

JUDICIAL COUNCIL OF THE THIRD CIRCUIT

J.C. No. 03-19-90065

IN RE: COMPLAINT OF JUDICIAL MISCONDUCT
OR DISABILITY

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

MEMORANDUM OPINION

(Filed: February 26, 2020)

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 District Judge (the “Subject Judge”). For the reasons discussed below, the complaints 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).

Beginning in 2015, Complainant was a plaintiff in two civil proceedings. One of the proceedings was assigned to the Subject Judge. In that matter, Complainant and his children, through counsel, sued a state agency and other parties for defamation, malicious

prosecution, and other claims. The Subject Judge dismissed the complaint for failure to state a claim. Complainant filed a pro se motion for reconsideration and a notice of appeal. The Subject Judge denied the motion for reconsideration, and the Court of Appeals affirmed the judgment. Complainant then filed a post-judgment motion to vacate. In it, Complainant argued that the Subject Judge should be disqualified and his rulings vacated. The Subject Judge recently denied the motion.

The other civil proceeding, a counseled qui tam matter, was assigned to a different District Judge.¹ That District Judge dismissed the complaint and closed the case. Complainant filed a motion for reconsideration and an appeal. The District Judge denied reconsideration, and the Court of Appeals affirmed the judgment. Complainant filed a post-judgment motion to vacate, alleging that the District Judge had a conflict of interest. Because the District Judge had retired, the matter was assigned to a new District Judge, who denied the motion on grounds that the case was before the Court of Appeals at the time. After the appeal concluded, Complainant sought leave to re-file the motion. The request remains pending.

Complainant avers that he filed this complaint of judicial misconduct because the Subject Judge had not ruled upon Complainant's motion to vacate. In the complaint,² he

¹ The District Judge is not a named Subject Judge of this complaint and has since retired from the bench.

² In addition to the complaint, Complainant filed a supplemental document containing allegations not verified under penalty of perjury as required by Rule 6(d), *Rules for Judicial-Conduct and Judicial-Disability Proceedings*. Upon review, these allegations do not provide information constituting "reasonable grounds for inquiry" into the existence of judicial misconduct. Accordingly, no complaint will be identified based upon the

reiterates allegations from the motion to vacate, including an allegation that the Subject Judge should have disclosed his membership in a state agency that “is the STATE agency granting FEDERAL monies to each and every defendant” in Complainant’s civil proceedings. In addition, Complainant contends that the Subject Judge should have disclosed his “financial generosity to . . . three federal subsidized non-profit law firms.”

These allegations were before the Subject Judge in Complainant’s motion to vacate, in which Complainant sought the Subject Judge’s recusal. Allegations concerning a failure to recuse, without more, are related to the merits of a procedural ruling and therefore 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.”).

Moreover, the allegation concerning the Subject Judge’s failure to rule on Complainant’s request for recusal is best understood as a claim of delay. Under Rule 4(b)(2), “[c]ognizable misconduct does not include an allegation about delay in rendering a decision or ruling, unless the allegation concerns an improper motive in delaying a particular decision or habitual delay in a significant number of unrelated cases.” Rule 4(b)(2), *Rules for Judicial-Conduct and Judicial-Disability Proceedings*. Although the motion to vacate was pending for some time, there is no indication that any delay in ruling on it is attributable to an improper motive and, as previously noted, the motion recently

allegations in the supplemental document. Rule 5, *Rules for Judicial-Conduct and Judicial-Disability Proceedings*.

was resolved. Accordingly, the claim of delay also is not cognizable misconduct and is subject to dismissal. *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*.

Finally, even assuming Complainant is correct that the Subject Judge is a member of the state agency³ and provides donations to a fundraising organization that supports non-profit legal aid groups, this does not give rise to a reasonable inference that judicial misconduct has occurred. There is no evidence that membership in the state agency or that support for a fundraising organization gives rise to an appearance that the Subject Judge could not be impartial in Complainant's proceeding. *See* Canon 4, *Code of Conduct for United States Judges* (a judge may engage in extrajudicial activities that are consistent with the obligations of judicial office, including membership in organizations devoted to the law, legal system, and administration of justice). Indeed, Complainant states that he "does not object" to the Subject Judge's involvement in these organizations. Rather, he "assert[s] that [the Subject Judge] should have disclosed his extra-judicial roles."

Complainant fails to identify any authority giving rise to a duty on the part of the Subject Judge to affirmatively disclose participation in extra-judicial activities involving organizations unrelated to the pending matter. Accordingly, these allegations are subject to dismissal as unsupported by evidence that would raise an inference that misconduct has

³ The state agency complainant has identified administers federal grant programs to enhance the criminal justice system in the state. Public documents indicate that, contrary to Complainant's allegations, the Subject Judge is not currently a member of that agency. Indeed, Complainant has attached a document to the misconduct complaint indicating that the Subject Judge was a member during his former employment as a government attorney.

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

Based on the foregoing, the complaint will be dismissed pursuant to 28 U.S.C. § 352(b)(1)(A)(ii) and (iii).

s/ D. Brooks Smith
Chief Judge

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ORDER

(Filed: February 26, 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)(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: February 26, 2020