

JUDICIAL COUNCIL OF THE THIRD CIRCUIT

J.C. Nos. 03-11-90139, 03-11-90140

IN RE: COMPLAINT OF JUDICIAL MISCONDUCT
OR DISABILITY

ORIGINAL PROCEEDINGS UNDER 28 U.S.C. § 351

MEMORANDUM OPINION

(Filed: April 26, 2012)

PRESENT: SLOVITER, Circuit Judge.¹

This complaint was filed under the Judicial Conduct and Disability Act, 28 U.S.C. §§ 351-64, against a United States Magistrate Judge (“Subject Judge I”) and a United States District Judge (“Subject Judge II”). For the reasons discussed below, the complaint will be dismissed as to Subject Judges I and II.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, after review, he or she finds it is not cognizable under the statute, is directly related to the

¹ Acting under Rule 25(f), Rules for Judicial-Conduct and Judicial-Disability Proceedings.

² The complaint includes allegations concerning another United States District Judge. The claims concerning that Subject Judge will be addressed separately. See J.C. No. 03-11-90141.

merits of a decision or procedural ruling, or is frivolous or lacks sufficient evidence to raise an inference of misconduct. 28 U.S.C. §§ 352(b)(1)(A)(i)-(iii).

Complainant, a licensed attorney, represents civil litigants before Subject Judges I and II. This judicial misconduct complaint primarily concerns Complainant's allegation that a judicial assistant to Subject Judge I disparaged Complainant in an email message. Complainant appends a copy of the email message, which was sent to five District Judges (but not to Subject Judges I and II). The email message states that Complainant lied to the District Court in a case pending before one of the five District Judges.

In response to the email message, the District Judge in that matter, who is not named as a Subject Judge, issued an order directing Complainant to show cause why sanctions should not be imposed for "allegedly inaccurate statements" to the District Court. The email message was filed on the public docket as part of the show cause proceeding and Complainant filed a response to the show cause order. Complainant was ultimately sanctioned under Fed. R. Civ. P. 11 for failure to conduct an adequate investigation into her representations to the District Court.

Complainant subsequently wrote a letter to Subject Judge II "to file a formal complaint for judicial misconduct" against Subject Judge I's judicial assistant and to "request an investigation to determine what other Judicial Employees may have engaged in similar and related conduct." Subject Judge II responded with a letter directing Complainant to the applicable rules and procedures for filing a judicial misconduct complaint.

As an initial matter, Complainant may not bring judicial misconduct claims directly against Subject Judge I's judicial assistant or other District Court employees, as such individuals are not covered by the Judicial Conduct and Disability Act. To the extent Complainant's allegations concern individuals not covered by the Judicial Conduct and Disability Act, the allegations will not be addressed in this opinion.³ See 28 U.S.C. §§ 351, 352(b)(1)(A)(i); Rule 4, Rules for Judicial-Conduct and Judicial-Disability Proceedings.

Complainant claims Subject Judges I and II engaged in judicial misconduct because they "failed to investigate or take appropriate actions concerning the [judicial assistant's] conduct." In an attempt to establish a duty on the part of the Subject Judges to investigate the alleged misconduct by the judicial assistant, Complainant relies upon the Code of Conduct for Judicial Employees, which states that "[j]udicial employees should require adherence to such standards by personnel subject to their direction and control."

The Code of Conduct for Judicial Employees does not apply to judges. The Code of Conduct for United States Judges, which does apply, provides that a judge should be "patient, dignified, respectful, and courteous. . ." and should require similar conduct of those subject to his or her control. Canon 3A(3), Code of Conduct for United States

³ Complainant was informed by letter that the misconduct complaint was not accepted for filing as to those individuals. Rule 8(c), Rules for Judicial-Conduct and Judicial-Disability Proceedings ("If the clerk receives a complaint about a person not holding an office described in Rule 4, the clerk must not accept the complaint for filing under the Rules.").

Judges. Complainant's allegations do not, however, establish a violation of either standard.⁴

The record does not support the claim that the judicial assistant's email message was an effort to disparage Complainant personally through "inappropriate and misleading characterizations." Rather, after allowing Complainant to respond to the email message directly, a District Judge found – consistent with the substance of that message – that Complainant did mislead the District Court, and imposed sanctions as a result. Under these circumstances, the Subject Judges' alleged failure to investigate and/or discipline the judicial assistant based upon this email message cannot give rise to cognizable claim of judicial misconduct. See Rule 3(h)(1), Rules for Judicial-Conduct and Judicial-Disability Proceedings (defining cognizable misconduct as "conduct prejudicial to the expeditious administration of the business of the courts"); see also Rule 11(c)(1)(D), Rules for Judicial-Conduct and Judicial-Disability Proceedings. Accordingly, these claims are dismissed as unsupported by evidence that would raise an inference that misconduct occurred. See 28 U.S.C. § 352(b)(1)(A)(iii); Rule 11(c)(1)(D), Rules for Judicial-Conduct and Judicial-Disability Proceedings.

