

JUDICIAL COUNCIL OF THE THIRD CIRCUIT

J.C. No. 03-15-90006

IN RE: COMPLAINT OF JUDICIAL MISCONDUCT
OR DISABILITY

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

MEMORANDUM OPINION

(Filed: May 14, 2015)

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).

In 2013, Complainant filed a pro se civil rights complaint accompanied by a motion for leave to proceed *in forma pauperis* (“IFP”). The Subject Judge denied the IFP motion

on the ground that Complainant had sufficient funds to pay the filing fee and closed the case.¹ Complainant paid the filing fee and the matter was reinstated. Complainant then filed several motions. Among others, she filed motions requesting changes to the docket, including the deletion of the names of terminated defendants and deletion of Complainant's address and personal information. The Subject Judge denied those motions. In addition, she filed motions to recuse the Subject Judge, which the Subject Judge also denied. One defendant filed a motion to remand a portion of the complaint to state court, and both defendants moved to dismiss other portions of the complaint. The Subject Judge granted both motions and directed Complainant to amend her Complaint within 30 days. Complainant appealed. The Court of Appeals summarily affirmed the remand order and dismissed the remainder of the appeal for lack of jurisdiction.² Most recently, Complainant amended her complaint for the third time; one defendant filed a motion to dismiss the amended complaint, which is pending.

¹ Complainant appealed the Subject Judge's decision denying IFP status, and sought leave to proceed IFP on appeal. The Court of Appeals granted the IFP motion, noting that the financial information that she provided on appeal differed from that which she had provided to the District Court. The Court of Appeals affirmed the Subject Judge's decision and dismissed the appeal.

² Complainant sought a petition for a writ of certiorari from the United States Supreme Court, which was denied.

This is Complainant's second complaint of judicial misconduct concerning the Subject Judge's conduct in this case.³ In this complaint, Complainant recounts the grounds for the underlying civil complaint, including contentions of racism and retaliation. With regard to the Subject Judge, she alleges that he "is displaying bias against the complainant who is a disabled, black, senior female" and that he has demonstrated "a pattern of conduct that protects and hides municipal corruption, cronyism, and nepotism, inadvertent or not."

Specifically, Complainant alleges that the Subject Judge "continues to improperly grant defendants' motions to dismiss. . ." and "intentionally delays the case." Among other things, she contends that he "failed to review documents," "refused to hold an evidentiary hearing," "improperly dismissed . . . defendants," and "manipulated a public docket to supposedly 'terminate' certain 'defendants.'" Complainant argues that these actions are "not merits related as [the Subject Judge] either refused to review the documents or ignored Federal Rules of Evidence." In addition, Complainant alleges that the Subject Judge "used what he knew or should have known to be false information to 'skew' the docket, changing the pleadings and embarrassing the Plaintiff Pro Se litigant with information which he had refused to amend in spite of her motions. . . ."

Complainant contends that the Subject Judge's allegedly "lenient judicial rulings" have permitted the defendants to be "protect[ed] from scrutiny" and demonstrate "prejudicial

³ The first complaint, filed in October 2013, was dismissed in December 2013 as merits-related, frivolous, and unsupported by evidence of misconduct. See J.C. No. 03-13-90069.

favor towards” them. Complainant also states that one of her unsuccessful motions to recuse sets forth the basis for this misconduct complaint.

Complainant’s statement to the contrary notwithstanding, her allegations are almost entirely merits-related. Rule 3(h)(3)(A), Rules for Judicial-Conduct and Judicial-Disability Proceedings (“An allegation that calls into question the correctness of a judge’s ruling, including a failure to recuse, without more, is merits-related.”). They reflect her disagreement with numerous procedural rulings and substantive decisions rendered in the long course of her civil rights proceeding, including the Subject Judge’s decisions about the proper case caption, orders dismissing certain defendants, orders concerning amendment of the complaint, and decisions to deny recusal.

This proceeding is not an appropriate forum for raising such allegations. Indeed, Complainant previously raised the allegations of this complaint in motions to recuse, which the Subject Judge denied. The Subject Judge’s decision not to recuse himself is not subject to review in this administrative proceeding. 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).

