

JUDICIAL COUNCIL OF THE THIRD CIRCUIT

J.C. No. 03-14-90015

IN RE: COMPLAINT OF JUDICIAL MISCONDUCT
OR DISABILITY

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

MEMORANDUM OPINION

(Filed: September 10, 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 and his wife were plaintiffs in a proceeding brought under the Americans with Disabilities Act against the wife’s former employer. In 2009, after a jury

trial, the plaintiffs were awarded judgment. In the years following, the parties engaged in various disputes, including issues of back pay and reinstatement.

The case was assigned to the Subject Judge in October 2011, after the plaintiffs filed an emergency motion.¹ After briefing and hearings, the Subject Judge denied the motion. The plaintiffs filed a notice of appeal and a motion for reconsideration. The Subject Judge denied reconsideration. Complainant attempted to file an amended notice of appeal, but it was not docketed. The appeal of the denial of the emergency motion proceeded; the plaintiffs were represented by counsel. In July 2013, the Court of Appeals affirmed the Subject Judge's decision.

The plaintiffs later filed another motion in District Court. It was held in abeyance for some time, first at the plaintiffs' request and later because the parties were engaged in mediation. With the assistance of a mediator, the parties reached a settlement agreement. Shortly thereafter, Complainant filed the instant complaint of judicial misconduct.

Complainant and his wife later sought to repudiate the settlement on the grounds that the wife was not competent to settle. The Subject Judge held a hearing on the issue. During the hearing, the Subject Judge acknowledged the pending complaint of judicial misconduct. After the hearing, the Subject Judge entered an order concluding that the settlement was valid and enforceable. The parties filed cross-appeals from the order; the appeals are pending. Complainant and his wife also have filed a petition for a writ of

¹ In April 2011, Complainant's wife filed a complaint of judicial misconduct against the earlier presiding District Judge. The complaint was dismissed in October 2011 pursuant to 28 U.S.C. § 352(b)(1)(A)(i), (ii), and (iii).

mandamus in the Court of Appeals. The petition raises many of the same issues presented by this complaint of judicial misconduct, and seeks the Subject Judge's recusal. The petition is pending.

In this complaint of judicial misconduct, Complainant alleges that the Subject Judge "failed to process pleadings filed Pro Se" – specifically, the amended notice of appeal from the denial of the motion for consideration and an accompanying motion for leave to proceed *in forma pauperis*. Complainant queries, "[h]ow in this day and age of I.T. can Appeal & In Forma Pauperis paperwork, delivered to chambers by a member of the clerk's office go missing?" In addition, Complainant alleges that the Subject Judge "has ignored and demonstrated an intolerance for the Plaintiff's disability." Among other things, Complainant argues that the Subject Judge "has not provided any protection for my wife under the Federal Court Order for Reinstatement. . . ." and asks that additional accommodations be provided for his wife's disability. Finally, in a supplement to the complaint, Complainant alleges that the Subject Judge "suddenly stated (on the record) and to everyone present on the teleconference and in the courtroom, I had filed a Complaint of Judicial Misconduct or Disability against him."

Pursuant to Rule 11(b), Rules for Judicial-Conduct and Judicial-Disability Proceedings, I asked the Subject Judge to respond to Complainants' allegations. Having reviewed the Subject Judge's response, I now address the complaint.

First, I address the allegations concerning the missing amended notice of appeal. Although, as complainant correctly alleges, the District Court docket does not reflect any

amended notice of appeal filed at the time the Subject Judge denied the motion for reconsideration, there is an August 2012 letter from Complainant to the Subject Judge concerning the whereabouts of the amended notice of appeal. According to the letter, when Complainant brought the documents to the District Court in May 2012, he specifically directed Clerk's office employees *not* to docket the notice of appeal or the motion to proceed *in forma pauperis* due to his confidentiality concerns. Instead, Complainant directed Clerk's office staff to hand-deliver copies of the documents to the Subject Judge's chambers.

