

JUDICIAL COUNCIL OF THE THIRD CIRCUIT

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J.C. Nos. 03-16-90052; 03-16-90062

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IN RE: COMPLAINTS OF JUDICIAL MISCONDUCT  
OR DISABILITY

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

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MEMORANDUM OPINION

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(Filed: November 16, 2016)

PRESENT: SMITH, *Chief Judge*.

These two complaints are filed under the Judicial Conduct and Disability Act, 28 U.S.C. §§ 351-64, against a United States District Judge (“Subject Judge I”) and United States Magistrate Judge (“Subject Judge II”). For the reasons discussed below, the complaints 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 federal prisoner, filed a motion to set aside, vacate, or correct his sentence pursuant to 28 U.S.C. § 2255 in January 2015. Complainant followed his initial filing with a series of amended § 2255 motions, a motion to dismiss<sup>1</sup>, and a motion for summary judgment. At the direction of Subject Judge II, Complainant filed the most recent amended § 2255 motion (his sixth) on the district court's appropriate form in October 2015. The day after Complainant filed the sixth amended § 2255 motion, the clerk of the district court directed the government to file a response within 60 days. The government complied. Complainant then filed a reply to the government's response and another motion to dismiss.

In May 2016, Subject Judge I referred the matter to Subject Judge II for a report and recommendation. Complainant continued filing motions, including another motion to dismiss, a motion to vacate the referral to Subject Judge II, and a motion for Subject Judge II's recusal. In October 2016, Subject Judge II issued a report and recommendation in which she recommended that the motion be denied. The sixth amended § 2255 motion and other related motions remain pending.

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<sup>1</sup> The motion sought to dismiss an attachment to the warrant application that ultimately led to Complainant's arrest on grounds that it violated his Sixth Amendment right to be informed of the nature of the accusation against him.

Meanwhile, only two months after Complainant filed his reply in support of the sixth amended § 2255 motion, Complainant filed his first petition for a writ of mandamus in the Court of Appeals, claiming undue delay and seeking an order directing Subject Judge I to schedule an evidentiary hearing in connection with his motion. In May 2016, the court dismissed the petition, noting that whether such a hearing is necessary is within the discretion of the district court and concluding that the amount of time the matter had been pending “does not rise to the level of undue delay.”

Complainant filed a second petition for a writ of mandamus the following month, this time seeking a ruling on his motion for summary judgment. In September 2016, observing that the matter had only recently been referred to Subject Judge II for a recommendation, the Court of Appeals denied the petition.

The next month, Complainant filed a third petition for a writ of mandamus. In it, Complainant seeks an order directing Subject Judge I to act on his motion to dismiss, his motion for summary judgment, and the motion under § 2255. That petition remains pending.

In these two complaints of judicial misconduct, Complainant accuses both Subject Judge I and Subject Judge II of “a willful and persistent failure to perform a duty,” “an improper motive for delaying” resolving Complainant’s § 2255 motion

and related motions, and “a habitual delay in a significant amount of unrelated cases.”

Complainant’s allegations of delay are the subject of Complainant’s pending mandamus petition, as well as the prior two mandamus petitions that the Court of Appeals denied. To the extent this complaint of judicial misconduct is intended to dispute the denial of the first two petitions or to influence the Court of Appeals’ decision on the pending petition, such allegations are merits-related. “An allegation that calls into question the correctness of a judge’s ruling, including a failure to recuse, without more, is merits-related.” Rule 3(h)(3)(A), *Rules for Judicial-Conduct and Judicial-Disability Proceedings*. Merits-related allegations are beyond the scope of a judicial misconduct proceeding and therefore are subject to dismissal. *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*.

In addition, a claim of delay generally does not constitute cognizable 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*. “[A]n allegation of a habitual pattern of delay in a significant number of unrelated cases, or an allegation of deliberate delay in a single case arising out of an illicit

motive, is not merits-related.” Here, in an effort to refute a conclusion that the complaints are merits-related, Complainant alleges both an illicit motive and habitual delay on the part of Subject Judges I and II.<sup>2</sup> These allegations are undercut by the plain fact that Complainant has not experienced any period of objectively unreasonable delay in his § 2255 proceeding.

Complainant correctly notes that he initially filed a § 2255 motion in early 2015. Yet due to Complainant’s choice to file numerous amended § 2255 motions, briefing in this matter did not conclude until January 2016, when Complainant filed his reply in support of his sixth amended § 2255 motion. Subject Judge I referred the matter to Subject Judge II not long thereafter and, as previously discussed, Subject Judge II recently issued a report and recommendation in Complainant’s case. Thus, the record does not reflect any period of objectively unreasonable delay. Because Complainant’s claim of delay is entirely lacking in a factual basis, it is dismissed as frivolous and unsupported by 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*.

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<sup>2</sup> Apart from the bald and conclusory statement that Subject Judges I and II have “an improper motive,” Complainant offers no evidence to support or explain this allegation.

In support of his claim of habitual delay, Complainant cites four cases handled by Subject Judge I and three cases handled by Subject Judge II, arguing that these cases, when considered along with his own case, establish a pattern of habitual delay warranting further investigation. It is highly doubtful that four or five cases involving each Subject Judge is a “substantial number” sufficient to give rise to a reasonable inference that misconduct has occurred, particularly in light of judges’ ability to manage their own dockets and assign priority to different cases accordingly. *See* Rule 3 Commentary, *Rules for Judicial-Conduct and Judicial-Disability Proceedings*.

Moreover, with regard to Subject Judge II, Complainant’s allegation of delay is not borne out by a review of the record, as Subject Judge II resolved two of the three cases cited within a period of less than one year. This simply is not undue delay. Complainant’s allegation of habitual delay on the part of Subject Judge I is therefore subject to dismissal as patently frivolous. *See* 28 U.S.C. § 352(a)(1)(iii); Rule 11(c)(1)(C), *Rules for Judicial-Conduct and Judicial-Disability Proceedings*.

The four cited cases handled by Subject Judge I reflect much more lengthy times until disposition, sometimes periods of several years. While the lengthy delay may give rise to some concern, those cases were resolved by Subject Judge I between eight and eleven years ago, far too long ago to shed light on Complainant’s

current circumstances. When considering the allegations in light of Complainant's own case, which (as previously discussed) has not been subject to any period of undue delay, the allegation of habitual delay in a significant number of unrelated cases is unsupported by evidence that would raise an inference that misconduct occurred. 28 U.S.C. § 352(b)(1)(A)(iii); Rule 11(c)(1)(D), *Rules for Judicial-Conduct and Judicial-Disability Proceedings*.

Based on the foregoing, the complaints are dismissed pursuant to 28 U.S.C. §§ 352(b)(1)(A)(ii), (iii).

s/ D. Brooks Smith  
Chief Judge

JUDICIAL COUNCIL OF THE THIRD CIRCUIT

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

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ORDER

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(Filed: November 16, 2016)

PRESENT: SMITH, *Chief Judge*.

On the basis of the foregoing opinion entered on this date, it is ORDERED AND ADJUDGED that the written complaints brought pursuant to 28 U.S.C. § 351 are 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 Circuit Executive within **42 days** after the date of the chief judge's order.



18(b) Form. The petition should be in letter form, addressed to the Circuit Executive, 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 and on the Court of Appeals’ internet site, [www.ca3.uscourts.gov](http://www.ca3.uscourts.gov).

s/ D. Brooks Smith  
Chief Judge

Dated: November 16, 2016