

JUDICIAL COUNCIL OF THE THIRD CIRCUIT

J.C. No. 03-14-90013

IN RE: COMPLAINT OF JUDICIAL MISCONDUCT
OR DISABILITY

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

MEMORANDUM OPINION

Filed: July 16, 2014

PRESENT: McKEE, 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”). Complainant previously filed a similar complaint of judicial misconduct against the same Subject Judge which was dismissed after a thorough review of the record. See J.C. No. 03-11-90073. For the reasons discussed below, this complaint also 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). 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).

After a ten-day trial, a jury found Complainant guilty of bank fraud, money laundering, false statements to the government, and other charges. Shortly before sentencing, it came to light that an FBI agent who had investigated the case may have committed perjury. According to Complainant, the FBI agent, after "being told by the prosecutor that he would be held accountable for lying to the jury," reacted by threatening to commit suicide in the courthouse. Through counsel, Complainant raised the perjury issue in a supplemental post-trial motion for judgment of acquittal and a new trial. After a hearing, the Subject Judge denied the motion. Shortly thereafter, the Subject Judge sentenced Complainant to 121 months of imprisonment. Complainant filed an unsuccessful appeal which again raised the perjury issue. Complainant thereafter raised essentially the same issue again in a motion filed under 28 U.S.C. § 2255. The Subject Judge recently denied Complainant's motion and an appeal is pending.

The current complaint reiterates Complainant's prior allegations that the Subject Judge is biased and engaged in misconduct because he allegedly knew of the FBI agent's alleged perjury during Complainant's criminal trial and participated in ex parte

communications with the prosecutor about it.¹ These allegations are again dismissed as 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)(D), Rules for Judicial-Conduct and Judicial-Disability Proceedings. As previously determined, none of the court records support Complainant's description of the events. See J.C. No. 03-11-90073.²

Furthermore, although Complainant asserts that the current complaint is supported by "newly discovered evidence," his complaint does not contain any material information not previously considered. Rule 11(c)(2), Rules for Judicial-Conduct and Judicial-Disability Proceedings. Although it is not entirely clear from his submission, Complainant's new "evidence" appears to be his "discovery" that an affidavit submitted by the prosecutor did not pertain to the "perjury/suicide incident," but instead described another incident on a different day. Complainant alleges that the Subject Judge was aware of the supposed "misrepresentation." Complainant also appears to contend that his motion under 28 U.S.C. § 2255 contains additional evidence. He further alleges that records

¹ As an initial matter, Complainant raises a number of serious charges of wrongdoing by the FBI agent and the prosecutor. Neither the FBI agent nor the prosecutor is subject to the Judicial Conduct and Disability Act, however, and this judicial misconduct proceeding is not the appropriate forum for addressing any claims against them. See 28 U.S.C. §§ 351, 352(b)(1)(A)(i); Rule 4, Rules for Judicial-Conduct and Judicial-Disability Proceedings. Accordingly, this opinion is limited to Complainant's claims of misconduct on the part of the Subject Judge. Complainant was previously advised in J.C. No. 03-11-90073 that the Department of Justice's Office of the Inspector General is tasked with investigating reports of misconduct by employees of the Department of Justice.

² Complainant refers repeatedly to a response filed by the Subject Judge to his prior complaint. However, the Subject Judge did not elect to file a response and none was required.

holding the “potential of exposing certain judicial misconduct” would be revealed if the Subject Judge issued subpoenas for records from the U.S. Marshals.

These arguments do not constitute new material evidence. In the first instance, Complainant provides no new evidence for his allegations concerning the Subject Judge other than speculation and innuendo. Moreover, the affidavit Complainant relies upon has been a part of the record since 2010 and does not support a claim of judicial misconduct against the Subject Judge. It bears emphasizing that the issue of the putative perjury and the FBI agent’s reaction to being told that he was being taken off the case was part of the record on appeal. A panel of this Court affirmed the judgment of conviction, stating:

Although Complainant argues vociferously that he was entitled to know immediately about [the prosecutor’s] concerns related to [the FBI agent’s] truthfulness and [the agent’s] response to his removal from the case such information was immaterial because the result of this case would not have been different even if we assume (without deciding) that this information should have been disclosed.

