

JUDICIAL COUNCIL OF THE THIRD CIRCUIT

---

J.C. No. 03-15-90071

---

IN RE: COMPLAINT OF JUDICIAL MISCONDUCT  
OR DISABILITY

---

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

---

MEMORANDUM OPINION

---

(Filed: August 25, 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).

Complainant, a prisoner, filed a civil rights complaint. The matter was assigned to the Subject Judge. Complainant moved for the appointment of counsel. The Subject

Judge granted the motion and referred the case to a panel to attempt to secure volunteer pro bono counsel for Complainant.

A pro bono attorney was identified but never responded to a pending dispositive motion. Accordingly, at Complainant's request, the representation was terminated, Complainant's case was re-submitted to a panel to attempt to locate new pro bono counsel, and the Subject Judge directed Complainant to provide a status update on the attorney search within sixty days. After sixty days, Complainant submitted a notice stating his intent to proceed with the law suit although no replacement counsel had been located. Complainant's notice also requested that his mother be permitted to prosecute the case on his behalf "should Unrepresented Plaintiff become Incapacitated, or Upon His Death. . . ." The Subject Judge has not ruled upon Complainant's request and there has been no recent activity in his case; it appears to remain stayed.

This is Complainant's fifth complaint of judicial misconduct generally and his third to name the Subject Judge. In the current complaint, Complainant states that the Subject Judge "is hereby accused of: A.) Failing/Refusing to appoint a GUARDIAN, or take some other remedial step, to protect the unrepresented incompetent plaintiff . . . [and] B.) Causing irreparable harm to, and inordinate delay and obstruction of, the prosecution of the related court action." Specifically, Complainant alleges the Subject Judge at first "secretly terminated" his motion for the appointment of counsel "without notifying anyone and without any lawful explanation" and then later granted the motion "7 months after she secretly terminated the motion, and without ANY explanation." Complainant

further alleges that, after the case was re-submitted to a panel for the possible identification of new pro bono counsel, he received a “threatening” letter from the Court, directing him to file a notice to proceed or face dismissal for lack of prosecution; he attaches a copy of the letter to his complaint. Complainant alleges “there is NO SUCH PROCEDURE requiring an incompetent litigant to file such a notice” and he only did so “under threats made by the Court.”

Complainant alleges he “has been unrepresented and unprotected in the related court action for almost 6-months with no end in sight. . . .” He contends the record in his case establishes “beyond all reasonable doubt” an alleged “pattern of indifference to, contempt for, and bias against your complainant by this Subject Judge. . . .”

Many of the allegations of this complaint take issue with decisions and rulings rendered by the Subject Judge in the course of Complainant’s civil rights action. For instance, Complainant clearly disagrees with the Subject Judge’s referral of his case to panel for a possible volunteer pro bono attorney rather than ordering court-appointed counsel. In addition, Complainant vigorously disputes the decision to require him to file a response concerning whether he will proceed without an attorney, contending that the directive is contrary to court procedure and inappropriate due to his alleged incompetence.

All such allegations 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. This administrative proceeding not the appropriate forum for raising such allegations,

because 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). 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). Because merits-related allegations are not cognizable in this matter, these allegations are dismissed.

Complainant also alleges inappropriate delay in the progress of his 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. 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, contrary to Complainant’s allegations, the record does not reflect objectively unreasonable delay. Although the civil rights complaint has been pending for some time, it is clear that a substantial amount of that time has been spent in attempting to locate volunteer pro bono counsel to represent Complainant. Indeed, after one attorney was identified, Complainant asked that the attorney be terminated and replaced, resulting in additional time spent on the search for counsel that cannot be attributed to the Subject Judge. As it now appears that no counsel has been located and the case must proceed pro se, I am confident that the stay will be lifted and the matter will progress at an appropriate pace.

Moreover, even if Complainant could establish undue delay, there is no evidence of improper motive on the part of the Subject Judge. Although Complainant baldly alleges that the record in this matter establishes bias on the part of the Subject Judge, I disagree. Upon review, the record in this matter lends no support to such a claim. Accordingly, Complainant’s allegations 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.

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.

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

JUDICIAL COUNCIL OF THE THIRD CIRCUIT

---

J.C. No. 03-15-90071

---

IN RE: COMPLAINT OF JUDICIAL MISCONDUCT  
OR DISABILITY

---

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

---

ORDER

---

(Filed: August 25, 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 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](http://www.ca3.uscourts.gov).

s/ Theodore A. McKee  
Chief Judge

Dated: August 25, 2015