

JUDICIAL COUNCIL OF THE THIRD CIRCUIT

J.C. Nos. 03-19-90020 and 03-19-90021

IN RE: COMPLAINT OF JUDICIAL MISCONDUCT
OR DISABILITY

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

MEMORANDUM OPINION

(Filed: May 17, 2019)

PRESENT: SMITH, *Chief Judge*.

This complaint is filed under the Judicial Conduct and Disability Act, 28 U.S.C. §§ 351-64, against a United States Magistrate Judge (“Subject Judge I”) and a United States District Judge (“Subject Judge II”). For the reasons discussed below, the complaint will be dismissed.¹

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

¹ In support of his complaint, Complainant filed hundreds of pages of exhibits. Many of these exhibits concern the alleged conduct of Complainant’s former attorneys, government employees, and the actions of state attorney discipline board employees, among others. These individuals are not covered by the Judicial Conduct and Disability Act. Accordingly, these allegations will not be addressed in this opinion. See 28 U.S.C. §§ 351, 352(b)(1)(A)(i); Rule 1(b), *Rules for Judicial-Conduct and Judicial-Disability Proceedings*.

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).

This complaint concerns two separate civil actions, one in which Complainant was a plaintiff and another action in which Complainant was not a party. With respect to the first civil action, Complainant expresses disagreement with Subject Judge I's rulings made in the course of his lawsuit against his former attorneys challenging their legal fees and accusing them of legal malpractice and other misconduct. Complainant sought to amend his complaint to name additional attorneys, as well as add allegations that his former attorneys were involved in a conspiracy and criminal RICO enterprise to defraud Complainant. Subject Judge I denied Complainant's motion to amend his complaint and subsequently issued a Report and Recommendation recommending that the lawsuit be dismissed on jurisdictional grounds. A District Court judge, who has not been named as a Subject Judge, issued an order adopting Subject Judge I's Report and Recommendation. Complainant did not appeal.

The second civil action complained of was presided over by Subject Judge I and Subject Judge II. Complainant had no role in this civil action, but one of his former attorneys represented a party to the action. Complainant appears to view the Subject Judges' presiding over this separate, unrelated matter as evidence of judicial misconduct. Complainant also seems to believe that the fact that Subject Judge II presided over this second law suit at the same time that her spouse's law firm represented his former

attorney in an attorney discipline matter initiated by Complainant constitutes evidence of bias and influence peddling, among other things.²

It is clear that the primary purpose of the present complaint is to contest and revisit Subject Judge I's and Subject Judge II's decisions and procedural rulings in both actions. For example, with respect to the first civil action, Complainant complains that: (1) Subject Judge I ruled that he could not represent his company because he is not an attorney; (2) Subject Judge I "knew" Complainant's former counsel never filed an affidavit of merit; (3) Subject Judge I never questioned his attorney's repugnancy claim; (4) Subject Judge I "refused" to address an argument he raised; (5) Subject Judge I refused to read and/or consider complaints made by Complainant to the state attorney ethics office; (6) Subject Judge I did not allow him to file an amended complaint; (7) Subject Judge I failed to report attorney misconduct to the relevant disciplinary authorities; and (8) Subject Judge I did not recuse herself. With respect to the second civil action, he alleged, among other things, that: (1) Subject Judge I and Subject Judge II did not recuse themselves; (2) Subject Judges I and II failed to report misconduct to the relevant disciplinary authorities; and (3) Subject Judge II should have stayed the case pending an ethics investigation.

Such merits-related allegations do not constitute cognizable misconduct under the Judicial Conduct and Disability Act. Rule 4(b)(1), *Rules for Judicial-Conduct and*

² Complainant also makes unsworn allegations in several supplemental submissions, as well as allegations against two other judges who were not named as Subject Judges. These allegations have been considered under Rule 5, *Rules for Judicial-Conduct and Judicial-Disability Proceedings*. I decline to identify a complaint based on these allegations as they do not set forth reasonable grounds for inquiry into whether misconduct occurred.

Judicial-Disability Proceedings (“Cognizable misconduct does not include an allegation that calls into question the correctness of a judge’s ruling, including a failure to recuse.”). Because they are non-cognizable, Complainant’s merits-related allegations will be dismissed. *See* 28 U.S.C. § 352(b)(1)(A)(ii); Rules 4(b)(1), 11(c)(1)(B), *Rules for Judicial-Conduct and Judicial-Disability Proceedings*. *See also In re Memorandum of Decision of Judicial Conference Committee on Judicial Conduct and Disability*, 517 F.3d 558, 561 (U.S. Jud. Conf. 2008) (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.”).

