

JUDICIAL COUNCIL OF THE THIRD CIRCUIT

J.C. No. 03-14-90014

IN RE: COMPLAINT OF JUDICIAL MISCONDUCT
OR DISABILITY

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

MEMORANDUM OPINION

(Filed: September 19, 2014)

PRESENT: McKEE, Chief Judge.

This is a complaint filed by an attorney under the Judicial Conduct and Disability Act, 28 U.S.C. §§ 351-64, against a United States District Judge (hereinafter “Subject Judge”). I conducted a limited inquiry in this matter under 28 U.S.C. § 352(a) and requested that the Subject Judge file a response to the complaint. See also Rule 11(b), Rules for Judicial-Conduct and Judicial-Disability Proceedings.¹ The Subject Judge’s response and the record have been reviewed and, for the reasons discussed below, the complaint will be dismissed.²

¹ In accordance with 28 U.S.C. § 352(a), a copy of this response was not provided to Complainant.

² As a preliminary matter, Complainant makes allegations concerning individuals and entities who are not subject to the Judicial Conduct and Disability Act; e.g., attorneys, a bank, an attorney disciplinary body, and various government entities. See 28

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). A chief judge may also dismiss the complaint “when a limited inquiry conducted under subsection (a) demonstrates that the allegations in the complaint lack any factual foundation or are conclusively refuted by objective evidence” 28 U.S.C. § 352(b)(1)(B).

Complainant alleges that his reputation and business have been damaged in the course of ongoing litigation about alleged violations of fiduciary duties under the Employee Retirement Income Security Act of 1974. The vast majority of his allegations concern the merits of this underlying litigation. For example, Complainant alleges that the Subject Judge granted summary judgment on an issue against Complainant, disregarded legal precedent, improperly allowed access to Complainant’s computer system, acted without jurisdiction, violated the Rehabilitation Act, froze assets “despite no factual basis in sworn testimony,” imposed a receivership, improperly characterized his response to an email, failed to hold an evidentiary hearing, and failed to apply the Bankruptcy Code.

These attempts to collaterally attack the Subject Judge’s rulings are plainly merits-related and are not cognizable under 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.

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 3(h)(3)(A), Rules for Judicial-Conduct and Judicial-Disability Proceedings (“[a]n allegation that calls into question the correctness of a judge’s ruling . . . without more, is merits-related”); 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). See also In re Memorandum of Decision of Judicial Conference Committee on Judicial Conduct and Disability, 517 F.3d 558, 561 (U.S. Jud. Conf. 2008)(“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.”).

Complainant also alleges that the Subject Judge issued a “retaliatory order” requiring that he provide medical evidence of his condition, compelled Complainant to respond to over 150 docket entries during his illness, and engaged in other forms of retaliation. He contends that she exhibited “judicial intemperance” and prejudice and scheduled numerous hearings requiring his presence in repeated attempts to find him in contempt. Complainant’s sole support for these allegations are sheer speculation and/or his disagreement with the Subject Judge’s rulings. As discussed above, merits-related allegations are not cognizable in these proceedings. Id. In any event, Complainant’s allegations of bias, judicial intemperance, and improper motive are dismissed as frivolous

and unsupported by sufficient evidence to 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.³ In fact, a review of the record indicates that the Subject Judge has been extremely patient with Complainant.

Complainant alleges, moreover, that the Subject Judge “illegally compelled” Complainant to participate in depositions and contempt proceedings “following two concussions.”⁴ These allegations of judicial misconduct are meritless. Complainant, who is himself an attorney, was represented by counsel during the contempt proceedings and the entirety of his deposition.⁵ The transcripts of the proceedings have been reviewed and do not support a complaint of misconduct. Indeed, prior to the commencement of Complainant’s deposition, his own counsel asked him “how are you feeling right now?” Complainant responded that he was feeling “not the best, but functional.” His attorney also asked him if he was capable of answering questions truthfully and to the best of his ability. Complainant responded, “I’ll answer truthfully, but whether I can answer the question depends on the question.” Nothing in the transcripts supports the allegation that the Subject Judge “illegally compelled” Complainant to participate. Indeed, a counseled motion for a protective order filed prior to the deposition did not raise any health issues.

