the Canon does not explicitly prohibit a judge's purchase of items at an auction held under the auspices of the court, I find that the judge's purchase did create an appearance of impropriety in contravention of the standards established by Canon 2. The judge's violation was, however, inadvertent; he has acknowledged his error and pledged to refrain from similar conduct in the future. There is nothing to suggest the incident had any effect on the sentence imposed by the judge. I find the judge's acknowledgment of error and pledge to avoid similar conduct to constitute appropriate voluntary corrective action. This allegation is, accordingly, concluded on that basis. 28 U.S.C. § 352(b)(2).

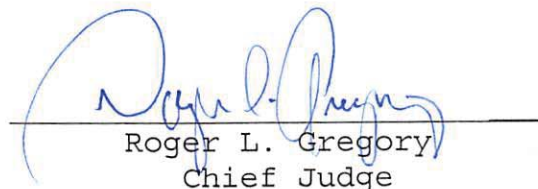
With respect to complainant's allegation of improper bias arising out of the judge and defense counsel's relationship as godfather to each other's children, it is clear from the responses that the friendship between the judge and defense

counsel was not particularly close. A relationship as godfather that does not approach the relationship between close relatives does not give rise to a claim of improper bias. See Advisory Opinion No. 11 (Codes of Conduct Committee June 2009) (judge's impartiality cannot reasonably be questioned based on relationship as godfather where relationship is not similar to that of a close relative). The relationship between the judge and defense counsel accordingly fails to support a claim of misconduct.

With respect to complainant's allegation of ex parte discussion between his defense counsel and the judge, complainant has conceded that the facts fail to support his claim.

This complaint is, accordingly, dismissed pursuant to 28 U.S.C. § 352(b)(1)(B) & (b)(2).

IT IS SO ORDERED.



Roger L. Gregory
Chief Judge