In his response, the Subject Judge confirms that the amended notice of appeal and accompanying motion cannot be located. The Subject Judge further confirms that, upon receiving the August 2012 letter from Complainant, the Subject Judge's courtroom deputy communicated with Complainant twice to ask that the documents be re-submitted. Complainant declined to comply.

These circumstances do not give rise to an inference that misconduct has occurred. Despite Complainant's implication of intentional wrongdoing, documents may at times be misplaced due to human error and nothing more. Here, Complainant compounded the likelihood that the documents could be misplaced by affirmatively directing Clerk's office staff not to follow their usual procedures. Complainant's insistence that the documents be routed to the Subject Judge's chambers is not the usual (or indeed, the appropriate) method for filing documents in District Court.² In addition, despite Complainant's

² I note that a District Judge generally does not file documents or create docket entries.

knowledge by at least August 2012 that the amended notice of appeal was not filed, and despite being invited by the Subject Judge's courtroom deputy to re-submit it, the docket reflects that Complainant never took further action in the District Court, nor did Complainant, his wife, or their counsel raise the issue before the Court of Appeals.

Considering these circumstances, there is nothing to indicate that the loss of Complainant's amended notice of appeal can reasonably be attributed to intentional misconduct on the part of the Subject Judge. Accordingly, the allegations are dismissed. See 28 U.S.C. § 352(b)(1)(A)(iii); Rule 11(c)(1)(D), Rules for Judicial-Conduct and Judicial-Disability Proceedings.

I next address Complainant's allegations of discrimination based upon his wife's disability. This claim is based largely upon Complainant's disagreement with several of the Subject Judge's decisions and rulings. Among other things, Complainant disputes the Subject Judge's decision that the settlement of the case should not be voided due to his wife's alleged incompetence to settle, as well as several decisions to deny continuances and disability accommodations. Complainant alleges that these rulings reflect the Subject Judge's "lack of interest, understanding and consideration for due process per ADA law."

These disputes 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 not cognizable as judicial misconduct. Accordingly, the

allegations 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.

Although Complainant further alleges that the Subject Judge has “made light” of his wife’s disability and has demonstrated a “growing bias” against her, these allegations are entirely unsupported when considered apart from the merits-related allegations. Indeed, the record reflects that the Subject Judge has made substantial efforts to accommodate Complainant’s wife’s disability. Complainant’s subjective view that the Subject Judge should have done something more or something different is a merits-related dispute; it does not provide evidence of invidious discrimination. Accordingly, any remaining allegations are subject to dismissal 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.

Finally, Complainant alleges that the Subject Judge violated the confidentiality provisions of Rule 23, Rules for Judicial-Conduct and Judicial-Disability Proceedings, by disclosing the existence of a misconduct complaint in the context of a court hearing. The transcript reflects that the Subject Judge did disclose the existence of the complaint, although he did not discuss any of its substance. In his response, the Subject Judge states that the breach of the confidentiality provision was inadvertent, and acknowledges that he is now aware that the statement was impermissible under the Rules.

This single instance in which the Subject Judge disclosed the existence of a confidential proceeding to a small number of individuals who were not otherwise privy to that information does not rise to the level of “conduct prejudicial to the effective and expeditious administration of the business of the courts.” See Rule 3(h)(1), Rules for Judicial-Conduct and Judicial-Disability Proceedings. Accordingly, this claim is subject to dismissal because it is based upon allegations lacking sufficient evidence to raise an inference that misconduct occurred. Rule 11(c)(1)(D), Rules for Judicial-Conduct and Judicial-Disability Proceedings. In the future, the Subject Judge is cautioned that the confidentiality of judicial misconduct proceedings should be maintained. 28 U.S.C. § 360(a); see also Rule 23(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)(ii) and (iii).

s/ Theodore A. McKee
Chief Judge

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ORDER

(Filed: September 10, 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)(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: September 10, 2014