

JUDICIAL COUNCIL OF THE THIRD CIRCUIT

J.C. No. 03-15-90083

IN RE: COMPLAINT OF JUDICIAL MISCONDUCT
OR DISABILITY

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

MEMORANDUM OPINION

(Filed: October 19, 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 filed a *pro se* civil complaint against her former employer, a university, and several university employees alleging discrimination on the basis of age

and gender. Discovery is ongoing and has been contentious. Among other things, the defendants sought and the Subject Judge granted a protective order prohibiting Complainant from communicating *ex parte* with individual defendants who were represented by counsel. Complainant filed a motion to compel discovery, which the Subject Judge denied as unreasonable and “to a degree, irrational.” The Subject Judge denied the defendants’ motion for summary judgment without prejudice and directed the defendants to provide certain discovery to Complainant. Complainant has moved for a default judgment and sanctions; the motion remains pending.

In this complaint of judicial misconduct, Complainant accuses the Subject Judge of “abuse of power, abuse of discretion and pro se discrimination.” Complainant alleges that the Subject Judge’s orders are written in a derogatory tone and unnecessarily refer to her as *pro se* when, she alleges, her unrepresented status “should not be an issue in a court of law.” Complainant further contends that the Subject Judge has inappropriately permitted the defendants to delay the progress of the case, further alleging that, in general, the Subject Judge’s counseled cases are resolved more quickly than *pro se* cases. Finally, Complainant states that “the court system is infested with racketeering by judges and lawyers; with no public oversight.”

First, to the extent any of Complainant’s allegations are intended to challenge the discovery rulings and other decisions rendered by the Subject Judge in the course of the case, 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. If Complainant disagrees with the discovery decisions in her case, she must challenge them before the Subject Judge or, at the appropriate time, in an appeal from a final judgment or other appealable order. 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, any 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.

Next, Complainant's contentions that the Subject Judge's opinions and orders are written in a derogatory tone and inappropriately employ the term *pro se* are frivolous. Upon review, the language in the Subject Judge's opinions and orders is respectful and professional in quality, and the Subject Judge's accurate use of the legal term *pro se* to describe Complainant's unrepresented status does not establish or imply bias. Repeatedly referring to a *pro se* litigant as such is commonplace, entirely appropriate, and far from sufficient to show such a degree of antagonism toward Complainant that fair judgment would have been 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). Accordingly, Complainant's allegations are dismissed. See 28 U.S.C. § 352(b)(1)(A)(iii); Rule 11(c)(1)(C), Rules for Judicial-Conduct and Judicial-Disability Proceedings.

In addition, Complainant alleges that the Subject Judge intentionally permitted delay in 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 objectively unreasonable delay. Although the matter has been pending for nearly two years and has not yet progressed beyond the discovery phase, the docket reflects substantial activity. Indeed, it is clear that the parties' contentious discovery practices and numerous discovery-related motions have caused what Complainant perceives as delay in her case. The parties' lack of cooperation and frequent disputes cannot be attributed to the Subject Judge. In any event, even if

Complainant could establish undue delay, there is no evidence of improper motive on the part of the Subject Judge.

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 theorizes that the Subject Judge may have “a direct or indirect relationship” with the defendants or defense counsel, and that the Subject Judge participates in a “court system . . . infested with racketeering by judges and lawyers; with no public oversight.” Complainant's sole support for these claims appears to be her disagreement with the progress of her case, which, as previously discussed, is merits-related and non-cognizable. To the extent they are not merits-related, they are entirely unsubstantiated and therefore subject to dismissal 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)(ii) and (iii).

s/ Theodore A. McKee
Chief Judge

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ORDER

(Filed: October 19, 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.

s/ Theodore A. McKee
Chief Judge

Dated: October 19, 2015