

JUDICIAL COUNCIL OF THE THIRD CIRCUIT

J.C. No. 03-12-90073

IN RE: COMPLAINT OF JUDICIAL MISCONDUCT
OR DISABILITY

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

MEMORANDUM OPINION

Filed: November 20, 2013

PRESENT: McKEE, Chief Judge.

This is a complaint filed by an attorney under the Judicial Conduct and Disability Act, 28 U.S.C. §§ 351-64, against a United States District Judge (the “Subject Judge”). Complainant previously filed another judicial misconduct complaint against the Subject Judge which was dismissed. See J.C. No. 03-11-90141.¹ For the reasons discussed below, this complaint will also be dismissed.

I. Background

Prior to the filing of her two complaints of judicial misconduct, Complainant filed a series of substantially identical motions seeking the Subject Judge’s recusal from eight otherwise-unrelated cases over which he presided. The cases were consolidated for

¹ I requested to be disqualified from the proceedings in J.C. No. 03-11-90141 under Rule 25 of the Rules for Judicial-Conduct and Judicial-Disability Proceedings. The circumstances warranting my disqualification from the prior proceedings do not apply here.

purposes of resolving the recusal motions. In essence, the recusal motions alleged that the Subject Judge harbored such animus against Complainant personally that he could no longer impartially preside over any case in which she participated as counsel.

While the recusal motions were pending, Complainant filed the first of multiple petitions for a writ of mandamus on behalf of the plaintiffs in the cases in which she had filed recusal motions. The first petition sought relief from discovery orders that the Subject Judge had issued in connection with the recusal motions. The Court of Appeals denied the petition without prejudice in all aspects “except that [the Subject Judge] is hereby directed to refer all discovery matters relating to the issue of disqualification to a U.S. Magistrate Judge.” All discovery matters relating to the recusal motions were thereafter referred to a Magistrate Judge.

After recusal-related discovery had concluded, the Subject Judge held a three-day hearing on the consolidated recusal motions. Complainant presented fourteen witnesses in support of recusal and testified herself. She presented multiple witnesses who testified about the Subject Judge’s allegedly hostile treatment of Complainant, particularly during a specific trial. The Subject Judge issued a Memorandum Opinion and Order denying the recusal motions. He held that there “is no objective evidence of settled animosity or bias against [Complainant] or her clients.”

The Subject Judge was critical of Complainant in the opinion, stating, “[t]he effort here goes beyond seeking recusal. It is an attempt to impugn the character and the reputation of a judicial officer. It makes serious charges of judicial misconduct. The

extreme allegations are false. They are not merely misleading. They are contrived.”

Among other things, the opinion states that Complainant engaged in “unprofessional and disrespectful conduct”, “displayed disrespect for the tribunal by talking over the judge”, manipulated and orchestrated her clients’ testimony, engaged in “duplicity and recklessness”, herself provided false testimony, and made an appellate argument based on a “misrepresentation.”

Thereafter, Complainant began filing petitions for a writ of mandamus – six in total – seeking review of the Subject Judge’s recusal decision and the Judge’s disqualification from the cases in which the recusal motions were filed. A panel of the Court of Appeals denied the petitions. On December 27, 2011, before the mandamus petitions were ruled on, Complainant filed a complaint of judicial misconduct naming the Subject Judge, as well another United States District Judge and a United States Magistrate Judge. J.C. Nos. 03-11-90139, 03-11-90140, 03-11-90141. In a Memorandum Opinion and Order dated April 26, 2012, Judge Sloviter, acting under Rule 25(f), dismissed the complaints against the District Judge and the Magistrate Judge. See J.C. Nos. 03-11-90139, 03-11-90140.

On May 2, 2012, Judge Sloviter appointed a Special Committee concerning the remaining misconduct complaint against the Subject Judge because disputed issues of material fact remained. 28 U.S.C. § 352(a); see also Rule 11(b); Commentary on Rule 11. On May 31, 2012, in an appeal from an underlying case, a panel of the Court of Appeals issued an order that affirmed “in all respects” the Subject Judge’s orders and rejected Complainant’s claims of hostile treatment by the Subject Judge. That panel determined

that, “there are no instances in which the District Judge acted improperly or in which his actions could be inferred to be improper. There is no error here.”