In addition, Complainant claims Subject Judges I and II "withheld information" about additional "misleading or defamatory" email messages or statements that may have

⁴ The Code is not a set of disciplinary rules. "Ultimately, the responsibility for determining what constitutes misconduct under the statute is the province of the judicial council of the circuit subject to such review and limitations as are ordained by the statute and by these Rules." Commentary on Rule 3, Rules for Judicial-Conduct and Judicial-Disability Proceedings.

been made by Subject Judge I's judicial assistant and/or by other District Court staff members. Complainant seeks an investigation into whether any District Court employees have been "poisoning the well" by damaging Complainant's reputation with District Judges, and demands that any "potentially adverse or hostile information" be disclosed to her.

Complainant offers nothing but speculation and conjecture to support her accusations against District Court staff members. To the extent Complainant requests investigations into this alleged conduct by judicial employees, the request is denied. There is no provision for such wide-ranging relief under the Act. Indeed, as discussed previously, judicial employees are not covered under the Act. Moreover, Complainant has failed to establish that, even if the Subject Judges were to become aware of any such allegedly defamatory statements by court staff, they have an affirmative duty to inform Complainant of them. Complainant's bare assertions fall far short of creating an inference that Subject Judges I and II engaged in any form of conduct prejudicial to the effective and expeditious administration of the business of the courts, and therefore an investigation is unwarranted. 28 U.S.C. § 351(a); Rule 3(h)(1), Rules for Judicial-Conduct and Judicial-Disability Proceedings. Accordingly, these claims are dismissed. See 28 U.S.C. § 352(b)(1)(A)(iii); Rule 11(c)(1)(D), Rules for Judicial-Conduct and Judicial-Disability Proceedings.

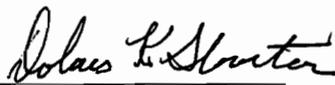
Finally, Complainant alleges that a District Judge "routinely gives . . . ex parte instructions" to Subject Judge I, "despite their appellate relationship." Complainant

— alleges one instance in which Subject Judge I stated during a pre-trial proceeding that a District Judge “provided him with off-record instructions regarding the scope of voir dire.” Complainant alleges a second instance in which Subject Judge I stated during a deposition that he had “been given specific guidance . . . in anticipation of certain types of objections.”

Complainant’s allegations demonstrate only that Subject Judge I may have received guidance on procedural matters from a District Judge. Even assuming arguendo that they occurred, such consultations and discussions among judicial colleagues are commonplace and appropriate and, without more, do not create cause for concern. Indeed, the Code of Conduct for United States Judges expressly provides that “[a] judge may consult with other judges . . . to aid the judge in carrying out adjudicative responsibilities.”

Commentary to Canon 3A(4), Code of Conduct for United States Judges. There is no indication that a District Judge provided procedural guidance for any improper purpose; consequently, there is no indication that Subject Judge I engaged in misconduct solely by virtue of having received that guidance. Accordingly, this claim is dismissed. See 28 U.S.C. § 352(b)(1)(A)(iii); Rule 11(c)(1)(D), Rules for Judicial-Conduct and Judicial-Disability Proceedings.

For the foregoing reasons, the complaint against Subject Judges I and II is dismissed pursuant to 28 U.S.C. §§ 352(b)(1)(A)(i) and (iii).


Circuit Judge

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ORDER

(Filed: April 26, 2012)

PRESENT: SLOVITER, Circuit Judge.¹

On the basis of the foregoing opinion entered on this date, it is ORDERED AND ADJUDGED that the written complaint brought pursuant to 28 U.S.C. § 351 is hereby dismissed under 28 U.S.C. §§ 352(b)(1)(A)(i) and (iii).

This order constitutes a final order under 28 U.S.C. § 352(c). Complainant is notified in accordance with Rules 11(g)(3) and 18, Rules for Judicial-Conduct and Judicial-Disability Proceedings, of the right to appeal this decision by the following procedure:

Rule 18(a) Petition. A complainant or subject judge may petition the Judicial Council of the Third Circuit for review.

¹ Acting under Rule 25(f), Rules for Judicial-Conduct and Judicial-Disability Proceedings.

Rule 18(b). Time. A petition for review must be filed in the office of the clerk of the court of appeals within **35 days** of the date on the clerk's letter informing the parties of the chief judge's order.

18(b) Form. The petition should be in letter form, addressed to the clerk of the court of appeals, and in an envelope marked "Misconduct Petition" or "Disability Petition." The name of the subject judge must not be shown on the envelope. The letter should be typewritten or otherwise legible. It should begin with "I hereby petition the judicial council for review of . . ." and state the reasons why the petition should be granted. It must be signed. There is no need to enclose a copy of the original complaint.

The full text of the Rules for Judicial-Conduct and Judicial-Disability Proceedings is available from the Clerk's Office of the Court of Appeals for the Third Circuit and on the Court of Appeals' internet site, www.ca3.uscourts.gov.


Circuit Judge

Dated: April 26, 2012