

JUDICIAL COUNCIL OF THE THIRD CIRCUIT

J.C. Nos. 03-16-90055; 03-16-90056

IN RE: COMPLAINT OF JUDICIAL MISCONDUCT
OR DISABILITY

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

MEMORANDUM OPINION

(Filed: December 15, 2016)

PRESENT: SMITH, *Chief Judge*.

This is a complaint filed under the Judicial Conduct and Disability Act, 28 U.S.C. §§ 351-64, against a United States District Judge (“Subject Judge I”) and United States Magistrate Judge (“Subject Judge II”). 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, a university professor, filed a pro se civil rights action. The matter was assigned to Subject Judge I and referred to Subject Judge II. The defendants moved

to dismiss the complaint. Subject Judge I granted the motion to dismiss without prejudice to filing an amended complaint. Complainant moved for reconsideration and also filed a notice of appeal.

In response to the motion, Subject Judge I issued a letter order. In it, she indicated that some of Complainant's correspondence was on university letterhead and, because this raised concerns in her mind about whether the university had sanctioned the litigation, she notified the university's general counsel. An attachment to Complainant's subsequent motion for reconsideration reflected that the university decided to pursue an ethics investigation of Complainant as a result of his use of university letterhead. Because of her knowledge of these issues, Subject Judge I recused herself.

The matter was reassigned to a District Judge who is not a subject of this complaint. The presiding District Judge denied Complainant's motion for reconsideration. Complainant's appeal remains pending.

Turning first to Complainant's allegations concerning Subject Judge II, Complainant alleges that Subject Judge II improperly granted the defendant "an extension of time [to answer the complaint] after the time to respond properly had pas[s]ed." Because neither the defendant nor the Subject Judge sought Complainant's consent prior to granting the extension, Complainant describes it as "ex parte." Complainant attempted to appeal Subject Judge II's order, but the appeal was dismissed for lack of appellate jurisdiction.

Complainant's allegations concerning Subject Judge II are entirely merits-related. Complainant offers nothing more than his disagreement with the merits of Subject Judge II's decision to grant an extension of time. "An allegation that calls into question the correctness of a judge's ruling, including a failure to recuse, without more, is merits-related." Rule 3(h)(3)(A), *Rules for Judicial-Conduct and Judicial-Disability Proceedings*. Merits-related allegations are beyond the scope of a judicial misconduct proceeding and are therefore subject to dismissal. *See* 28 U.S.C. § 352(b)(1)(A)(ii); Rules 3(h)(3)(A), 11(c)(1)(B), *Rules for Judicial-Conduct and Judicial-Disability Proceedings*.

To the extent Complainant characterizes Subject Judge II's order as "*ex parte*," Complainant misunderstands the term. *Ex parte* refers to communications outside the presence of one or both parties, yet it is apparent that Complainant is taking issue with decisions that are embodied in documents filed on the public docket in his case and that were served upon him as plaintiff. He provides no allegations establishing that Subject Judge II engaged in any improper *ex parte* communications at all. The allegations of *ex parte* communications therefore will be dismissed as plainly frivolous. 28 U.S.C. § 352(b)(1)(A)(iii); Rule 11(c)(1)(C), *Rules for Judicial-Conduct and Judicial-Disability Proceedings*.

Turning next to Complainant's allegations concerning Subject Judge I, Complainant takes issue with her decision to contact his employer concerning his use of university letterhead in court filings. He alleges that Subject Judge I "continue[d] this *ex parte* behavior" by making the contact, and then "violated the confidentiality of this

investigation by filing a public order confessing to this secret attack on the Plaintiff.”

Complainant requests that Subject Judge I contact the university and “ask them to discontinue their investigations and disciplinary actions.” I requested that Subject Judge I respond to Complainant’s claims. After review of the record and Subject Judge I’s response, I address Complainant’s allegations.¹

In her response, Subject Judge I acknowledges that she contacted the university, a non-party to the action, to inform its general counsel of Complainant’s conduct. This contact is properly described as *ex parte*. While the decision of Subject Judge I to contact the university independently rather than in the context of the case before her is subject to question, she promptly disclosed that action in a letter order and opted to recuse herself from the case on that basis. Moreover, the documents to which Subject Judge I referred the university are public and would have been available to the university in any event. Under these circumstances, Complainant’s allegations do not rise to the level of judicial misconduct. Accordingly, they will be dismissed. 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 is dismissed pursuant to 28 U.S.C. §§ 352(b)(1)(A)(ii) and (iii).

s/ D. Brooks Smith

Chief Judge

¹ Pursuant to the Judicial Conduct and Disability Act, the Subject Judge’s response was not made available to Complainant. 28 U.S.C. § 352(a).

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ORDER

(Filed: December 15, 2016)

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: December 15, 2016