On the same day as the Third Circuit’s affirmance of the Subject Judge’s orders, the Subject Judge wrote to the Chief Justice of Complainant’s Bar and reported what he viewed as Complainant’s unprofessional actions “[p]ursuant to Canon 3(B)(5) of the Code of Conduct for United States Judges” See Canon 3(B)(5) (requiring judges to take “appropriate action” when a lawyer violates applicable rules of professional conduct). The Subject Judge stated he believed Complainant’s actions, “violated rules of professional conduct. Among those actions are testifying falsely, suborning perjury, contacting represented parties in the absence of their attorneys, lacking candor to the court and incivility.” Attached to this letter was a copy of his Memorandum Opinion denying the recusal motions, documents from an underlying case, and a letter the Subject Judge requested from an attorney with extensive experience with attorney discipline cases. The letter analyzed the Subject Judge’s decision denying Complainant’s recusal motions, opined that the actions described in that opinion violated the Model Rules of Professional Conduct, and recommended that Complainant’s conduct “be fully reported to the appropriate disciplinary authorities.”

According to exhibits submitted by Complainant, after receiving the Subject Judge’s letter, the Chief Justice referred the matter to the Ethics and Grievance Committee for an investigation in accordance with the applicable rules of the Supreme Court. Thereafter the Subject Judge’s letter was docketed as an official Grievance. Complainant

was provided with an opportunity to file a response, which she did so. The attorney discipline proceedings appear to remain on-going at this time.²

On November 1, 2012, approximately two months after filing her response in the attorney discipline proceedings, Complainant filed the instant complaint of judicial misconduct against the Subject Judge.³ Complainant alleged that the Subject Judge's filing of an ethics grievance against her was done "for the purpose of retaliating against" Complainant for filing a complaint of judicial misconduct. Among other claims, Complainant repeated allegations of judicial misconduct that she previously raised in J.C. No. 03-11-90141, including arguments concerning the Subject Judge's putative hostility towards Complainant and his refusal to recuse himself from her cases. Attached to her complaint was a copy of the Subject Judge's grievance and her response thereto.

On March 19, 2013, the Complainant's initial complaint against the Subject Judge was dismissed. See J.C. No. 03-11-90141. After an extensive investigation by the Special Committee and a hearing, the Judicial Council found no violation of the Judicial Conduct and Disability Act and dismissed the complaint in its entirety pursuant to 28 U.S.C. § 354(a)(1)(B) and Rules 20(b)(1)(A)(i),(ii), and (iii) of the Rules for Judicial-Conduct

² Attorney discipline proceedings are generally confidential. I am unaware of any public order concluding the grievance concerning Complainant.

³ Complainant's initial complaint (J.C. No. 03-11-90141) against the Subject Judge remained pending at that time.

and Judicial-Disability Proceedings.⁴ Complainant did not file a petition for review under Rule 21(b) of the Judicial Council’s order dismissing her complaint.

II. Analysis

As a preliminary matter, a significant portion of the present complaint concerns arguments and allegations that relate directly to the merits and procedures of the pending attorney discipline proceedings. Such allegations are not the province of the Judicial Conduct and Disability Act and therefore will not be addressed here. 28 U.S.C. § 352(b)(1)(A)(i); Rule 11(c)(1)(G).

Complainant’s primary allegation in the present complaint is that the Subject Judge’s filing of an ethics grievance against her “less than a month after the appointment of the Special Committee” was done “for the purpose of retaliating against” Complainant for filing a complaint of judicial misconduct. Complainant contends that “most of the allegedly bad acts [the Subject Judge] does set out in the Grievance predate the filing of the Grievance by two years or more. As such, the only motivating factor for the filing of the Grievance can be retaliation.”

Complainant’s allegations of improper retaliation amounting to judicial misconduct are subject to dismissal as lacking sufficient evidence to raise an inference that misconduct has occurred. 28 U.S.C. § 352(b)(1)(A)(iii); Rule 11(c)(1)(D). Complainant bases her claim of retaliation on sheer speculation based on the timing of the Subject

⁴ Unless otherwise specified, all Rules cited in this opinion are the Rules for Judicial-Conduct and Judicial-Disability Proceedings.

