

JUDICIAL COUNCIL OF THE THIRD CIRCUIT

J.C. No. 03-20-90027

IN RE: COMPLAINT OF JUDICIAL MISCONDUCT
OR DISABILITY

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

MEMORANDUM OPINION

(Filed: July 1, 2020)

PRESENT: MCKEE, *Circuit Judge*.¹

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 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).

¹ Acting as Chief Judge pursuant to Rule 25(f), *Rules for Judicial-Conduct and Judicial-Disability Proceedings* (assigning the Chief Judge’s duties to the “most-senior active circuit judge not disqualified”).

In 2017, Complainant filed a habeas petition that was assigned to the Subject Judge. The matter was administratively closed shortly thereafter because it had been opened in error. In early 2019, Complainant filed a document entitled “petition for writ of mandamus” in the closed proceeding. A few months later, Complainant filed a complaint of judicial misconduct naming the Subject Judge. The misconduct proceeding was dismissed. *See* J.C. No. 03-19-90051. After the dismissal, in December 2019, the Subject Judge issued an order in Complainant’s closed habeas proceeding denying the mandamus petition.

In this complaint of judicial misconduct,² Complainant contends that the Subject Judge should not have ruled on the mandamus petition, and instead should have *sua sponte* recused due to the prior misconduct complaint. In addition, Complainant alleges that the Subject Judge’s mandamus ruling is erroneous, gives rise to “manifest injustice,”

² Although Complainant styled his submission as a petition for review of the decision issued in J.C. No. 03-19-90051, Complainant previously filed a timely petition for review in that matter in November 2019 and the Judicial Council affirmed the Chief Judge’s opinion. No further review is available in that proceeding. *See* 28 U.S.C. § 352(c). Accordingly, the submission was docketed as a new complaint.

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

and constitutes “an act of judicial bullying, vindictiveness and retaliation” in response to Complainant’s allegations in J.C. No. 03-19-90051.³

Clearly, the majority of Complainant’s allegations are intended to collaterally challenge the Subject Judge’s decision to deny mandamus relief. Such allegations are merits-related and therefore do not constitute cognizable misconduct. “Cognizable misconduct does not include an allegation that calls into question the correctness of a judge’s ruling.” Rule 4(b)(1), *Rules for Judicial-Conduct and Judicial-Disability Proceedings*. Merits-related allegations are not cognizable as misconduct because 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, such allegations are 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*.

Moreover, although Complainant alleges misconduct for failing to recuse, Complainant did not move for the Subject Judge’s recusal. A recusal motion must be presented to the appropriate judge in the first instance. A substantive decision rendered on

³ Complainant also alleges misconduct on the part of the Circuit Judge who dismissed the earlier misconduct complaint. The complaint does not, however, name that Judge as a Subject Judge. Having reviewed the allegations concerning the Judge, the allegations do not provide “reasonable grounds for inquiry” into the existence of judicial misconduct. Accordingly, no complaint will be identified against the Circuit Judge. See Rule 5(a), *Rules for Judicial-Conduct and Judicial-Disability Proceedings*.

such a motion also is merits-related and therefore does not, without more, constitute cognizable misconduct. *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*.

To the extent the allegations of the complaint are not merits-related, they are unsubstantiated. A review of the record reveals no evidence of retaliation, vindictiveness, bullying, or any other form of judicial misconduct. Accordingly, the 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, the complaint will be dismissed pursuant to 28 U.S.C. § 352(b)(1)(A)(ii) and (iii). This is Complainant's fourth complaint against the Subject Judge. *See* J.C. Nos. 03-16-90037; 03-18-90061; 03-19-90051. The prior complaints also were dismissed as merits-related, unsupported, and frivolous. Complainant's attention is therefore 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 pursuant to this provision

⁴ Rule 10(a) of the *Rules for 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.

s/ Theodore A. McKee
Circuit Judge

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: July 1, 2020)

PRESENT: MCKEE, *Circuit Judge*.¹

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.

¹ Acting as Chief Judge pursuant to Rule 25(f), *Rules for Judicial-Conduct and Judicial-Disability Proceedings* (assigning the Chief Judge's duties to the "most-senior active circuit judge not disqualified").

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/ Theodore A. McKee
Circuit Judge

Dated: July 1, 2020