

FILED

MAY 9 2017

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

**JUDICIAL COUNCIL
OF THE NINTH CIRCUIT**

**IN RE COMPLAINT OF
JUDICIAL MISCONDUCT**

No. 16-90139

ORDER

THOMAS, Chief Judge:

Complainant, an attorney representing a debtor in bankruptcy proceedings, raises several allegations against the bankruptcy judge assigned to the case.

First, complainant alleges that over the course of two years, the judge was “constantly” 15 to 30 minutes late for hearings. Pursuant to a limited inquiry under Judicial-Conduct Rule 11(b), the judge was asked to respond to this allegation. In response, the judge stated that, based on his review of audio recordings of the calendar, complainant appeared in front of the judge 16 times (as of the date of this complaint). Out of those appearances, the judge began court more than 15 minutes late on only one occasion, which involved late filings and an emergency motion set on 72-hours notice. Otherwise, calendar typically started two to ten minutes after the hour, and all but eight of those hearings involved late filings by one or more parties, often requiring a last-minute review by the judge. Complainant fails to demonstrate any chronic or improper tardiness on the part of

the judge, and these allegations are dismissed as unfounded and for failure to allege misconduct. See 28 U.S.C. § 352(b)(1)(A)(iii), (b)(1)(B); In re Complaint of Judicial Misconduct, 726 F.3d 1060, 1062 (9th Cir. Jud. Council 2013)

(“Because complainant’s charges wouldn’t constitute misconduct even if true, the complaint is dismissed as groundless”); In re Complaint of Judicial Misconduct, 583 F.3d 598 (9th Cir. Jud. Council 2009); Judicial-Conduct Rule 11(c)(1)(A), (D).

Next, complainant alleges that the judge continually threatened and intimidated complainant, complainant’s client, and the client’s spouse. A review of the underlying record belies this claim. Nothing in the record, including the hearing transcript cited by complainant, shows that the judge threatened or intimidated any individual, or treated any individual in an egregious or hostile manner. See In re Complaint of Judicial Misconduct, 761 F.3d 1097, 1099 (9th Cir. Jud. Council 2014) (“Misconduct includes treating litigants or attorneys in a demonstrably egregious and hostile manner. The comments here do not meet that standard. The judge did not use demeaning language or heap abuse on anybody”) (internal quotations omitted); In re Complaint of Judicial Misconduct, 579 F.3d 1062, 1064 (9th Cir. Jud. Council 2009) (“Complainant did allude to one hearing in particular The transcript there indicates that the judge, while frustrated by

the tactics of both parties, remained professional and did not exhibit bias.

Allegedly improper statements quoted by complainant were, in context, completely benign”). Accordingly, these allegations are dismissed as unfounded and conclusively refuted by objective evidence. See 28 U.S.C. § 352(b)(1)(A)(iii), (b)(1)(B); In re Complaint of Judicial Misconduct, 583 F.3d 598 (9th Cir. Jud. Council 2009); Judicial-Conduct Rule 11(c)(1)(D).

As further proof of intimidation, complainant alleges that the judge ordered a U.S. Marshal to be present during complainant’s appearances. Complainant does not specify any dates or provide any further details, other than his allegation that a U.S. Marshal was present during hearings, and would leave when complainant and his client left the courtroom. Complainant does not claim that the Marshal exhibited any intimidating behavior, or that the judge emphasized that the Marshal was present specifically for complainant or his client. Judges are allowed great latitude in decisions about courtroom security. Even assuming that the judge requested a Marshal to be present during complainant’s appearances, this charge, without more, does not allege misconduct, and must be dismissed. See 28 U.S.C. § 352(b)(1)(A)(iii); In re Complaint of Judicial Misconduct, 647 F.3d 1181, 1182 (9th Cir. Jud. Council 2011) (“Because complainant doesn’t allege conduct

‘prejudicial to the effective and expeditious administration of the business of the courts,’ her charges must be dismissed”); Judicial-Conduct Rules 11(c)(1)(A).

Complainant further alleges that the judge falsely reported that complainant threatened his life, and as a result, a U.S. Marshal visited complainant’s residence. As part of the limited inquiry under Rule 11(b), the judge was asked to respond to this allegation. The judge stated that at the end of a hearing, complainant made a statement that the judge found odd and unnerving, in light of the hostility surrounding the proceedings. (For example, complainant previously accused the judge of corruption and other improprieties, the Trustee reported that complainant’s client threatened to destroy property of the bankruptcy estate, and complainant’s client distributed flyers in front of the courthouse accusing the judge of racism and corruption). A review of the hearing transcript shows that the judge inquired whether complainant’s comment was a veiled threat, and stated that he would have the U.S. Marshals listen to the audio transcript of the hearing. In response to the limited inquiry, the judge stated that in an abundance of caution, he reported complainant’s remark to the U.S. Marshal’s Office, but had no further involvement in the matter, and did not request the U.S. Marshal to take any specific action. Complainant does not provide any details about his encounter with the Marshal, and does not allege that the Marshal used any intimidating

language or otherwise acted inappropriately. In light of this record, and considering the volatility of the underlying proceedings, it was not inappropriate for the judge to report complainant's comment to the U.S. Marshal's Office. Indeed, at the subject hearing, the judge stated on the record his intent to report complainant's comment, without any objection from complainant. Accordingly, this allegation is dismissed for failure to allege misconduct. See 28 U.S.C. § 351(a); In re Complaint of Judicial Misconduct, 726 F.3d 1060, 1062 (9th Cir. Jud. Council 2013) ("Because complainant's charges wouldn't constitute misconduct even if true, the complaint is dismissed as groundless"); Judicial-Conduct Rule 11(c)(1)(A).

