

JUDICIAL COUNCIL OF THE THIRD CIRCUIT

J.C. No. 03-17-90007

IN RE: COMPLAINT OF JUDICIAL MISCONDUCT
OR DISABILITY

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

MEMORANDUM OPINION

(Filed: May 11, 2017)

PRESENT: SMITH, *Chief Judge*.

This is a complaint 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 was a criminal defendant in a proceeding before the Subject Judge. During Complainant’s trial, which took place over the course of ten days in 2010, an FBI agent who had investigated the case suffered a mental breakdown and may have

threatened to commit suicide in a courthouse bathroom. At that time, the Assistant U.S. Attorney (AUSA) speculated that the breakdown could have been brought on, in part, because the agent may have committed perjury.¹ Specifically, the agent had testified during an earlier suppression hearing that he did not recall telling Complainant during an interrogation that the AUSA – who had in the past prosecuted Complainant for a different crime – “says hello.”² Although the agent consistently had testified that he told Complainant the identity of the AUSA during the interrogation, the issue was whether or not the FBI agent recalled specifically using the AUSA “says hello” phrase.

According to the AUSA’s 2010 report memorializing the events, which Complainant appended to his complaint of misconduct, the AUSA informed Complainant’s counsel about the incident while the trial was ongoing. Counsel took no action at that time, allegedly stating “that he did not see it ‘as a big deal.’” In addition, with the guidance of the District Ethics Officer, the AUSA presented the testimony of a second FBI agent to resolve any doubts concerning the veracity of the first agent’s testimony. The second agent testified that the first agent made the AUSA “says hello” statement.

¹ As reflected in the exhibits Complainant appended to his complaint, the FBI agent had been experiencing personal problems, had been acting erratically, admitted having contemplated suicide on several occasions, and had not slept for nearly two weeks before the date of the trial testimony. After the apparent suicide attempt, the FBI agent was removed from the case and was hospitalized.

² During this interrogation, Complainant made a number of false statements that were unrelated to the alleged AUSA “says hello” comment by the FBI agent. Complainant’s false statements to authorities provided part of the basis for his conviction.

The jury ultimately found Complainant guilty of bank fraud, money laundering, making false statements to the government, and other crimes. The AUSA states in his report that, shortly after the jury rendered its verdict, he met with the Subject Judge and provided “a full explanation of everything that had occurred.”

Through counsel, Complainant raised the issue of the FBI agent’s alleged perjury in a supplemental post-trial motion for judgment of acquittal and a new trial, arguing that the AUSA should have presented the issue to Complainant’s counsel immediately after the possible perjury was discovered. After a hearing, the Subject Judge issued an opinion and order denying the motion. The Subject Judge concluded that, even if Complainant’s counsel had been provided the information sooner, there was no reasonable probability that it would have changed the outcome of the proceeding. Shortly thereafter, the Subject Judge sentenced Complainant to a lengthy term of imprisonment.

Complainant appealed, and the Court of Appeals affirmed the judgment. Addressing Complainant’s claim concerning the FBI agent’s alleged perjury and suicide attempt, the Court of Appeals held that those issues were immaterial to the result of Complainant’s case and that the government was under no obligation to disclose the information.

Complainant thereafter raised the same issue again in a motion to vacate, set aside, or correct the sentence under 28 U.S.C. § 2255 and a motion for the Subject Judge’s recusal. The Subject Judge denied Complainant’s motions. Complainant appealed the denial of his § 2255 motion, and the Court of Appeals declined to grant a certificate of

appealability. Complainant also filed two pro se petitions for a writ of mandamus, both of which again addressed the FBI agent's alleged perjury and presented allegations of bias on the part of the Subject Judge. The Court of Appeals denied the petitions.

Complainant later failed to surrender to serve his sentence and was apprehended as a fugitive in possession of a stolen firearm. He was tried before a different District Judge and a jury found him guilty. He was sentenced to an additional term of imprisonment and the Court of Appeals affirmed the conviction.

