

JUDICIAL COUNCIL OF THE THIRD CIRCUIT

J.C. No. 03-18-90020

IN RE: COMPLAINT OF JUDICIAL MISCONDUCT
OR DISABILITY

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

MEMORANDUM OPINION

(Filed: April 9, 2018)

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).

Complainant, a state prisoner, is a plaintiff in a civil rights action that has been pending for a number of years. Approximately two years ago, the matter was reassigned to the Subject Judge. Since then, Complainant has attempted to terminate his court-

appointed attorney,¹ but the Subject Judge denied the request. Most recently, Complainant's court-appointed attorney filed a petition for the appointment of a guardian ad litem, arguing that Complainant is incompetent and refuses to communicate with him. The Subject Judge granted the petition and appointed a guardian ad litem to act on Complainant's behalf. The civil rights action remains pending.

In this complaint of judicial misconduct, Complainant expresses dissatisfaction with several of the Subject Judge's rulings and actions, including the decision to deny Complainant's request to terminate his current court-appointed counsel and the Subject Judge's efforts (via a letter written by a law clerk) to communicate with Complainant's mother concerning the appointment of a guardian ad litem. Complainant accuses the Subject Judge of "failure/refusal to perform his judicial duty/obligation to protect an incompetent litigant," "aiding and abetting court-appointed-counsel [*sic*] misconduct,"² engaging in "ex parte communications with your complainant's next-friend" (apparently, "next friend" refers to Complainant's mother) without Complainant's consent, and "continued obstruction and sabotage of your complainant's related court action."

¹ Complainant was permitted to terminate his first court-appointed attorney. He is currently represented by replacement counsel.

² To the extent Complainant's allegations concern alleged misconduct by his second court-appointed attorney, the attorney is not a federal judge and therefore is not subject to 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*. Allegations against non-covered individuals are beyond the scope of this proceeding and will not be addressed in this opinion.

It is apparent that these allegations are largely 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.”). As Complainant has been repeatedly advised, 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*. Accordingly, all merits-related allegations are subject to dismissal.

Complainant’s non-merits-related allegations are contradicted by the record in his civil rights proceeding. For instance, the record demonstrates that the Subject Judge has denied Complainant’s efforts to terminate counsel and has appointed a guardian ad litem in an express effort to protect Complainant’s rights in light of his court-determined incompetence to represent his own interests. In addition, the record clearly establishes that the Subject Judge did not engage in ex parte communications with Complainant’s mother, but rather copied counsel for both Complainant and the defense when the law clerk wrote to her in regard to the possibility of acting as Complainant’s guardian ad litem. Finally, there is no evidence whatsoever that the Subject Judge is “aiding and abetting” misconduct by the court-appointed attorney or has engaged in “obstruction and sabotage” of Complainant’s case. Accordingly, all remaining allegations are 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, this complaint will be dismissed pursuant to 28 U.S.C. §§ 352(b)(1)(A)(i), (ii), and (iii). Prior to this complaint, Complainant filed six complaints of judicial misconduct. *See* J.C. Nos. 03-08-90090; 03-09-90001–02; 03-13-90040; 03-14-90037; 03-15-90071; 03-16-90063. Complainant’s prior complaints were dismissed as non-cognizable, frivolous, and unsupported. In the opinion dismissing J.C. No. 03-16-90063, Complainant was warned that future abuse of the judicial misconduct complaint procedure could result in the imposition of filing restrictions under Rule 10, *Rules for Judicial-Conduct and Judicial-Disability Proceedings*. Complainant nonetheless filed this complaint, which once again is frivolous, merits-related, and unsupported.

Accordingly, a copy of this Memorandum Opinion and Order will be transmitted to the Judicial Council to determine whether to issue an order to show cause why Complainant should not be enjoined from filing further complaints under the Judicial Conduct and Disability Act. *See* Rule 10(a), *Rules for Judicial-Conduct and Judicial-Disability Proceedings*.³

³ 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

s/ D. Brooks Smith
Chief Judge

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: April 9, 2018)

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: April 9, 2018