

JUDICIAL COUNCIL OF THE THIRD CIRCUIT

J.C. No. 03-13-90061

IN RE: COMPLAINT OF JUDICIAL MISCONDUCT
OR DISABILITY

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

MEMORANDUM OPINION

(Filed: December 20, 2013)

PRESENT: McKEE, 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 (hereinafter “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). 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).

As a preliminary matter, Complainant makes allegations concerning an attorney. Attorneys are not 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. Accordingly, these allegations will not be addressed in this opinion.

Complainant further alleges that the Subject Judge repeatedly allowed an attorney to make false statements of material fact about Complainant's criminal record in the course of two civil actions Complainant filed against a city. In support of this claim, Complainant references a transcript of a hearing in a civil matter before the Subject Judge where the defense attorney stated Complainant was arrested and convicted of multiple offenses. Complainant also references a transcript of a civil jury trial before the Subject Judge. According to Complainant, this second transcript demonstrates that the defense attorney handed the Subject Judge a document proving that Complainant was not convicted of harassment, but that the Subject Judge nonetheless asked Complainant to:

tell her what [Complainant] was convicted of. Wow, this was incredible she just demanded to see the copy [of the case record] and then the one page document was in her hands with the words dismissed right there, and, wow then she asked me to say it, but for some reason she didn't ask me before, not only that she asked for that instead. On the next page, it states what she said but not what was coupled with it, she stated, "Okay he was convicted of that, [Mr. Defense Attorney]", but stopped after she said it to give him a

stern look and head nod.

The transcripts have been reviewed and they do not support a claim of judicial misconduct. Indeed, the transcript of the first hearing reflects that the Subject Judge allowed Complainant to make his argument that he “wasn’t convicted of all the things It was just unlawful use of the computer and --” The second transcript reflects that Subject Judge asked the defense attorney whether he had a certified copy of Complainant’s conviction. When the defense attorney said no and handed the Subject Judge a “court summary,” the Subject quite properly asked Complainant to testify concerning what he was convicted of, and Complainant did so. These actions do not in any way support a claim of judicial misconduct. Accordingly, Complainant’s allegations of misconduct 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.

Complainant further alleges that the Subject Judge engaged in judicial misconduct because the Subject Judge “could have instantaneously checked on the [attorney’s] ethics crimes, by simply going to the public website with the record” This allegation is likewise subject to dismissal. As discussed above, the Subject Judge provided Complainant with an opportunity to dispute the attorney’s claims and he did so. Furthermore, it would have been improper for the Subject Judge to check a website in the course of a hearing or trial as proposed by Complainant. Id.

Complainant further asserts that the Subject Judge engaged in judicial misconduct because she failed to take any action regarding the attorney’s false statements of material fact.¹ Canon 3(B)(5) of the Code of Judicial Conduct provides that a “judge should take appropriate action upon learning of reliable evidence indicating the likelihood that . . . a lawyer violated applicable rules of professional conduct.” Canon 3(B)(5) (listing standards for judges’ “Administrative Responsibilities”). This Canon makes clear that a judge’s decision about whether or not to refer an attorney to the appropriate authority is an administrative action.² Any allegation that calls into question the correctness of an official action of a judge, without more, is subject to dismissal as merits-related. Commentary on Rule 3 (explaining that the phrase “decision or procedural ruling” in Rule 3(h)(3)(A) is not limited to rulings issued in deciding Article III cases or controversies and that a complaint challenging a judge’s administrative determination is properly dismissed as “merits-related”). See also 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.

Complainant further contends that the Subject Judge “has a long, long history of this type of behavior and favoritism towards the City.”³ In support of this claim, he

¹ Complainant references the Subject Judge’s alleged violation of “Canon 2:15 (B) and (D),” but it is unclear which Code of Conduct he is referencing. The Code of Conduct referenced in the national Rules for Judicial-Conduct and Judicial-Disability Proceedings is the Code of Conduct for United States Judges. Canon 3(B)(5) – and not Canon 2 – is relevant here.

² Notably, Complainant himself filed a disciplinary complaint against the attorney and it was dismissed after an investigation.

³ Complainant also makes a brief allegation of misconduct about another judge who is not named as a Subject Judge in the complaint. Complainant alleges that this “friend” of the

contends that the case summary referenced above was not listed as an exhibit in the trial transcript and that this constitutes an attempt on the part of the Subject Judge to cover up her misconduct with respect to the testimony about Complainant's convictions. In the first instance, the transcript does not reflect that the case summary was ever marked as an exhibit or formally moved into evidence as an exhibit. This explains why the document is not listed as an exhibit in the transcript. In any event, there is no evidence to support Complainant's allegations of bias and they 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)(i), (ii), and (iii).

/s/ Theodore A. McKee
Chief Judge

Subject Judge is engaging in delay to protect the Subject Judge. There is no evidence to support this allegation of delay for an improper motive and I decline to identify a complaint under Rule 5 of the Rules for Judicial-Conduct and Judicial-Disability Proceedings based on this unsupported and speculative allegation.

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ORDER

(Filed: December 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: December 20, 2013