Judge's letter to the Chief Justice regarding her conduct. Although it is true that the Subject Judge's letter to the Chief Justice was sent after the appointment of a Special Committee in J.C. No. 03-11-90141, this does not demonstrate that the Subject Judge's "only motivating factor" was retaliation. In the first instance, the Subject Judge's findings concerning Complainant's allegedly unprofessional behavior were articulated in an opinion denying Complainant's recusal motion issued several months prior to Complainant's filing of a judicial misconduct complaint. Thus, the Subject Judge had already gone on record with his view that Complainant had engaged in unprofessional conduct before she ever filed a complaint of judicial misconduct. Complainant's retaliation theory is further undercut by the fact that the letters attached as exhibits to her own complaint demonstrate that the Subject Judge waited to send a formal letter about her conduct until after a panel of the Third Circuit denied Complainant's petitions for writ of mandamus seeking review of the Subject Judge's opinion articulating those findings. The Subject Judge's letter, dated May 31, 2012, to the Chief Justice states:

The nature and extent of [Complainant's] actions in matters before me are detailed in the Memorandum Opinion Complainant sought review of those findings by filing petitions for writs of mandamus in the Third Circuit Court of Appeals. On March 6, 2012, the Third Circuit denied the petitions for writ of mandamus. Thus, the findings set forth in the opinion are settled.

Notably, the Subject Judge sent this letter to the Chief Justice on the same day that another Third Circuit panel affirmed "in all respects" the Subject Judge's orders and rejected Complainant's claims of hostile treatment by the Subject Judge. Under these circumstances, I find that Complainant's allegations of retaliation based primarily on the

timing of the letter are subject to dismissal as lacking sufficient evidence to raise an inference that misconduct has occurred. 28 U.S.C. § 352(b)(1)(A)(iii); Rule 11(c)(1)(D).

Moreover, in the May 31, 2012 letter to the Chief Justice, the Subject Judge explained that his reason for reporting Complainant's conduct was the Subject Judge's obligation to do so under Canon 3(B)(5) of the Code of Conduct for United States Judges. This Canon directs judges to "take appropriate action upon learning of reliable evidence indicating the likelihood that ... a lawyer violated applicable rules of professional conduct." Complainant offers no evidence demonstrating that the Subject Judge's compliance with this Canon constituted improper retaliation under the circumstances presented here. It bears emphasizing in this regard that the Subject Judge issued a strongly worded opinion detailing what he viewed as unprofessional conduct in his courtroom well before Complainant filed a complaint of judicial misconduct. Furthermore, prior to sending a formal letter to the Chief Justice, the Subject Judge took the extra step of obtaining advice from an attorney experienced in the field of attorney misconduct. This attorney opined that Complainant's actions, as set forth in the Subject Judge's opinion, ran afoul of the Model Code of Professional Conduct. This expert further recommended that, "[t]his conduct should be fully reported to the appropriate disciplinary authorities." The Subject Judge's decision to follow this advice and the mandate of Canon 3(B)(5) of the Code of Conduct for United States Judges does not raise an inference that judicial misconduct has occurred. Id.

In further support of her retaliation claim, Complainant seeks to demonstrate that the Subject Judge's allegations concerning her unprofessional conduct are "false" and "unsupported" because her recusal motions were "factually supported" and "filed in good faith." As evidence of the Subject Judge's "*modus operandi*" of hostile treatment, Complainant cites to a completely unrelated District Court case where another attorney made an allegation in a motion for a new trial that the Subject Judge had addressed that attorney in an "angry, hostile and demeaning tone."⁵ Complainant also insists that the Subject Judge has "refused to recuse himself from cases in which I am a lawyer and in cases in which he has prejudged live issues"

Complainant's allegations concerning the Subject Judge's pattern and practice of treating her in an abusive and hostile manner were already addressed and dismissed in J.C. No. 03-11-90141. As explained in that opinion, three panels of the Court of Appeals have rejected claims related to Complainant's allegations of abusive and hostile treatment by the Subject Judge. These allegations are again subject to dismissal as lacking sufficient evidence to raise an inference that misconduct has occurred for the reasons explained at length in J.C. No. 03-11-90141. 28 U.S.C. § 352(b)(1)(A)(iii); Rule 11(c)(1)(D). In addition, to the extent Complainant seeks essentially to re-litigate arguments concerning the Subject Judge's putative hostility towards her and the merits of the recusal motions in these administrative proceedings, the complaint is subject to dismissal as merits-related.