Next, complainant alleges that over the course of two years, the judge "constantly interrupted" him. Complainant does not identify any particular hearings, and instead states that evidence can be found in the hearing transcripts for the past two years. Complainant's vague and conclusory allegations fail to raise any inference that misconduct has occurred, and these charges must be dismissed as unfounded. See 28 U.S.C. § 352(b)(1)(A)(iii); In re Complaint of Judicial Misconduct, 650 F.3d 1370, 1372 (9th Cir. Jud. Council 2011) (rejecting complainant's "invitation for the Judicial Council to conduct a fishing expedition" and explaining that "vague accusations and convoluted demands don't satisfy

complainant's obligation to provide objective evidence of misconduct"); Judicial-Conduct Rules 11(c)(1)(D).

Complainant alleges that the judge is racially biased against complainant and his client. As evidence of bias, complainant first alleges that the judge denied each of his motions (while granting those filed by the Trustee), imposed sanctions, and ordered his client to vacate property pursuant to a sale order. Adverse rulings are not proof of bias, and these allegations must be dismissed for failure to allege misconduct. See 28 U.S.C. § 351(a); In re Complaint of Judicial Misconduct, 583 F.3d 598 (9th Cir. Jud. Council 2009); Judicial-Conduct Rule 11(c)(1)(A). As additional evidence of bias, complainant alleges that the judge embarrassed him by stating in open court that complainant lacked experience in bankruptcy law, referred to complainant as "obstructionist" and other inappropriate names, prevented complainant from entering the courthouse, and coached the Trustee's arguments. Complainant offers no evidence or citation to the record in support of these allegations, nor does he specify the dates on which these actions occurred. Accordingly, these allegations are unsupported by evidence and must be dismissed. See 28 U.S.C. § 352(b)(1)(A)(iii); In re Complaint of Judicial Misconduct, 583 F.3d 598 (9th Cir. Jud. Council 2009); Judicial-Conduct Rule 11(c)(1)(D).

Complainant alleges that the judge “constantly flouted existing appellate directives.” Although a pattern and practice of disregarding controlling precedent may amount to misconduct, “a complainant must at a minimum allege that the rulings in question have been reversed[.]” In re Complaint of Judicial Misconduct, 631 F.3d 961, 962 (9th Cir. Jud. Council 2011). Moreover, “a single reversal, or even a handful of reversals, doesn’t prove misconduct The number of erroneous rulings must be large enough that it could constitute a pattern.” Id. Complainant fails to make any such showing, and accordingly, these charges are dismissed as unfounded. See 28 U.S.C. § 352(b)(1)(A)(iii); In re Complaint of Judicial Misconduct, 583 F.3d 598 (9th Cir. Jud. Council 2009); Judicial-Conduct Rule 11(c)(1)(D).

Complainant also alleges that the judge has improperly delayed in ruling on various motions. Complainant only identifies one such motion, which allegedly was continued for over one and a half years. As part of the limited inquiry under Rule 11(b), the judge was asked to respond to this allegation. The judge stated that this particular motion involved disputed facts, a lengthy valuation process for disputed real property, and litigation of related issues. This litigation, and the process of marketing the disputed property for valuation purposes, was the reason for the delay. Complainant offers no evidence that the delay was based on an

improper motive, or that the judge has habitually delayed ruling in a significant number of unrelated cases, and accordingly this charge is dismissed. See Judicial-Conduct Rule 3(h)(3)(B); In re Complaint of Judicial Misconduct, 584 F.3d 1230, 1231 (9th Cir. Jud. Council 2009).

Complainant alleges that the judge had a “material conflict of interest.” However, complainant fails to identify any specific conflict of interest or source of bias on the part of the judge, and his vague and conclusory allegations raise no inference that misconduct has occurred. Accordingly, these charges must be dismissed as unfounded. See 28 U.S.C. § 352(b)(1)(A)(iii); In re Complaint of Judicial Misconduct, 650 F.3d 1370, 1372 (9th Cir. Jud. Council 2011) (“vague accusations and convoluted demands don’t satisfy complainant’s obligation to provide objective evidence of misconduct”); Judicial-Conduct Rule 11(c)(1)(D).

Finally, complainant alleges that the judge improperly failed to recuse himself. However, complainant offers no evidence that the judge failed to recuse for an improper purpose, and as discussed, complainant’s allegations of bias, conflict of interest, and hostility toward complainant are unfounded. Accordingly, this charge must be dismissed because it relates directly to the merits of the judge’s rulings. See 28 U.S.C. § 352(b)(1)(A)(ii); In re Complaint of Judicial Misconduct, 647 F.3d 1181 (9th Cir. Jud. Council 2011) (“Allegations that a judge

erred in failing to recuse are generally dismissed as merits-related”); Judicial-Conduct Rule 11(c)(1)(B).

DISMISSED.