Complainant further alleges that Subject Judge I stated during a conference call in the first civil action that, “I recommend you not speak or confer with [name deleted] in the future.”³ According to Complainant, the individual referenced by Subject Judge I was a witness to the alleged crimes discussed in his complaint.⁴ Complainant contends that Subject Judge I’s comments “were inappropriate and demonstrated bias” and were made with the “sole purpose to intimidate to prevent evidence and witnesses from being introduced to the court.” Complainant speculates that Subject Judge I’s comment was

³ Complainant also characterizes Subject Judge I as stating, “I am advising you to stay away from [name deleted]”. Complainant does not provide the date or time for this alleged telephone call and there is no transcript on the docket. The docket reflects, however, that a conference with the parties was held in the fall of 2017.

⁴ It is unclear what the current relationship is between Complainant and this individual; he was a consultant for Complainant’s company during litigation before the Court of Federal Claims.

“based on some sort of ex parte communication between the Judge and others who we believe to be [my former attorneys]” Complainant further states that Subject Judge I said, “Well I have had clients that did not want to pay their bills” and commented, “I am here to help you find a way in resolving your bill.” Complainant views these comments as an “insinuation that I was guilty before she even heard the true circumstances” and as reflecting an assumption that the attorney bill he received from the law firm he was suing was “legitimate.” Complainant believes that this bias came from “her colleagues and associates.”

Even assuming *arguendo* that Subject Judge I made the statements as described above, these comments do not constitute judicial misconduct and/or reflect improper intimidation or bias. Rule 4(a), *Rules for Judicial-Conduct and Judicial-Disability Proceedings* (defining cognizable misconduct as “conduct prejudicial to the effective and expeditious administration of the business of the courts”). Significantly, Subject Judge I did not prohibit or prevent Complainant from consulting with anyone if he so chose. Nor does the quoted language reflect any type of threat. Rather, Subject Judge I’s alleged statement simply advised Complainant not to confer with this individual, as opposed to a threat seeking to prevent consultation. The other comments complained of reflect an attempt to facilitate a settlement and are not an insinuation of “guilt.” Importantly, Complainant was represented by counsel and counsel was present when all of these comments were allegedly made. There is no indication in the record that counsel made any objections to the Subject Judge’s comments. Indeed, the docket reflects that several

days after the 2017 telephone conference, Complainant's counsel filed a letter seeking permission to file an amended complaint. This letter contains no reference to Subject Judge I's putative comments and no motion seeking Subject Judge I's recusal was ever filed by Complainant and/or his attorney. Ultimately, as noted above, the civil suit was dismissed on jurisdictional grounds and Complainant did not appeal. In the absence of any evidence of improper bias or intimidation, Complainant's allegations are subject to dismissal. 28 U.S.C. § 352(b)(1)(A)(iii); Rule 11(c)(1)(C), (D) *Rules for Judicial-Conduct and Judicial-Disability Proceedings*.

Furthermore, Complainant alleges that Subject Judge I's and Subject Judge II's actions in the second civil action are attributable to "conflicts of interest," "influence peddling," and "racketeering." Complainant views the fact that Subject Judge I presided with Subject Judge II over an unrelated case involving one of Complainant's former attorneys as a "conflict." Complainant appears to view this as a "conflict" because: (1) Complainant sought to amend his complaint in the lawsuit pending before Subject Judge I to name the attorney representing a party in this second, unrelated lawsuit that Subject Judge I was also presiding over; and (2) Subject Judge II's spouse's law firm represented Complainant's former attorney in an attorney grievance proceeding initiated by Complainant. In addition, Complainant states that another conflict of interest exists because the wife of the clerk of court is an attorney and she interacts with Subject Judge I

and Subject Judge II daily.⁵ Also, Complainant states that some of the attorneys he is complaining about have been on the same CLE panels as Subject Judge I and II.

The connections that Complainant describes between the Subject Judges and other individuals do not, without more, reasonably call into question the Subject Judges' impartiality. Moreover, with respect to the allegations regarding Subject Judge II and her spouse's law firm's representation of Complainant's former attorney, a review of the district court record reflects that the attorney wrote a letter to Subject Judge II stating that he was represented by her spouse's law firm partner in a personal matter.⁶ The attorney copied defense counsel on the letter and submitted it before Subject Judge II made any substantive rulings in the civil suit. The letter in question was docketed and available to all of the parties to review. Thereafter, the civil suit was reassigned to another District Judge. There is no evidence of judicial misconduct and Complainant's allegations are subject to dismissal. *Id.*

Finally, Complainant asserts that Subject Judge I had ex parte communications with one of his former attorneys. Complainant's only evidence for this, however, are letters which were docketed on CM-ECF by the attorney. Letters which are placed on the docket and available for review by all parties and the judge are plainly not ex parte

⁵ Notably, similar allegations were raised by two other Complainants in J.C. Nos. 03-16-90090 and 03-19-90016 and were previously dismissed.

⁶ The letter stated that the attorney had never met Subject Judge II's spouse or spoken to the spouse.

communications. This allegation is dismissed as frivolous. 28 U.S.C. § 352(b)(1)(A)(iii); Rule 11(c)(1)(C), *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).

s/ D. Brooks Smith
Chief Judge

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ORDER

(Filed: May 17, 2019)

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: May 17, 2019