

JUDICIAL COUNCIL OF THE THIRD CIRCUIT

J.C. No. 03-13-90089

IN RE: COMPLAINT OF JUDICIAL MISCONDUCT
OR DISABILITY

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

MEMORANDUM OPINION

Filed: March 6, 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 (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 civilly committed individual and frequent pro se litigant, filed a civil rights complaint in November 2009 and an amended complaint in June 2010. The

matter was assigned to the Subject Judge. In June 2011, the Subject Judge issued an opinion concluding that the complaint largely should be dismissed for failure to state a claim upon which relief could be granted, but that one claim against one defendant should proceed. In an accompanying order, the Subject Judge directed the United States Marshal to serve the summons and complaint upon the remaining defendant and directed the defendant to respond to the complaint within the time set forth in Fed. R. Civ. P. 12.

The defendant did not respond. In October and December 2011, Complainant moved for a default judgment against the defendant. In February 2012, the Subject Judge denied the motions as premature, explaining that Complainant had not requested the Clerk to enter a default pursuant to Fed. R. Civ. P. 55, and that that the defendant had not yet been properly served in any event. Service upon the defendant was effected in June 2012. To date, the defendant has not responded to the complaint, and Complainant has not requested the Clerk to enter a default pursuant to Fed. R. Civ. P. 55. Complainant moved for the appointment of counsel; the Subject Judge denied the motion in June 2013. Most recently, in October 2013, Complainant filed a letter in which he requests the Subject Judge to recuse himself.

In this complaint of judicial misconduct, Complainant alleges that “the focus of this complaint is . . . the case is going on five years old with absolutely no relief at all which has created basically a failed cause before it started . . . [by permitting] the defendant to continue with their criminal acts including violence and bloodshed with impunity to the degree of accomplice.”

Generally, delay in a single case is not cognizable as 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 the 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 in a single proceeding may, however, qualify as cognizable judicial misconduct where “the allegation concerns an improper motive in delaying a particular decision. . . .” Rule 3(h)(3)(B), Rules for Judicial-Conduct and Judicial-Disability Proceedings.

To attempt to illustrate improper motive, Complainant alleges that, in a separate civil rights proceeding, the Subject Judge also acted improperly. Somewhat illogically, Complainant alleges that the Subject Judge resolved the other proceeding too quickly.¹ Complainant alleges that the Subject Judge “earned a REMAND from such disregard,” and argues that the Subject Judge “rubber-stamped that case as well without taking an honest look at it. . . .” Complainant’s allegations appear, however, to be merits-related disputes with the Subject Judge’s decision in the proceeding. 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-

¹ In that case, the Subject Judge dismissed the complaint for failure to state a claim upon which relief may be granted. On appeal, the Court of Appeals vacated the decision and remanded the matter for further proceedings. Shortly after remand, the Subject Judge issued a new memorandum and opinion dismissing the case. The appeal from that judgment is pending.

Disability Proceedings. These allegations do not provide evidence of improper motive in delaying a particular decision in the civil rights case that is the focus of the delay claim.

In any event, while Complainant's case indeed is progressing slowly, it is not apparent that any delay in Complainant's case is attributable to the Subject Judge. The defendant was not properly served with the complaint until June 2012, and the defendant's failure to respond to the complaint since then is not the fault of the Subject Judge.² Complainant has not chosen to request the Clerk to enter a default pursuant to Fed. R. Civ. P. 55(a), although the Subject Judge issued an order in February 2012 expressly setting forth the appropriate procedure for doing so. In addition, Complainant sought the involvement of the Court of Appeals and was provided a letter setting forth the procedures for properly filing a petition for a writ of mandamus pursuant to Fed. R. App. P. 21, but he did not choose to file a petition.

Instead, Complainant has chosen to send numerous informal letters to the District Court, which are not clearly intended as motions and which therefore do not require the Subject Judge's action.³ See Fed. R. Civ. P. 7(b) ("A request for a court order must be made by motion. The motion must . . . state with particularity the grounds for seeking the

² Some of Complainant's allegations concern the defendant in his case, who is not covered by the Judicial Conduct and Disability Act. Accordingly, such allegations will not be addressed in this opinion. See 28 U.S.C. §§ 351, 352(b)(1)(A)(i); Rule 4, Rules for Judicial-Conduct and Judicial-Disability Proceedings.

³ To the extent Complainant alleges misconduct based upon a "failure/refusal to reply" to letters that are not filed as motions and do not formally request judicial action, such allegations are 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)(D), Rules for Judicial-Conduct and Judicial-Disability Proceedings.

order; and state the relief sought.”). Thus, as a factual matter, to the extent it is not merits related, Complainant’s claim of misconduct based upon delay is 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)(D), Rules for Judicial-Conduct and Judicial-Disability Proceedings.

Finally, many of the allegations of the misconduct complaint were raised in Complainant’s letter of October 2013, concerning the Subject Judge’s recusal. While it is not clear that the October 2013 letter is a properly-filed motion in conformance with Fed. R. Civ. P. 7(b) that will be ruled upon by the Subject Judge, I note that any dispute with a decision not to recuse also would qualify as 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.

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

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ORDER

Filed: March 6, 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)(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: March 6, 2014