⁵ The motion for a new trial in this unrelated District Court case remains pending and does not provide evidence of bias against Complainant or a "*modus operandi*" of hostile treatment.

See also 28 U.S.C. § 352(b)(1)(A)(ii); Rule 3(h)(3) (“An allegation that calls into question the correctness of a judge’s ruling, including a failure to recuse, without more, is merits-related.”); Rule 11(c)(1)(B).

Complainant further alleges that the Subject Judge’s procurement of a letter from an expert on attorney discipline issues is additional evidence of retaliation and an “independent violation” of Model Rule 2.9(A)(2) and (C) of the ABA’s Model Code of Judicial Conduct because the Subject Judge: (1) obtained advice from an expert without notice; and (2) investigated facts in a matter “independently.” Similar to the ABA Model Code,⁶ the Code of Conduct for United States Judges issued by the Judicial Conference authorizes judges to “obtain the written advice of a disinterested expert on the law, but only after giving advance notice to the parties” Canon 3A(4)(C). This Canon, however, concerns a judge’s “Adjudicative Responsibilities”. Here, the Subject Judge’s referral of Complainant’s conduct to the relevant bar was not done as part of the Judge’s adjudicative function. Indeed, the Subject Judge did not make any findings of attorney misconduct or otherwise discipline Complainant based on the expert’s letter. Rather, as noted above, the Subject Judge referred her actions to the Chief Justice for evaluation pursuant to Canon 3(B)(5) after Complainant’s mandamus petitions concerning his recusal opinion were denied.

⁶ The ABA Model Code is not binding in these proceedings. Moreover, the ABA Model Code is not the code relied on and referenced in the Rules of Judicial-Conduct and Judicial-Disability Proceedings. Rather, the Rules cite to the Code of Conduct for United States Judges issued by the Judicial Conference.

Nor is there any evidence that the Subject Judge improperly “paid, used court funds, or called in a favor” to obtain the letter from the expert. The absence of a specific Canon authorizing the Subject Judge’s procurement of the expert’s letter does not mean, as maintained by Complainant, that the action necessarily constitutes judicial misconduct. As discussed above, the Subject Judge did not make any judicial findings based on the letter; rather, he referred his concerns to the Chief Justice so that appropriate action could be taken by the disciplinary authorities. Accordingly, these allegations are subject to dismissal as frivolous and unsupported by any evidence that would raise an inference that misconduct has occurred. 28 U.S.C. § 352(b)(1)(A)(iii); Rule 11(c)(1)(C),(D), Rules for Judicial-Conduct and Judicial-Disability Proceedings.

Complainant makes additional claims of judicial misconduct that are closely related to the foregoing claims and need not be addressed at length here. In addition, Complainant alleges that the Subject Judge has a history of violating her due process rights and has “improperly asserted his status as a federal judicial officer to bolster his allegations” by claiming that his “findings” are “settled” for purposes of the Grievance. It is clear on the face of the Subject Judge’s letter that his use of the term “settled” was not intended to suggest that the state disciplinary authorities were bound by his findings. Rather, the Subject Judge was simply communicating to the Chief Justice that his findings were no longer the subject of a collateral legal challenge. This statement is not evidence of judicial misconduct and the allegation is dismissed. Id. I have carefully considered each of Complainant’s remaining claims and conclude that they are subject to dismissal as

frivolous and unsupported by any evidence that would raise an inference that misconduct has occurred. Id.

III. Conclusion

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

/s/ Theodore A. McKee
Chief Judge

JUDICIAL COUNCIL OF THE THIRD CIRCUIT

J.C. No. 03-12-90073

IN RE: COMPLAINT OF JUDICIAL MISCONDUCT
OR DISABILITY

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

ORDER

Filed: November 20, 2013

PRESENT: McKEE, Chief Judge.

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),(ii), 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.

Rule 18(b) Time. A petition for review must be filed in the office of the Circuit Executive of the Court of Appeals within **35 days** of the date on the letter informing the parties of the Chief Judge's order.

18(b) Form. The petition should be in letter form, addressed to the Circuit Executive 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 Office of the Circuit Executive of the Court of Appeals for the Third Circuit and on the Court of Appeals’ internet site, www.ca3.uscourts.gov.

/s/ Theodore A. McKee
Chief Judge

Dated: November 20, 2013