

JUDICIAL COUNCIL OF THE THIRD CIRCUIT

J.C. No. 03-16-90053

IN RE: COMPLAINT OF JUDICIAL MISCONDUCT
OR DISABILITY

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

MEMORANDUM OPINION

(Filed: December 16, 2016)

PRESENT: SMITH, Chief Judge.

This is a complaint filed under the Judicial Conduct and Disability Act, 28 U.S.C. §§ 351-64, against a United States District Judge (hereinafter “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). 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).

Complainant was a co-defendant in a civil action brought by her former employer. During the litigation, Complainant and her co-defendant filed a motion seeking the recusal of the Subject Judge. The Subject Judge denied the motion. Complainant filed a petition for writ of mandamus with the Court of Appeals, arguing recusal was warranted because of the Subject Judge's bias and prejudice. Complainant also argued that the Subject Judge engaged in improper ex parte communications. The mandamus petition was denied, as was a subsequent mandamus petition again seeking the recusal of the Subject Judge. In the underlying civil litigation, Complainant failed to appear for trial. The Subject Judge awarded plaintiffs compensatory damages, costs, and attorneys' fees. Complainant failed to appear for two contempt hearings and the Subject Judge directed the Clerk to issue bench warrants.¹

As a preliminary matter, Complainant makes allegations concerning individuals and entities who are not subject to the Judicial Conduct and Disability Act; e.g., U.S. Marshals, attorneys, and a state court judge. See 28 U.S.C. §§ 351, 352(b)(1)(A)(i); Rule

¹ Complainant's appeal of the judgment awarded in favor of plaintiffs was dismissed for failure to pay the filing fee. Complainant's appeal of an earlier injunction order entered in the matter is still pending at this time.

4, Rules for Judicial-Conduct and Judicial-Disability Proceedings. Accordingly, these allegations will not be addressed in this opinion.

In her present complaint of judicial misconduct, Complainant alleges that the Subject Judge is biased, engaged in fraud, and made “egregious legal errors.” Complainant’s support for these allegations is her disagreement with the Subject Judge’s decisions in the course of the underlying civil litigation. For example, Complainant disagrees with the Subject Judge’s discovery rulings, his denial of a motion to strike testimony, and his denial of her recusal motion, among other decisions and procedural rulings.² These allegations are plainly merits-related and are not cognizable 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 3(h)(3)(A), Rules for Judicial-Conduct and Judicial-Disability Proceedings (“[a]n allegation that calls into question the correctness of a judge’s ruling, including a failure to recuse, without more, is merits-related”); 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).

In any event, Complainant’s allegations of bias and fraud are subject to dismissal as frivolous and unsupported by any evidence that would raise an inference that misconduct

² As noted above, one of Complainant’s appeals remains pending at this time. I express no opinion as to the merits of her appeal in these separate administrative proceedings.

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. The record has been reviewed and there is no evidence of judicial misconduct. Indeed, Complainant’s allegation that the Subject Judge exhibited prejudice against her during a preliminary injunction hearing was specifically rejected by a panel of the Third Circuit. A panel of this Court stated that, “Although [defendants] complain about the District Judge’s ‘verbal thrashing’ during the preliminary injunction hearing and perceive evidence of extreme prejudice against them . . . our review of the transcripts of the preliminary injunction hearing do not reveal any exchanges between [the Subject Judge] and the parties that rise to the level of ‘deep-seated favoritism or antagonism that would make fair judgment impossible.’” (citation omitted).

Complainant also repeats allegations she made in her recusal motion and mandamus petitions; i.e., that the Subject Judge has engaged in ex parte communications. Complainant attaches to her complaint copies of billing statements outlining phone calls between the law firm representing plaintiffs in the underlying civil suit and the Subject Judge’s chambers. However, some of the time entries listed by Complainant reference conference calls about scheduling or discussion of a potential settlement. These types of communications are explicitly permitted under the *Code of Conduct for United States Judges*. Canon 3(A)(4)(b), *Code of Conduct for United States Judges* (“A judge may . . . when circumstances require it, permit ex parte communication for scheduling, administrative, or emergency purposes”); Canon 3(A)(4)(d), *Code of Conduct for*

United States Judges (“A judge may . . . with the consent of the parties, confer separately with the parties and their counsel in an effort to mediate or settle pending matters.”).

Other than speculation and innuendo, Complainant provides no evidence for her statement that any of the communications referenced in the billing statements were improper.

Furthermore, in dismissing Complainant’s first mandamus petition, a panel of the Court of Appeals stated as follows:

[Defendants] rely on plaintiffs’ counsel’s billing and time-keeping records, which list periodic telephone conferences with the District Judge’s chambers prior to scheduled hearings or other deadlines. Although *ex parte* communications are strongly disfavored . . . the record does not demonstrate that recusal is mandated on the basis of such communications here. In this context, there is nothing to indicate that the telephone calls with the District Judge’s chambers were anything other than communications regarding procedural issues, and there is no indication that substantive advice was either solicited or offered during the calls.