In this complaint of judicial misconduct, Complainant alleges that the Subject Judge engaged "in [a] conspiracy with the prosecutor which was clearly meant to, and has, deprive me of my civil rights and my freedom." Upon review, it is apparent that the current complaint simply reiterates Complainant's prior allegations to the effect that the Subject Judge engaged in misconduct because he knew of the FBI agent's alleged perjury during Complainant's trial.³ *See* J.C. Nos. 03-11-90073, 03-14-90013.

Once again, there is nothing in the record to support Complainant's theory that the Subject Judge knew of the alleged perjury while the criminal trial was ongoing. There is, however, ample evidence to demonstrate that the information about the incident was presented to the Subject Judge shortly after trial, in the context of Complainant's unsuccessful post-trial motion for acquittal. Accordingly, these allegations will once

³ To the extent the complaint includes allegations of wrongdoing on the part of the FBI agent and AUSA, these allegations will not be addressed. Neither the FBI agent nor the AUSA is subject to the Judicial Conduct and Disability Act. *See* 28 U.S.C. §§ 351, 352(b)(1)(A)(i); Rule 4, *Rules for Judicial-Conduct and Judicial-Disability Proceedings*.

again by dismissed as merits-related and unsupported by evidence that would raise an inference that misconduct has occurred, for the same reasons set forth in the opinions dismissing Complainant's prior complaints. *See* 28 U.S.C. § 352(b)(1)(A)(ii), (iii); Rules 3(h)(3)(A), 11(c)(1)(B), 11(c)(1)(D), *Rules for Judicial-Conduct and Judicial-Disability Proceedings*.

Complainant asserts that the current complaint is supported by “newly discovered evidence,” in the form of trial testimony provided by the AUSA in August 2015 in the course of Complainant's more recent criminal proceeding. In that testimony, the AUSA testified consistently with his 2010 report, in which he stated that he met with the Subject Judge after trial and provided “a full explanation of everything that occurred.” Specifically, the AUSA testified “I told [the Subject Judge] that [the FBI agent] had apparently had a mental breakdown and he was in a hospital, and that during [the] mental breakdown, he had made accusations against me . . . and others.” The AUSA further observed that, shortly after this conversation with the Subject Judge, “[t]here was a full-blown hearing after this, where all of those accusations were made and all of that evidence was presented.”

Upon review, it is clear that the foregoing does not constitute material information not previously considered. Rule 11(c)(2), *Rules for Judicial-Conduct and Judicial-Disability Proceedings*. While the 2015 testimony of the AUSA is of a more recent vintage than many of Complainant's other documents, it is entirely consistent with information that repeatedly has been presented to, and considered by, the Court of

Appeals and the District Court in the context of Complainants' criminal proceeding, appeals, and petitions, as well as the information previously presented in Complainant's two prior complaints of judicial misconduct. *See* J.C. Nos. 03-11-90073, 03-14-90013.

Based on the foregoing, this complaint will be dismissed pursuant to 28 U.S.C. §§ 352(b)(1)(A)(i), (ii), and (iii). Because this is Complainant's third complaint of judicial misconduct naming the same Subject Judge, presenting essentially the same allegations, and subject to dismissal on the same grounds, Complainant's attention is directed to Rule 10(a), *Rules for Judicial-Conduct and Judicial-Disability Proceedings*.⁴ Future abuse of the judicial misconduct complaint procedure may result in the imposition of restrictions under this provision.

s/ D. Brooks Smith
Chief Judge

⁴ Rule 10(a) of the *Rules of Judicial-Conduct and Judicial-Disability Proceedings* provides:

Abusive Complaints. A complainant who has filed repetitive, harassing, or frivolous complaints, or has otherwise abused the complaint procedure, may be restricted from filing further complaints. After giving the complainant an opportunity to show cause in writing why his or her right to file further complaints should not be limited, the judicial council may prohibit, restrict, or impose conditions on the complainant's use of the complaint procedure. Upon written request of the complainant, the judicial council may revise or withdraw any prohibition, restriction, or condition previously imposed.

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ORDER

(Filed: May 11, 2017)

PRESENT: SMITH, *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 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.

s/ D. Brooks Smith

Chief Judge

Dated: May 11, 2017