

JUDICIAL COUNCIL OF THE THIRD CIRCUIT

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J.C. No. 03-19-90035

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IN RE: COMPLAINT OF JUDICIAL MISCONDUCT  
OR DISABILITY

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

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MEMORANDUM OPINION

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(Filed: February 14, 2020)

PRESENT: SMITH, *Chief Judge*.

This complaint is filed by an attorney 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 alleges that the Subject Judge did not review the objections she filed on behalf of her client de novo, contrary to what he stated in his decision. Complainant further appears to allege that the Subject Judge has a disability because, according to her, he perceived comments that Complainant made to him as “personal attacks” and “expressing ‘disrespect’” and the Subject Judge admonished her in a status hearing for the comments. She also appears to view a remark the Subject Judge made to another judge who sat with him on a continuing legal education panel as evidence of judicial misconduct and/or a disability. Complainant alleges that comments the Subject Judge made during the same panel about the conduct of an attorney in connection with a fee petition constitutes further evidence of a violation of the Judicial Conduct and Disability Act.

To the extent Complainant’s allegations contest the Subject Judge’s judicial rulings, such as his putative failure to review her objections de novo, Complainant’s allegations do not constitute cognizable misconduct under the Judicial Conduct and Disability Act. Rule 4(b)(1), *Rules for Judicial-Conduct and 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.”). Accordingly, 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*. Furthermore, as she acknowledges, Complainant appealed the Subject Judge’s decision to the Court of Appeals. A panel of Third Circuit judges rejected

Complainant's contention that the Subject Judge did not review her objections de novo and affirmed the Subject Judge's decision.<sup>1</sup>

I now turn to a discussion of Complainant's remaining allegations. I asked the Subject Judge to submit a response to the complaint and he did so. In addition, the transcript of the status conference and the other documentation that Complainant attached to her complaint in support of her allegations of misconduct and disability have been reviewed. There is no evidence of either misconduct or disability in the documents. Furthermore, it is significant that Complainant raised some of the same allegations about the Subject Judge's putative actions in her unsuccessful direct appeal. Notably, the reviewing panel made no suggestion in their opinion that the Subject Judge had acted inappropriately in any way in the underlying matter.<sup>2</sup> Thus, these allegations are dismissed as frivolous and unsupported by evidence that would raise an inference that

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<sup>1</sup> A decision in the present matter was held in abeyance pending the conclusion of Complainant's direct appeal as she raised some of the same allegations in both her appeal and the complaint of misconduct and disability. *See* Commentary on Rule 4, *Rules for Judicial-Conduct and Judicial-Disability Proceedings* (“[T]here may be occasions when appellate and misconduct proceedings overlap, and consideration and disposition of a complaint under these Rules may be properly deferred by the chief judge until the appellate proceedings are concluded to avoid inconsistent decisions.”).

<sup>2</sup> To the extent Complainant contends that the Subject Judge's decision to hold an in-person status conference, as opposed to telephonic status conference, is evidence of judicial misconduct, this allegation is likewise subject to dismissal. Complainant requested that the status conference be recorded by a court reporter and appeared to further question the Subject Judge's conduct in a letter to the Subject Judge. The Subject Judge thereafter ordered an in-person conference that was transcribed by a court reporter. This is not evidence of misconduct or the existence of a disability.

misconduct has occurred or that a disability exists. 28 U.S.C. § 352(b)(1)(A)(iii); Rule 11(c)(1)(C), (D), *Rules for Judicial-Conduct and Judicial-Disability Proceedings*.

Even if the Subject Judge’s joking comment to another judge at the continuing legal education session could be viewed as a poor choice of words subject to misinterpretation (as apparently it was judging by Complainant’s reaction), it is evident that the Subject Judge’s conduct falls far short of behavior that constitutes judicial misconduct under the Judicial Conduct and Disability Act. Nor does it evidence the existence of a disability. 28 U.S.C. § 352(b)(1)(A)(i); Rule 11(c)(1)(A), *Rules for Judicial-Conduct and Judicial-Disability Proceedings* (“A complaint may be dismissed in whole or in part to the extent that the chief judge concludes that the complaint . . . alleges conduct that, even if true, is not prejudicial to the effective and expeditious administration of the business of the courts and does not indicate a mental or physical disability resulting in the inability to discharge the duties of judicial office . . .”).

Finally, the Subject Judge’s discussion critiquing an attorney’s improper conduct in the context of a continuing legal education panel on the topic of improper fee petitions by counsel is likewise not evidence of a violation of the Act. Indeed, the attorney whose conduct was criticized by the Subject Judge was disciplined by the state disciplinary board for her conduct. Accordingly, these allegations are subject to dismissal as frivolous and unsupported by evidence that would raise an inference that misconduct has occurred or that a disability exists. 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).

s/ D. Brooks Smith  
Chief Judge

JUDICIAL COUNCIL OF THE THIRD CIRCUIT

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ORDER

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(Filed: February 14, 2020)

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](http://www.ca3.uscourts.gov).

s/ D. Brooks Smith

Chief Judge

Dated: February 14, 2020