Merits-related allegations do not constitute cognizable misconduct under the Judicial Conduct and Disability Act. See 28 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 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). Accordingly, these allegations are dismissed.

In addition, Complainant alleges that the Subject Judge intentionally delayed the progress of her case. Generally, delay is not cognizable as judicial misconduct because it effectively poses a challenge to merits of official actions by the judge – *i.e.*, the decision to assign a lower priority to a particular case. See Rule 3 Commentary, Rules for Judicial-Conduct and Judicial-Disability Proceedings. As previously observed, 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 case may qualify as cognizable judicial misconduct only if “the allegation concerns an improper motive in delaying a particular decision” Rule 3(h)(3)(B), Rules for Judicial-Conduct and Judicial-Disability Proceedings.

Here, the record does not reflect any occasions of substantial or objectively unreasonable delay. Although the matter has been pending for more than two years, the docket reflects substantial and frequent activity. Moreover, the lengthy pendency of this case has been caused at least in part by the Complainant’s own actions. For instance, Complainant has amended the complaint at least three separate times, most recently in late

2014.⁴ In addition, Complainant has filed frequent, repetitive, and sometimes difficult to understand motions, which required substantial court time to consider and resolve.

Moreover, even if Complainant could establish delay, there is no evidence of improper motive on the part of the Subject Judge. When considered apart from her merits-related allegations, Complainant's claims of bias and prejudice are based upon mere speculation and subjective belief. While she observes one occasion on which the Subject Judge denied one of her motions as "unintelligible," the Subject Judge's use of this adjective does not constitute a personal insult. Moreover, the single use of this word is far from sufficient to establish such a degree of antagonism toward Complainant that fair judgment was impossible. See Liteky v. United States, 510 U.S. 540, 555 (1994); see also United States v. Wecht, 484 F.3d 194, 220 (3d Cir. 2007).

In sum, Complainant's unsupported allegations of bias and delay do not give rise to an inference that misconduct has occurred. Thus, to the extent they are not merits-related, they are subject to dismissal as frivolous and unsupported by evidence that would raise an inference that misconduct has occurred. See 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 engaged in inappropriate *ex parte* communications with the defendants on two occasions. She describes one instance in which an attorney, who had previously represented a number of entities, was permitted

⁴ I note that the Subject Judge directed Complainant to amend the complaint in November 2013; rather than do so, she filed an interlocutory appeal. A year later, and more than six months after the appeal was dismissed in part for lack of jurisdiction, Complainant amended the complaint.

to “later change the nature of the case by entering his appearance as counsel” on behalf of one defendant only. She cites a second instance in which the Subject Judge “allow[ed] . . . [defense counsel] to file a motion to dismiss for failure to state a claim . . . without notifying [the other defendants].” These allegations do not describe improper *ex parte* communications between the Subject Judge and defense counsel. Rather, it is apparent that Complainant is taking issue with documents that were filed on the public docket in her case and that were served upon her as plaintiff. Accordingly, the allegations of *ex parte* communications are dismissed as plainly frivolous. See 28 U.S.C. § 352(b)(1)(A)(iii); Rule 11(c)(1)(C), Rules for Judicial-Conduct and Judicial-Disability Proceedings.

For the foregoing reasons, this complaint is dismissed pursuant to 28 U.S.C. § 352(b)(1)(A)(ii) and (iii). As mentioned earlier, Complainant previously filed a misconduct complaint against this Subject Judge concerning the same proceeding, which also was dismissed under the same provisions, see J.C. No. 03-13-90069. Accordingly, Complainant’s attention is directed to Rule 10(a), Rules for Judicial-Conduct and Judicial-Disability Proceedings.⁵ Complainant is cautioned that future abuse of the judicial

⁵ Rule 10(a), Rules for Judicial-Conduct and Judicial-Disability Proceedings, states:

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, a judicial council may prohibit, restrict, or impose conditions on the complainant’s use of the complaint procedure.

misconduct complaint procedure may result in the imposition of restrictions under that rule.

s/ Theodore A. McKee
Chief Judge

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 14, 2015)

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 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: May 14, 2015