

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

October 1, 2010

FRANK H. EASTERBROOK
Chief Judge

Nos. 07-10-90061 to -90064

IN RE COMPLAINT AGAINST FOUR JUDICIAL OFFICERS

MEMORANDUM

Complainant, a lawyer, represented the plaintiff in a case recently decided by the Seventh Circuit. (A petition for rehearing is pending.) Complainant asserts that the magistrate judge, who entered final judgment by consent under 28 U.S.C. §636(c), and the three members of the appellate panel, all committed misconduct by deciding the case without adequately understanding and discussing complainant's arguments on behalf of his client.

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.

Although complainant is a lawyer, he does not discuss §352(b)(1)(A)(ii) or otherwise attempt to demonstrate that his allegations come within the scope of the 1980 Act. Complainant may believe that, because his allegations principally concern the language of the opinions—not only the points discussed, but also what complainant thinks is culpable failure to discuss other points or evidence—§352(b)(1)(A)(ii) is inapplicable. The Judicial Conference ruled otherwise in *In re Complaint of Judicial Misconduct*, 517 F.3d 558 (Committee on Judicial Conduct & Disability 2008), holding that §352(b)(1)(A)(ii) prevents any challenge to the way in which judges explain their decisions, and that omissions from opinions are treated the same as the included language.

In two respects the complaint concerns conduct that is, in principle, outside the scope of §352(a)(1)(A)(ii). Complainant asserts that some questions asked during the

oral argument of the appeal demonstrate that the judges must not have read the briefs or otherwise prepared for the argument. This aspect of the complaint is dismissed under §352(a)(1)(A)(iii) because it is not supported by evidence. The questions and statements that complainant highlights show that complainant understands his arguments differently from the way the appellate judges understand them. This does not show lack of preparation, however. The appellate judges were attempting to distinguish between claims decided adversely to plaintiff by a jury, and those that the judges thought (rightly or wrongly) were the ones remaining in contention. A good deal of the complaint is devoted to establishing that the original contentions in the district court included points that the appellate judges thought no longer in the case. That some issues drop out is normal in litigation. A lawyer's disagreement with a judge about which issues remain for decision does not establish that the judges failed to prepare.

According to complainant, a question by the magistrate judge establishes a different kind of misconduct: delegation to a law clerk. During one hearing, the magistrate judge prefaced a statement with: "I am assuming the reason I keep saying ...". Complainant infers from this that the judge did not actually know why she was saying something; and if the judge did not know, the reason must be that a law clerk had done the work and put words in the judge's mouth. This is a non-sequitur. The magistrate judge was being windy, but padding is common in speech; written exposition can be edited to be shorter and more precise. (Much the same can be said about questions asked at an appellate argument. Judges state things less precisely than they would in writing, and often they have to try several times to formulate the point.) The contention that the magistrate judge was nothing but a mouthpiece for a law clerk is not only unsupported by evidence but also frivolous and is dismissed under §352(a)(1)(A)(iii). And the contention that the three appellate judges were merely pawns of a magistrate judge's law clerk (an assertion that also appears in the complaint) is absurd.