The panel went on to state:

the record does not show that [the Subject Judge] engaged in improper *ex parte* communications with the judge presiding over the related . . . state court action. Furthermore, in addressing this claim when denying the motion for recusal, [the Subject Judge] stated that he never engaged in any communications with the state court judge.

Accordingly, this allegation is dismissed 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.

Complainant’s second mandamus petition reiterated similar allegations and her petition for rehearing *en banc* further alleged that the Subject Judge gave *ex parte*

instructions to a U.S. Marshal. Both the mandamus petition and petition for rehearing were denied. Complainant's allegations are dismissed as frivolous and unsupported by any evidence that would raise an inference that misconduct has occurred. Id.³

Complainant alleges, moreover, that the Subject Judge "called in a favor" of a magistrate judge located in another state to have Complainant arrested on a bench warrant. Complainant alleges that the Subject Judge initiated her "malicious arrest" and "illegal" detention.⁴ In addition, she claims that the Subject Judge contacted the magistrate judge "ex parte" and convinced him to issue a warrant from another district. Complainant further alleges that the Subject Judge has engaged in harassment and retaliation and timed her detention to prevent her from timely filing a motion to proceed *in forma pauperis* on appeal. There is no evidence that the Subject Judge engaged in any improper conduct. Rather, the record reflects that the Subject Judge ordered the Clerk to issue a bench warrant after Complainant failed to appear for a contempt hearing. Plaintiffs filed a motion to transfer the bench warrant to the venue where Complainant resides and the Subject Judge granted the transfer. Complainant was arrested and then released when she

³ To the extent Complainant seeks to collaterally attack the decisions made in the recusal and mandamus proceedings, Complainant's allegations are subject to dismissal as merits-related. Rule 3(h)(3)(A), Rules for Judicial-Conduct and Judicial-Disability Proceedings ("[a]n allegation that calls into question the correctness of a judge's ruling, including a failure to recuse, without more, is merits-related").

⁴ The non-Third Circuit magistrate judge's alleged actions will not be addressed in this opinion. Rule 7(a), Rules for Judicial-Conduct and Judicial-Disability Proceedings (a complaint against "a judge of . . . a United States district court . . . must be filed with the circuit clerk in the jurisdiction in which the subject judge holds office."). Complainant states that she filed a complaint against the magistrate judge in the judge's home circuit.

agreed to appear at a contempt hearing. When Complainant again failed to appear, a second bench warrant was issued and she was arrested once more. Furthermore, a Third Circuit panel rejected Complainant's contention that her incarceration for failure to appear at a contempt hearing prevented her from paying the docketing fee for her appeal, reasoning, "The district court docket reflects that she was released on July 19. Yet, Appellant has made no attempt to remedy the reason why this case was closed, i.e. she has not paid the docketing fees." Thus, Complainant's allegation that the Subject Judge engaged in judicial misconduct is dismissed 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. To the extent Complainant seeks to collaterally attack the orders to issue bench warrants, the complaint is dismissed as merits-related. 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 blames the Subject Judge for alleged improper actions taken by the U.S. Marshals in the course of her arrest and detention. For example, Complainant alleges the Subject Judge should have required the U.S. Marshals to act with "order and decorum." Complainant states that the U.S. Marshals were "obviously subject to [the Subject Judge's] direction and control." There is no evidence that the Subject Judge acted improperly in any way or, for that matter, directed the U.S. Marshals to engage in

improper behavior.⁵ Complainant’s allegations of judicial misconduct are dismissed 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.⁶

For the foregoing reasons, the complaint is dismissed pursuant to 28 U.S.C. § 352(b)(1)(A)(i), (ii), and (iii).

s/ D. Brooks Smith
Chief Judge

⁵ Complaints about any alleged improper conduct on the part of the U.S. Marshals may be filed directly with that office.

⁶ Complainant has also sent multiple emails containing unsworn allegations. I conclude the allegations do not provide “reasonable grounds for inquiry” into the existence of misconduct or disability and I therefore decline to identify any complaints based upon them. See Rule 5, Rules for Judicial-Conduct and Judicial-Disability Proceedings.

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ORDER

(Filed: December 16, 2016)

PRESENT: SMITH, 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 Circuit Executive within **42 days** after the date of the chief judge's order.

Rule 18(b) Form. The petition should be in letter form, addressed to the Circuit Executive, 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 and on the Court of Appeals’ internet site, www.ca3.uscourts.gov.

s/ D. Brooks Smith
Chief Judge

Dated: December 16, 2016