

JUDICIAL COUNCIL OF THE THIRD CIRCUIT

J.C. No. 03-15-90007

IN RE: COMPLAINT OF JUDICIAL MISCONDUCT
OR DISABILITY

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

MEMORANDUM OPINION

Filed: April 30, 2015

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 (the “Subject Judge”). 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, attempted to file a pro se civil rights complaint and a motion to proceed *in forma pauperis*. The matter was assigned to the Subject Judge. The Subject Judge denied the motion to proceed *in forma pauperis* without prejudice for

failure to file a prison account statement. Complainant contends that he attempted to file the necessary document, but that the Clerk of the District Court “obstructed the process by returning the Complainant’s declaration without processing. . . .”

Complainant then filed a document entitled “notice of appeal,” to which he attached the prison account statement. Shortly after an appeal was docketed in the Court of Appeals, Complainant attempted to withdraw the appeal by filing a document in the District Court, explaining that he had not intended to file an appeal but had actually intended to file the prison account statement as directed by the Subject Judge.

Complainant did not file a motion to withdraw in the Court of Appeals but the appeal eventually was dismissed for failure to prosecute. Then, apparently considering the account statement that Complainant had submitted along with the “notice of appeal,” the Subject Judge issued a *sua sponte* order again denying the motion to proceed *in forma pauperis*, this time pursuant to the “three strikes” rule, and directing that Complainant may reinstate the complaint by paying the filing fee within thirty days. Complainant did not pay the filing fee and did not appeal the Subject Judge’s second order. The case remains closed.

In this complaint of judicial misconduct, Complainant contends the Subject Judge initially dismissed the complaint in error by allegedly “not giving the layman Complainant any notice before dismissing it.” Complainant further alleges the Subject Judge “is using FRAUDULENT INFORMATION to obstruct justice.” Specifically, Complainant contends that the “three strikes” rule does not apply to him, that a magistrate judge in a

different district court misapplied the rule to him, and that the Subject Judge compounded the magistrate judge's alleged error by wrongfully denying him *in forma pauperis* status. In support, Complainant has provided a copy of an administrative order from a third district court, where he has re-filed his civil rights complaint. He argues that the administrative order reflects that the third district court has not applied the "three strikes" rule to him.

As an initial matter, Complainant raises allegations that concern individuals who are not judges and who therefore are not covered by the Judicial Conduct and Disability Act, including the Clerk of the District Court. See Rule 4, Rules for Judicial-Conduct and Judicial-Disability Proceedings. This judicial misconduct proceeding is not a proper forum for considering the merits of allegations concerning non-judges. Accordingly, such allegations will not be addressed in this opinion. See 28 U.S.C. §§ 351, 352(b)(1)(A)(i).

Next, it is clear that the primary purpose of this complaint is to challenge the Subject Judge's decisions and rulings; in particular, the decision to apply the "three strikes" rule to Complainant and the consequent decision to dismiss his complaint for failure to pay the filing fee. Attempts to collaterally attack a Subject Judge's decisions constitute merits-related allegations. "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. Merits-related allegations do not constitute cognizable misconduct under the Judicial Conduct and Disability Act. See 28 U.S.C. § 352(b)(1)(A)(ii) (chief judge may dismiss a complaint if he or she finds

that it is directly related to the merits of a decision or procedural ruling); Rule 11(c)(1)(B), Rules for Judicial-Conduct and Judicial-Disability Proceedings (a complaint must be dismissed in whole or in part to the extent that the chief judge concludes that the complaint is directly related to the merits of a decision or procedural ruling). Although Complainant could have filed an appeal from the Subject Judge’s final dismissal order, he did not choose to do so. The order is therefore final and cannot be challenged 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). Accordingly, Complainant’s merits-related allegations are dismissed.

Finally, Complainant contends that an older case upon which the Subject Judge relied in his final dismissal order should not be counted as a “strike.” It appears that, due to the age of the case, the hard-copy record no longer exists and Complainant’s allegations about the content of that complaint therefore cannot be directly corroborated. Complainant claims that, because the complaint “cannot be verified because the record is destroyed,” this amounts to “fraudulent concealment.”

To the extent Complainant is attempting to undercut the conclusion about the applicability of the “three strikes” rule, as previously discussed, the allegation is a non-cognizable merits-related allegation. See 28 U.S.C. § 352(b)(1)(A)(ii); Rule 11(c)(1)(B).

In addition, accepting that the document no longer exists because, due to its age, it was no longer subject to the district court's document retention policies, this allegation is far from sufficient to give rise to an inference that judicial misconduct has occurred.

There is nothing to indicate that the Subject Judge would have any role in or responsibility for maintaining hard copies of documents filed in another district court two decades ago. Accordingly, to the extent the allegations of "fraudulent concealment" implicate the Subject Judge at all, they 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.

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. 03-15-90007

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

ORDER

Filed: April 30, 2015

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 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: April 30, 2015