

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

January 14, 2010

FRANK H. EASTERBROOK  
Chief Judge

No. 07-09-90139

IN RE COMPLAINT AGAINST A JUDICIAL OFFICER

MEMORANDUM

Complainant is the defendant in a criminal prosecution completed last year in a district court and pending on appeal. He accuses the district judge of misconduct because the judge made unfavorable rulings; complainant also contends that the judge went to sleep during the trial and allowed defense counsel to sleep.

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). Most allegations of this complaint fit that description. Complainant disagrees with the jury instructions, for example, and with the judge’s ruling that defense counsel could not let complainant see certain materials produced during discovery under a protective order. These and other contentions in the “misconduct” section of the complaint may be arguments for the court of appeals, but under §352(b)(1)(A)(ii) they are outside the scope of the 1980 Act.

Complainant also alleges: “Judge, during trial, went to sleep as he turned his back to the jury and courtroom camera. Not only did the judge take a nap he allowed defense counsel to take a nap on courtroom camera.” Complainant states that these allegations can be corroborated by persons in the courtroom and by the video recording of the proceedings made for security purposes.

Section 352(a) calls for the chief judge to make a “limited inquiry” into such allegations. I wrote to the subject judge and to the prosecutor (who has not been accused of snoozing and was in a position to see whether anyone else slept); I asked them to furnish not only their own understanding of events but also any recordings and the names of third parties in a position to know the truth. The prosecutor informed

me that neither the judge nor defense counsel nodded off during the trial. The subject judge stated that complainant likely misunderstood the significance of his swiveling his chair. The judge explained: "I often turn around to consult the treatises that I keep behind my chair. I try to anticipate issues that might require a ruling from me." The judge added that complainant also misunderstood the significance of the computer on the bench. Complainant asserts that the judge paid too much attention to a computer and too little to the trial proceedings; the judge pointed out that the bench computer displays a real-time transcript of the trial, so that to attend to the screen is to keep track of the trial. (A real-time transcript provides a more reliable basis for evidentiary rulings than does a judge's memory of what a witness said.)

The subject judge informed me that the marshal's recordings are retained for only two weeks, so that no video is available to be consulted. (The trial took place in February 2009.) But six deputy marshals who attended parts of the trial have submitted statements; all six deputies say unequivocally that neither the judge nor defense counsel fell asleep during the proceedings.

I therefore dismiss this aspect of the complaint under §352(b)(2). A chief judge cannot make findings about "any matter that is reasonably in dispute." 28 U.S.C. §352(a). But a chief judge must dismiss a complaint if "a limited inquiry under subsection (a) demonstrates that the allegations in the complaint lack any factual foundation". 28 U.S.C. §352(b)(2). Complainant may believe that the judge or defense counsel took a nap, but that belief—based on suspicions about what the judge was doing when his back was to the audience—lacks a factual foundation.