

JUDICIAL COUNCIL OF THE THIRD CIRCUIT

J.C. Nos. 03-13-90095, 03-13-90096, 03-13-90097

IN RE: COMPLAINT OF JUDICIAL MISCONDUCT
OR DISABILITY

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

MEMORANDUM OPINION

(Filed: March 17, 2014)

PRESENT: McKEE, Chief Judge.

This complaint is filed under the Judicial Conduct and Disability Act, 28 U.S.C. §§ 351-64, against a United States District Judge (“Subject Judge I”) and two United States Magistrate Judges (“Subject Judge II” and “Subject Judge III”). For the reasons discussed below, the complaint will be dismissed.

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 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 state prisoner, filed petitions for a writ of habeas corpus in 2012 and 2013 concerning parole decisions.¹ The 2012 petition originally was assigned to Subject Judge I, but the parties submitted their signed consent to proceed before a magistrate judge. Accordingly, in February 2013, Subject Judge I referred the petition to Subject Judge II for all purposes. In August 2013, Subject Judge II issued a memorandum and order denying the 2012 petition. In response, Complainant filed a lengthy document entitled “Reconsideration Objection to [Subject Judge II’s] Memorandum and Order.” The document was entered onto the District Court’s docket as a notice of appeal. In November 2013, the Court of Appeals declined to issue a certificate of appealability. Among other things, the Court of Appeals concluded that, because Complainant had consented to proceed before a magistrate judge, the District Court did not err in construing his objections as a notice of appeal.

Complainant’s 2013 habeas petition was assigned to Subject Judge I, who referred it to Subject Judge III for a report and recommendation. In December 2013, Subject Judge III recommended that the petition be denied. Complainant filed objections to the report and recommendation and also filed a notice of appeal. In January 2014, Subject Judge I adopted the report and recommendation, overruled Complainant’s objections, and dismissed the 2013 petition. Complainant’s appeal remains pending.

¹ Complainant actually filed two habeas petitions in 2012, but the matters were consolidated into a single proceeding. For clarity, I will discuss the consolidated 2012 petitions as a single proceeding.

In this complaint of judicial misconduct, Complainant alleges that Subject Judge I improperly failed to conduct a *de novo* review of Subject Judge II's decision on the 2012 habeas petition. Complainant alleges that "[Subject Judge I was obligated to make a de novo determination, especially when de novo review as of right applies to all factual and legal matters to which objections is made. . . ." In addition, Complainant alleges that all three Subject Judges "are rubber-stamping; lifting and copying the exact same arguments" made by the defendants in Complainant's habeas proceedings.

Although Complainant states that he "is not claiming that a judicial decision was wrong because this does not establish misconduct and is challenging the correctness of a judge's decision in court," it is apparent that these allegations are merits-related. "An allegation that calls into question the correctness of a judge's ruling, . . . without more, is merits-related." Rule 3(h)(3)(A), Rules for Judicial-Conduct and Judicial-Disability Proceedings. Indeed, as Complainant expressly acknowledges, Subject Judge I's allegedly improper failure to consider his objections was the basis for his appeal from Subject Judge II's decision. That appeal was unsuccessful, and the conclusions reached by the Court of Appeals are not subject to collateral challenge in this administrative proceeding. The "misconduct procedure [under the Act] is not designed as a substitute for, or supplement to, appeals or motions for reconsideration. Nor is it designed to provide an avenue for collateral attacks or other challenges to judges' rulings." In re Memorandum of Decision of Judicial Conference Committee on Judicial Conduct and Disability, 517 F.3d 558, 561 (U.S. Jud. Conf. 2008).

Complainant's merits-related allegations are not cognizable as judicial misconduct. Accordingly, these allegations are dismissed. See 28 U.S.C. § 352(b)(1)(A)(ii); Rules 3(h)(3)(A), 11(c)(1)(B), Rules for Judicial-Conduct and Judicial-Disability Proceedings.

Next, Complainant alleges that prison officials engaged in improper *ex parte* communications in the course of the 2013 habeas proceeding. He states that "when [the defendants] wrote [Subject Judge II] a personal letter about the case before the court, which was verbally transferred to [Subject Judge III] and [Complainant] strongly believes these judges . . . was having improper discussions with counsel for one side in a case. [Subject Judge I] allowed this to occur and did nothing about it."