³ Complainant also complains about a putative joke the Subject Judge made about her personal knowledge of bankruptcy law and her reliance on her law clerks in this regard. This allegation is frivolous. 28 U.S.C. § 352(b)(1)(A)(iii); Rule 11(c)(1)(C).

⁴ In his pending civil proceedings, Complainant claims he suffered from a concussion following a car accident some years ago. He further claims that a more recent car accident and a subsequent fall triggered concussion type symptoms.

⁵ I note, however, that attorney discipline proceedings are currently pending against Complainant in multiple courts.

Accordingly, Complainant's allegations are dismissed because they lack any factual foundation and are conclusively refuted by objective evidence. 28 U.S.C.

§ 352(b)(1)(B).⁶

Complainant further contends that the Subject Judge allowed the government entity to "present a PowerPoint show in court, without the opportunity of [Complainant] to contest it because he was home, in bed and recuperating from his injuries. The judge allowed this show, full of conclusions and distortions, knowing the intention of the attorneys for the undersigned to withdraw. She allowed this evidentiary sideshow, without giving any notice of any hearing, but rather listing the matter as an argument."

Complainant also makes a related allegation that the Subject Judge called Complainant at home "rousing him from bed in his pajamas, [and] the Court demanded that he remain on the line for interrogation in open court, without the assistance of anyone, while counsel stood by and told two lies to the court."

Complainant's allegations are again without merit. The record reflects that an order was issued providing notice of the hearing which the Subject Judge scheduled after the government entity filed a motion for a temporary restraining order arguing that Complainant was involved with the dissipation of trust assets. When Complainant moved

⁶ Complainant also references, but does not name as a subject judge, another federal judge in his complaint. Complainant was directed to advise the Circuit Executive's Office if he wished to file a complaint against this judge under Rule 6. Complainant did not thereafter file a formal complaint under Rule 6 naming this other judge as a subject judge. I have, therefore, considered Complainant's allegations concerning this other judicial officer in accordance with Rule 5. I conclude that his allegations do not warrant the identification of a complaint. Rule 5(a), Rules for Judicial-Conduct and Judicial-Disability Proceedings.

for a continuance on the basis of being physically unwell, the Subject Judge ordered that the hearing would proceed “as a hearing on the temporary restraining order motions” and that she would hear arguments regarding interim relief and discuss the scheduling of an evidentiary hearing. The Subject Judge further directed Complainant’s counsel to submit additional medical information about Complainant’s concussion.

Although notice of the hearing was provided, Complainant did not appear in person. His counsel, however, was present. Counsel did not present any additional records substantiating Complainant’s medical condition, affirmed that Complainant was aware of the hearing, and informed the Subject Judge for the first time that they intended to move to withdraw. The Subject Judge took a break so that counsel could contact Complainant. During the break, the Subject Judge learned that Complainant had faxed various documents to chambers. Court resumed for some period of time and then the Subject Judge took another break so that counsel could again attempt to contact Complainant. Complainant then himself called in and Court staff members were able to hook the call up to the courtroom. According to the hearing transcript, the Subject Judge stated, “I would wait for you to come in or you could be on the phone, and you have now called, and I’m happy to have you on the phone.” There is no complaint from Complainant in the transcript that he was in bed or in his pajamas. Moreover, the record reflects that Complainant actively participated in the hearing via telephone and continued to be represented by counsel throughout.

