

JUDICIAL COUNCIL OF THE THIRD CIRCUIT

J.C. No. 03-16-90063

IN RE: COMPLAINT OF JUDICIAL MISCONDUCT
OR DISABILITY

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

MEMORANDUM OPINION

(Filed: December 15, 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 (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 2014, Complainant, a state prisoner, filed a federal civil rights action under 28 U.S.C. § 1983, alleging that prison officials failed to protect him from assault by a fellow

inmate and were deliberately indifferent to injuries that resulted from the assault. The matter was assigned to a District Judge who is not a subject of this complaint.¹ The presiding District Judge granted Complainant's request for the appointment of counsel and pro bono counsel was then located. Counsel filed a motion to reinstate one defendant but did not respond to a partial motion to dismiss filed by other defendants, and the partial motion to dismiss was granted as unopposed. About three months after counsel entered an appearance, Complainant requested that counsel be terminated for failing to respond to the partial motion to dismiss and asked that substitute counsel be appointed. The presiding District Judge granted the motion and referred the matter to a panel to locate substitute counsel. More than a year later, substitute counsel was located. The presiding District Judge ordered Complainant to undergo a competency evaluation and, shortly thereafter, the matter was reassigned to the Subject Judge.²

About two months after counsel was located, Complainant filed a notice purporting to terminate replacement counsel and again requesting appointment of new counsel. This time, Complainant argued that counsel had not met with him in person. Construing the notice as a motion for replacement counsel, the Subject Judge denied the request, directed

¹ That District Judge was the subject of three of Complainant's prior complaints of judicial misconduct. *See* J.C. Nos. 03-13-90040; 03-14-90037; 03-15-90071. Those complaints concerned this civil rights matter and an earlier related proceeding. All three complaints were dismissed as merits-related, frivolous, and lacking in evidence that would give rise to an inference of misconduct.

² Although Complainant alleges that the presiding District Judge "had to 'RECUSE' herself," no recusal motion or recusal order appears on the record.

counsel to arrange a meeting with Complainant within thirty days, and scheduled a status conference. To date, the matter remains pending and it appears the competency evaluation has not been completed.

In this complaint of judicial misconduct, Complainant presents a number of allegations of improper conduct on the part of substitute counsel. For instance, Complainant alleges that counsel, despite being appointed pro bono, is attempting to charge him \$510.00 per hour plus advance costs and fees. While these allegations, if true, are of concern, they are beyond the scope of a judicial misconduct proceeding. A private attorney, even when appointed to act as pro bono counsel by a court, is not covered by the Judicial Conduct and Disability Act. *See* 28 U.S.C. §§ 351, 352(b)(1)(A)(i); Rule 4, *Rules for Judicial-Conduct and Judicial-Disability Proceedings*. Accordingly, allegations concerning misconduct on the part of counsel will not be addressed in this opinion.

With regard to the Subject Judge, Complainant alleges that the Subject Judge has “Fail[ed] or Refus[ed], which ever it is, to Perform His Duty and Obligation to Protect Your Incompetent Complainant” in violation of the Federal Rules of Civil Procedure.³ Complainant contends that the Subject Judge’s order denying replacement counsel “was Totally Non-Responsive to all of the Good-Cause and Misrepresenting Fact’s [*sic*] of the Termination Notice, and thereby DENIED Complainant His Right to Terminate Counsel.”

³ Complainant cites a civil rule permitting a representative to sue or defend on behalf of an incompetent individual.

Complainant further alleges that this “BIAS BEHAVIOR” is interfering with Complainant’s right to diligently prosecute his civil rights action.

Because these allegations are clearly aimed to challenge the Subject Judge’s order denying Complainant’s second request for the appointment of substitute counsel, they are merits-related. “An allegation that calls into question the correctness of a judge’s ruling, . . . without more, is merits-related.” Rule 3(h)(3)(A), *Rules for Judicial-Conduct and Judicial-Disability Proceedings*. 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); Rules 3(h)(3)(A), 11(c)(1)(B), *Rules for Judicial-Conduct and Judicial-Disability Proceedings*. This administrative proceeding does not provide an opportunity to litigate a substantive challenge to the merits of the Subject Judge’s 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, Complainant’s allegations are subject to dismissal.

To the extent Complainant’s claim of bias is not merits-related, it is entirely unsupported. The record in the civil rights matter provides nothing to substantiate any allegations of misconduct. Complainant’s remaining allegations are 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*.

Based on the foregoing, the complaint is dismissed pursuant to 28 U.S.C. §§ 352(b)(1)(A)(i), (ii), and (iii). This is Complainant's sixth complaint of judicial misconduct. *See* J.C. Nos. 03-08-90090; 03-09-90001-02; 03-13-90040; 03-14-90037; 03-15-90071. Like the current complaint, the prior complaints were dismissed as merits-related, frivolous, and unsupported by evidence of misconduct. Accordingly, Complainant's attention is directed to Rule 10(a), *Rules for Judicial-Conduct and Judicial-Disability Proceedings*.⁴ Future abuse of the judicial misconduct complaint procedure may result in the imposition of restrictions under this provision.

s/ D. Brooks Smith
Chief Judge

⁴ Rule 10(a) of the *Rules of Judicial-Conduct and Judicial-Disability Proceedings* provides:

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, the 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: December 15, 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.

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 15, 2016