Complainant's allegations are far too vague in this regard. He does not provide a copy of the alleged letter, describe its contents, or disclose how he became aware of it. While there are a number of letters from Complainant to Subject Judge II on the District Court docket, there is no letter from the defense to Subject Judge II, and there is no obvious reference to such a letter in the numerous documents that Complainant filed in that matter.² There is simply nothing to substantiate Complainant's allegation. In any event, while Complainant's allegation of improper communications specifically concerns Subject Judge II, Subject Judge II did not write the report and recommendation in

² The record reflects one letter sent by defense counsel to a local district attorney's office in March 2013. That letter was not sent to Subject Judge II; rather, it was copied to Complainant, who filed it in the District Court proceeding. In the letter, defense counsel suggests that the district attorney's office should handle the defense of the habeas corpus proceeding. If this is the letter that Complainant is describing, it does not constitute an improper *ex parte* communication with Subject Judge II, as it was copied to Complainant and was not sent to Subject Judge II.

Complainant's 2013 habeas proceeding. Thus, these allegations are unsupported by any evidence that would raise an inference that any improper *ex parte* communication has occurred. Accordingly, they are dismissed. 28 U.S.C. § 352(b)(1)(A)(iii); Rule 11(c)(1)(D), Rules for Judicial-Conduct and Judicial-Disability Proceedings.

Next, Complainant alleges that, in the 2013 habeas petition, "they was taking forever to disposition. . . ." Complainant further alleges that the Subject Judges have been "habitually delaying in many unrelated cases."

Generally, delay does not constitute judicial misconduct, as it effectively poses a challenge to merits of an official action by the judge – *i.e.*, the decision to assign a lower priority to a particular case. See Rule 3 Commentary, Rules for Judicial-Conduct and Judicial-Disability Proceedings. Merits-related claims are not cognizable under the Judicial Conduct and Disability Act. See 28 U.S.C. § 352(b)(1)(A)(ii); Rules 3(h)(3)(A), 11(c)(1)(B), Rules for Judicial-Conduct and Judicial-Disability Proceedings.

A claim of delay may, however, qualify as cognizable judicial misconduct where "the allegation concerns . . . habitual delay in a significant number of unrelated cases." Rule 3(h)(3)(B), Rules for Judicial-Conduct and Judicial-Disability Proceedings. Since December 2012, Complainant has filed a total of four cases – the two habeas petitions previously discussed, which both challenge parole decisions, a third habeas petition that also challenges parole decisions and purports to be on behalf of a class of similarly situated plaintiffs, and a civil rights complaint that alleges deprivation of due process in a parole hearing. Even if it were accepted that these four cases about Complainant's parole

determination could constitute “a significant number of unrelated cases” (a dubious proposition), a review of the docket sheets reveals that there is no factual support whatsoever for Complainant’s claim of habitual delay.

The record demonstrates that, even despite Complainant’s numerous motions, letters, and other submissions, which clearly have contributed to the time required to resolve the proceedings, there have been no periods of undue delay in any of Complainants’ cases. Because the record refutes Complainant’s claim, these allegations are dismissed as frivolous and unsupported by evidence that would raise an inference that misconduct occurred. 28 U.S.C. § 352(b)(1)(A)(iii); Rule 11(c)(1)(C), (D), Rules for Judicial-Conduct and Judicial-Disability Proceedings.

Finally, Complainant alleges that the three Subject Judges “discriminated against [Complainant] because of his race, ethnicity, or other legally protected [trait].” Apart from his disagreement with the merits of the Subject Judges’ decisions and rulings in his habeas corpus proceedings and the other previously-discussed unsubstantiated claims of misconduct, Complainant does not provide any support for his allegations of discrimination. The record does not substantiate his claims. Accordingly, any remaining claims are dismissed 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.

For the foregoing reasons, the complaint is dismissed pursuant to 28 U.S.C. §§ 352(b)(1)(A)(ii) and (iii).³

s/ Theodore A. McKee
Chief Judge

³ After filing the initial complaint, Complainant filed additional documents containing allegations not made under penalty of perjury as required by Rule 6, Rules for Judicial-Conduct and Judicial-Disability Proceedings. I have considered these allegations under Rule 5 and conclude that they do not provide “reasonable grounds for inquiry” into the existence of judicial misconduct. Accordingly, I decline to identify any complaints based upon these allegations.

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ORDER

(Filed: March 17, 2014)

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)(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 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.

s/ Theodore A. McKee
Chief Judge

Dated: March 17, 2014