With respect to the “PowerPoint show,” the record reflects that there was a discussion of the exhibits that had been included with the government entity’s motion for a temporary restraining order, including a flow chart showing the alleged diversion of plan assets. It is plainly incorrect that Complainant did not have the opportunity to contest the exhibit. As noted above, Complainant participated in the hearing telephonically and he was still represented by counsel at the hearing because the motion to withdraw had not yet been granted. Accordingly, Complainant’s allegations of misconduct are dismissed because the limited inquiry demonstrates that the allegations in the complaint lack any factual foundation. 28 U.S.C. § 352(b)(1)(B).

Complainant further alleges that the Subject Judge “compel[ed] [Complainant], under threat of imprisonment, to sign documents purporting to give control of assets of the Trusts.” This is a reference to a contempt hearing regarding Complainant’s refusal to turn over assets to an Independent Fiduciary appointed by the Court. During the hearing, the Subject Judge made clear that if the Court ordered Complainant to sign certain documents, and he refused to do so, then he would be incarcerated until he complied. Complainant’s allegation that the Subject Judge’s action constitutes misconduct is an effort to call into question the correctness of an official action of a judge. Such an allegation is merits-related and not cognizable in these proceedings. See 28 U.S.C. § 352(b)(1)(A)(ii); Rule 3(h)(3)(A), Rules for Judicial-Conduct and Judicial-Disability Proceedings. In any event, the transcript has been reviewed and it does not support a claim of judicial misconduct.

Complainant further claims that the Subject Judge was subject to an extra judicial influence. In support of this claim, he quotes selectively from a portion of the Subject Judge's statement in a hearing. The statement in question is quoted here in context:

.... I think at this point I have a responsibility, I feel it very, very strongly, to take control of this. I haven't done that at this point, and a lot of people I know think I should have done it sooner. I've got to take control of this.

....

I'm going to treat everybody with courtesy, and listen and listen, but we really do have to get this done. I feel strongly, but if I don't get this done, I'm not following my oath of office. All right? We're going to get it done.

Read in view of the transcript as a whole, the Subject Judge's comments are plainly about taking control of the issue of appointing an independent fiduciary. The comments are not indicative of an extra judicial influence. In her response, the Subject Judge affirms that she was "not referring to a single unnamed individual with this statement, but rather the accumulation of requests to temporarily take control of the Trusts from [Complainant] for the sake of preserving the status quo." The Subject Judge's response makes clear that there were no extra judicial requests, just an accumulation of communications from the litigants, employers and plan participants, and lawyers representing participants. Complainant's allegation of an improper extra judicial influence is dismissed because the limited inquiry demonstrates that the allegations in the complaint lack any factual foundation. 28 U.S.C. § 352(b)(1)(B).

Complainant further alleges that the Subject Judge "impaired" Complainant's communications with his lawyers and took away his lawyer. This allegation appears to be related to the Subject Judge's decisions about when and whether trust funds could be used

to pay for Complainant's counsel. Complainant also complains about a reciprocal attorney discipline order issued by another district court judge temporarily suspending Complainant from the practice of law. To the extent Complainant seeks to collaterally attack the Subject Judge's rulings and/or the suspension order, the complaint is subject to dismissal as merits-related. See 28 U.S.C. § 352(b)(1)(A)(ii); Rule 3(h)(3)(A), Rules for Judicial-Conduct and Judicial-Disability Proceedings.⁷ To the extent that Complainant suggests that the Subject Judge had an improper motive for these rulings or any other official actions, the complaint is 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. Moreover, the Subject Judge did not participate in the decision to temporarily suspend Complainant and recused herself from those proceedings.

For the foregoing reasons, the complaint is dismissed pursuant to 28 U.S.C. § 352(b)(1)(A)(i), (ii), and (iii) and 28 U.S.C. § 352(b)(1)(B).

s/ Theodore A. McKee
Chief Judge

⁷ Without providing any explanation, Complainant alleges that the Subject Judge "allowed" the government entity to distribute a document containing allegations about Complainant's actions to the state disciplinary authority. This is not evidence of judicial misconduct.

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ORDER

(Filed: September 19, 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) and 28 U.S.C. § 352(b)(1)(B).

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: September 19, 2014