Further, as the Subject Judge concluded in a recent opinion denying Complainant’s motion for relief under 28 U.S.C. § 2255:

Defendant also previously argued . . . that aside from the “Hello” statement, [other] portions of [the FBI agent’s] trial testimony may have been perjury. After a hearing and extensive briefing by the parties, we found that this argument was not compelling. The Third Circuit Court of Appeals also rejected this claim, indicating that “there is no evidence to support this argument.” . . . Despite defendant’s vociferous arguments to the contrary, the evidence has not changed since the defendant’s appeal.

In brief, Complainant does not present any material evidence not previously considered.

In addition, the foregoing allegations are subject to dismissal as frivolous and unsupported

by any evidence that would raise an inference that misconduct occurred. 28 U.S.C. § 352(b)(1)(A)(iii); Rule 11(c)(1)(C), (D), Rules for Judicial-Conduct and Judicial-Disability Proceedings.

Complainant's remaining allegations seek to collaterally attack the Subject Judge's decisions and rulings, including the Subject Judge's alleged failure to give Complainant a fair trial, refusal to recuse himself, failure to grant Complainant's request to subpoena documents from the U.S. Marshals, and the imposition of an overly harsh sentence. Complainant's merits-related allegations are not cognizable under the Judicial Conduct and Disability Act, and are therefore dismissed. See 28 U.S.C. § 352(b)(1)(A)(ii)(chief judge may dismiss a complaint if he or she finds that it is directly related to the merits of a decision or procedural ruling); Rule 3(h)(3)(A), Rules for Judicial-Conduct and Judicial-Disability Proceedings (“[a]n allegation that calls into question the correctness of a judge's ruling, including a failure to recuse, without more, is merits-related.”); Rule 11(c)(1)(B), Rules for Judicial-Conduct and Judicial-Disability Proceedings (a complaint must be dismissed in whole or in part to the extent that the chief judge concludes that the complaint is directly related to the merits of a decision or procedural ruling).

Complainant also complains of the Subject Judge's delay in ruling on his recusal motion, requests for subpoenas, and motion for relief under 28 U.S.C. § 2255. These allegations are dismissed as merits-related. 28 U.S.C. § 352(b)(1)(A)(ii). See also Rules 3(h)(3)(A), 3(h)(3)(B) (cognizable 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”), 11(c)(1)(B), Rules for Judicial-Conduct and Judicial-Disability Proceedings. To the extent Complainant suggests that the Subject Judge had an improper motive for his putative delay, his allegations are dismissed pursuant to 28 U.S.C. § 352(b)(1)(A)(iii) as unsupported by any evidence that would raise an inference that misconduct occurred. In fact, the Subject Judge recently ruled on all of Complainant’s pending motions and did so approximately one month after Complainant filed a second reply brief concerning the motion under Section 2255.³

Finally, Complainant alleges that the Subject Judge is biased against him because Complainant filed a prior complaint of judicial misconduct concerning him (J.C. No. 03-11-90073) and wrote a letter describing the Subject Judge in derogatory terms. Complainant’s allegations are subject to dismissal as unsupported by any evidence that would raise an inference that misconduct has occurred. 28 U.S.C. § 352(b)(1)(A)(iii); Rule 11(c)(1)(D), Rules for Judicial-Conduct and Judicial-Disability Proceedings. Cf. In re Evergreen Securities, Ltd., 570 F.3d 1257, 1265 (11th Cir. 2009) (“The mere filing of a complaint of judicial misconduct is not grounds for recusal.”); United States v. Studley, 783 F.2d 934, 940 (9th Cir. 1986) (“A judge is not disqualified by a litigant’s suit or

³ Complainant also filed an unsworn supplement to his complaint raising allegations of delay and the Subject Judge’s putative complicity with the prosecutor. I have considered these allegations under Rule 5 of the Rules for Judicial-Conduct and Judicial-Disability Proceedings and conclude that they do not provide “reasonable grounds for inquiry” into the existence of judicial misconduct. Accordingly, I decline to identify a complaint based upon these allegations.

threatened suit against him, or by a litigant's intemperate and scurrilous attacks.”
(citations omitted)).

For the foregoing reasons, the complaint is dismissed pursuant to 28 U.S.C.
§§ 352(b)(1)(A)(i), (ii), and (iii).

s/ Theodore A. McKee
Chief Judge

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ORDER

Filed: July 16, 2014

PRESENT: McKEE, 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 Circuit Executive's Office within **35 days** of the date on the letter informing the parties 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 Circuit Executive’s Office and on the Court of Appeals’ internet site, www.ca3.uscourts.gov.

s/ Theodore A. Mckee
Chief Judge

Dated: July 16, 2014