

JUDICIAL COUNCIL OF THE THIRD CIRCUIT

J.C. No. 03-15-90078

IN RE: COMPLAINT OF JUDICIAL MISCONDUCT
OR DISABILITY

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

MEMORANDUM OPINION

(Filed: September 21, 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).

Decades ago, Complainant filed a *pro se* civil rights complaint. Summary judgment was granted to the defendants and the matter was closed. Last year,

Complainant filed a document in the closed case titled “independent action,” seeking to present new claims pursuant to Fed. R. Civ. P. 60. The matter was assigned to the Subject Judge. Complainant filed several motions and the Subject Judge set a deadline for the defendants to respond. On the deadline date, the defendants filed a motion to dismiss and for summary judgment without a certificate of service.

Thereafter, Complainant filed numerous motions seeking sanctions and other relief on the grounds that the defendants had not timely responded as directed by the Subject Judge. The Subject Judge ordered defendant to file and serve a certificate of service upon Complainant to confirm that the motion to dismiss had been timely filed. The defendant complied by filing a certificate of service stating that the motion had been served upon Complainant two months previously. The Subject Judge then denied Complainant’s motions.

Complainant moved to recuse the Subject Judge. While the motion was pending, the matter was reassigned to a new District Judge, who is not a Subject Judge of this complaint. The presiding District Judge dismissed the motion to recuse as moot and has not yet ruled upon the pending motion to dismiss and for summary judgment.

In this complaint of judicial misconduct, Complainant alleges “it was judicial misconduct for the Court to order defendants’ lawyer to back-date a certificate of service” for the motion to dismiss. Complainant alleges that the Subject Judge’s instruction to the attorney to later file an allegedly false certificate of service constitutes subornation of perjury and fraud.

To the extent Complainant alleges wrongdoing by counsel, a private attorney is not covered by the Judicial Conduct and Disability Act or by the Rules for Judicial-Conduct and Judicial-Disability Proceedings. Rule 4, Rules for Judicial-Conduct and Judicial-Disability Proceedings (a complaint filed under the Rules “may concern the actions or capacity **only of judges . . .**” (emphasis added)). Because the defense attorney is not a judge, any allegations concerning his allegedly improper behavior 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.

In addition, it appears Complainant is attempting challenge the Subject Judge’s decisions and rulings, including the decision to consider the defendants’ allegedly untimely motion to dismiss, the order directing defense counsel to later file the certificate of service, and the denial of Complainant’s subsequent motions. All such allegations are 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.”). Merits-related allegations do not constitute cognizable judicial misconduct. 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. 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). Accordingly, Complainant's merits-related allegations are dismissed. 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.

Finally, Complainant's allegations of fraud and subornation of perjury are unsubstantiated. The Subject Judge's instruction to defense counsel to file a certificate of service concerning a court filing made approximately two months earlier does not lead to a reasonable inference that judicial misconduct has occurred. Even though the certificate of service was filed after the motion to dismiss, the attorney certified in it that he made appropriate and timely service of the motion. This does not constitute "back-dating." Moreover, the truth or falsity of the attorney's certification, which is subject to all the rules of ethics and candor that apply to an officer of the court, cannot be attributed to the Subject Judge. Accordingly, these allegations are dismissed as frivolous and 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)(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)(i), (ii), and (iii). Complainant has filed at least three prior judicial misconduct complaints, which also were dismissed on these grounds. See J.C. Nos. 03-12-90053; 03-13-90053; 03-14-90004. Complainant's attention is therefore directed to

Rule 10(a), Rules for Judicial-Conduct and Judicial-Disability Proceedings.¹ Complainant is cautioned that future abuse of the judicial misconduct complaint procedure may result in the imposition of restrictions under this provision.

s/Theodore A. McKee
Chief Judge

¹ 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. 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: September 21, 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)(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: September 21, 2015