

FILED

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

**JUDICIAL COUNCIL
OF THE NINTH CIRCUIT**

**IN RE COMPLAINT OF
JUDICIAL MISCONDUCT**

No. 20-90114

ORDER

THOMAS, Chief Judge:

Complainant, a pro se litigant, has filed a complaint of judicial misconduct against a district judge. Review of this complaint is governed by the Rules for Judicial Conduct and Judicial-Disability Proceedings (“Judicial-Conduct Rules”), the federal statutes addressing judicial conduct and disability, 28 U.S.C. § 351 et seq., and relevant prior decisions of the Ninth Circuit Judicial Council. In accordance with these authorities, the names of complainant and the subject judge shall not be disclosed in this order. See Judicial-Conduct Rule 11(g)(2).

The Judicial Conduct and Disability Act provides a remedy if a federal judge “has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts.” 28 U.S.C. § 351(a). A chief judge may dismiss a complaint if, following review, he or she finds it is not cognizable under the statute, is directly related to the merits of a decision or procedural ruling, or is frivolous or lacks sufficient evidence to raise an inference of misconduct. See 28 U.S.C. §

352(b)(1)(A)(i)-(iii). Judicial misconduct proceedings are not a substitute for the normal appellate review process, and may not be used to seek reversal of a judge's decision, to obtain a new trial, or to request reassignment to a different judge.

Complainant alleges the judge racially discriminated against him because he did not liberally construe complainant's pleadings when he should have done so because complainant is a pro se litigant. A review of the underlying record reveals that complainant amended his complaint in violation of Rule 15(a)(2) of the Federal Rules of Civil Procedure. However, the judge considered whether the complaint would have been allowed leave to amend his complaint if he sought it because complainant was a pro se litigant and the judge construed his pleadings liberally. This allegation is directly refuted by the record. See 28 U.S.C. § 352(b)(1)(B).

Complainant next alleges that the judge engaged in ex parte communications with the defendants. While conceding that this allegation cannot be directly proven, complainant points to "circumstantial evidence" to infer that the improper communications occurred. Specifically, he refers to the judge stating that it is more efficient to raise any deficiencies in complainant's claims through a motion to dismiss or motion for summary judgment rather than granting defendants' motion to strike the complaint. Approximately a month later, defendants filed a motion to dismiss. Based on this sequence of events, complainant presumes that there was

some degree of coordination between the judge and the defendants. Motions to dismiss are commonly filed in cases and complainant offers no objectively verifiable proof of ex parte communications. This allegation is 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).

Finally, complainant alleges that the district judge improperly dismissed his case without considering evidence complainant submitted. However, the judge was considering a motion to dismiss for failure to state a claim and review is generally limited to the complaint. See Lee v. City of Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001), *overruled on other grounds by Galbraith v. County of Santa Clara*, 307 F.3d 1119, 1125-26 (9th Cir. 2002). Nevertheless, the judge considered extrinsic evidence by taking judicial notice of public records and examining documents referred to in the complaint. This allegation is refuted by the record and must be dismissed. See 28 U.S.C. § 352(b)(1)(B). Moreover, this allegation is directly related to the merits of the case and must be dismissed on that ground as well. See 28 U.S.C. § 352(b)(1)(A)(ii); Judicial-Conduct Rule 11(c)(1)(B); In re Complaint of Judicial Misconduct, 579 F.3d 1062, 1064 (9th Cir. Jud. Council 2009).

DISMISSED.