THE JUDICIAL COUNCIL OF THE SEVENTH CIRCUIT
219 South Dearborn Street
Chicago, Illinois 60604

April 18, 2012

FRANK H. EASTERBROOK
Chief Judge

No. 07-12-90022

IN RE COMPLAINT AGAINST A JUDICIAL OFFICER

MEMORANDUM

Complainant is the mother of the plaintiff in a suit recently resolved by a district court (and pending on appeal). She contends that the district judge made errors of fact and law in his opinion granting summary judgment to the defendants.

Any complaint that is "directly related to the merits of a decision or procedural ruling" must be dismissed. 28 U.S.C. §352(b)(1)(A)(ii). See also Rule 11(c)(1)(B) of the Rules for Judicial-Conduct and Judicial-Disability Proceedings. "Any allegation that calls into question the correctness of an official action of a judge … is merits related." Standard 2 for Assessing Compliance with the Act, *Implementation of the Judicial Conduct and Disability Act of 1980: A Report to the Chief Justice* 145 (2006). Many allegations of this complaint—all those that concern the disposition of the suit and the contents of the opinion—fit that description. Section 352(b)(1)(A)(ii) applies to the language the judge uses to explain a decision, no less than to the bottom line. See *In re Complaint of Judicial Misconduct*, 517 F.3d 558 (Jud. Conf. 2008). The forum for a grievance about the decision is the court of appeals, not the Judicial Council.

Complainant also contends that the district judge committed misconduct during a pretrial conference held under Fed. R. Civ. P. 16 to discuss the possibility of settlement. This aspect of the complaint is outside §352(b)(1)(A)(ii) but must be dismissed nonetheless because the allegations of the complaint do not establish misconduct.

The nub of complainant's grievance is that during the Rule 16 conference the judge made suggestions to defendants about relief they might provide to plaintiff under §504 of the Rehabilitation Act. Defendants were reluctant to make any changes, but they agreed to implement one of the judge's suggestions. Complainant describes this suggestion as an "order" on the premise that no litigant dares risk a federal judge's ire by rejecting the judge's proposal. And if the judge entered an "order" then the procedure was irregular—for the judge did not take evidence, allow cross-examination, or otherwise satisfy the requirements of a trial. Complainant submits that the procedure accordingly violated the due process clause of the Constitution. She relies on cases in which appellate courts and disciplinary bodies found fault with judges who issued formal orders without evidentiary support or without allowing a litigant to obtain a lawyer's assistance.

The difficulty with this line of reasoning, beyond the fact that both sides in this suit had the assistance of counsel, is that the district judge did not enter an order of any kind. Suggestions are not orders. Judges make suggestions all the time—that's one thing settlement conferences are for—and are quite prepared to have parties say no. Most litigants reject most suggestions made during settlement conferences. No judge worthy of the title takes offense or retaliates when a litigant stands on his right to a formal decision, and it would be unsound for me to assume that the subject judge was counting on the defendants to equate suggestions with orders. The district judge's opinion shows no signs of pique (though most of his suggestions, to both sides, had been rebuffed) or any hint that the judge had earlier equated suggestions with orders.

The events that complainant describes, such as asking those present a lot of questions without placing them under oath, attempting to find out what the parties' real objectives are and what changes by the other side will satisfy their desires, are normal. Complainant observes that she has been involved in other litigation in which the district judge (and the settlement attorney for the court of appeals) used a different approach. Different judges handle Rule 16 proceedings differently; this does not mean that any misconduct has occurred. The settlement conference attorneys in the court of appeals are not judges and cannot speak for the court of appeals; that necessitates a style different from the approach used by any judge.

Arm-twisting, bullying, and deceit during settlement negotiations are forms of misconduct. But the events that complainant narrates do not merit such appellations. The judge (as complainant describes him) was civil and chatty in drawing out the parties' views. When the judge suggested that defendants implement a §504 plan as an experiment, he did not state or imply that adverse consequences would follow refusal. And in the end the judge concluded that the plaintiff is entitled to no relief at all; it seems odd for someone on the plaintiff's side of a case to contend that the judge committed misconduct by inducing the defendants to do more than (the judge believes) the law requires.

Complainant is convinced that the judge suggested the plan to the defendants in order to justify delay of the litigation. I see no basis for that belief in the complaint's factual narration or in the docket of the lawsuit. Less than three years passed from filing to disposition. The absence of docket entries during the year after the settlement conference reflects the absence of any pending business before the court; plaintiff did not ask for summary judgment or request a trial date. When defendants moved for summary judgment, the motion was briefed in the normal course, and a decision was made about 4½ months after the close of briefing. Complainant recognizes that the judge had a busy schedule. Civil suits often must take their place in the queue after criminal trials. At all events, an assertion that the judge should have resolved a particular suit faster is covered by §352(b)(1)(a)(ii). See *Report* at 146. Deciding which cases to resolve in what order is a procedural ruling for the purpose of that subsection.