

United States Court of Appeals for the Federal Circuit

IN RE COMPLAINT NO. F-15-90005

Before PROST, *Chief Judge*.

ORDER AND SUPPORTING MEMORANDUM

The complainant has filed a judicial misconduct complaint concerning a judge of this court.

The complainant indicates that he was an appellant in two appeals before this court and that in both appeals the identified judge was on the panel. The two appeals were from the same district court case. In both appeals, the complainant was represented by counsel. In the first appeal, the district court's judgment was affirmed-in-part and vacated-in-part, with further proceedings directed on remand. In the second appeal, the matters on review were affirmed. In each case, a petition for writ of certiorari was subsequently denied by the United States Supreme Court.

Most of the complaint disagrees with the rulings of the merits panels in the two cases, and as such must be dismissed. *See* Rule 11(c)(1)(B) of the Rules for Judicial Conduct and Judicial Disability Proceedings.

There are three assertions that are not necessarily direct challenges to the rulings or merits of the decisions: (1) that the judge presides over all cases in which the appellee was involved, (2) that the judge should not have heard any cases because the appellee was a former em-

ployer of the judge, and (3) that the judge "made facial contacts with [appellee's] counsel" during oral argument.

Concerning the first assertion, this court's Internal Operating Procedure 3, paragraph 1 states in pertinent part:

The chief judge provides to the clerk's office a list of judges that are available for each day of an argument session. The clerk's office runs a computer program that randomly generates three-judge panels for each month, subject to the judges' availability.

The clerk's office screens cases to determine if they are calendar-ready, i.e., if all briefs and the joint appendix have been filed. A computer program merges the list of calendar-ready cases in order of filing with panels of judges determined randomly, subject to the requirements of 28 U.S.C. 46(b) and Fed. Cir. R. 47.2(b) ("Assignment of cases to panels will be made so as to provide each judge with a representative cross-section of the fields of law within the jurisdiction of the court.").

A case that is remanded by the Supreme Court is referred to the panel or to the en banc court that previously decided the matter, subject to the circumstances provided by IOP # 15, paragraph 2(a). *When an appeal is docketed in a case that was previously remanded by this court, or when an appeal concerning attorney fees is docketed after any appeal on the underlying merits is decided, the clerk's office attempts to assign the appeal to the previous panel, to a panel including at least two members of the previous panel (if one of those members was the authoring judge), or to a panel that contains the authoring judge, if such a*

panel is otherwise constituted and available on a subsequent argument calendar. [emphasis added]

The court discerns no issue with the assignment of these cases. All indications are that it was a random assignment that placed the judge on the panel in the first noted appeal.* The composition of the second panel was also proper and pursuant to the above-quoted Internal Operating Procedure. It was pursuant to this court's procedures that a panel including at least two members of the previous panel, including the authoring judge, were assigned to hear the second appeal in the same underlying matter. The judge mentioned in this complaint was the authoring judge in the first appeal, and thus that judge was assigned to the second appeal.

Accordingly, pursuant to Rule 11(c)(1)(D), the complainant's assertion concerning the assignment of the cases is dismissed because it is "based on allegations lacking sufficient evidence to raise an inference that misconduct has occurred."

The complainant's second assertion, that the judge previously worked for the appellee, appears to be based on the judge's previous employment approximately 50 years before the judge participated in the appeal. We need not decide whether the entity the judge may have worked for is the same entity that participated in the appeal. We assume the issue is whether such participation would raise an appearance of impropriety.

On this issue, we take guidance from the Committee on Codes of Conduct, which is authorized by the Judicial Conference of the United States to publish advisory opinions on issues related to judicial ethics.

* Although the complainant asserts that the judge "presides over all of [appellee's] cases," the complainant only identifies two cases.

In Advisory Opinion No. 24, the Committee addressed the concern when a judge may hear cases involving the judge's former employer, which in that matter was a law firm. The committee "recommends that judges consider a recusal period of at least two years, recognizing that there will be circumstances where a longer period is more appropriate." The Committee stated that the judge should consider "whether his or her participation would create any appearance of impropriety."

Here, the asserted former employment is significantly more than two years prior. Additionally, there is no assertion here that the judge performed work in the previous employment that was related to the matter that was on appeal.

Thus, concerning the complainant's second assertion, we determine that no further inquiry is warranted and that the complaint should be dismissed as frivolous pursuant to Rule 11(c)(1)(C) and as lacking sufficient evidence to raise an inference that misconduct has occurred pursuant to Rule 11(c)(1)(D).

Concerning the complainant's third assertion, that the judge made "facial contacts" with appellee's counsel during oral argument, that assertion lacks sufficient evidence to raise an inference that misconduct has occurred. Stated simply, it is not uncommon for a judge to make contact with, i.e., look at an attorney during oral argument. Thus, dismissal is appropriate pursuant to Rule 11(c)(1)(D). For the reasons stated above, the complaint is dismissed.

Accordingly,

IT IS ORDERED THAT:

The complaint is dismissed.

May 5, 2015
Date

/s/ Sharon Prost
Sharon Prost
Chief Judge

There is a right to file a petition for review of this order. Pursuant to Rule 18(b) of the Rules for Judicial Conduct and Judicial Disability Proceedings, any petition for review must be received by the circuit executive within 35 days of the date of the letter transmitting this order. Any petition must be sent to:

Circuit Executive
United States Court of Appeals for the Federal Circuit
717 Madison Place, NW
Washington, DC 20439