

JUDICIAL COUNCIL OF THE THIRD CIRCUIT

J.C. No. 03-17-90090

IN RE: COMPLAINT OF JUDICIAL MISCONDUCT
OR DISABILITY

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

MEMORANDUM OPINION

(Filed: December 6, 2018)

PRESENT: SMITH, *Chief Judge*.

This is a complaint filed by an attorney under the Judicial Conduct and Disability Act, 28 U.S.C. §§ 351-64, against a United States District Judge (hereinafter “Subject Judge”). For the reasons discussed below, the complaint will be dismissed.¹

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

¹ Consideration of the present complaint was deferred until the conclusion of Complainant’s direct appeal of the Subject Judge’s decision denying Complainant’s petition for attorneys’ fees. Commentary on Rule 3, *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 in order to avoid, *inter alia*, inconsistent decisions.”).

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 majority of Complainant's allegations are merits-related. Among other allegations, Complainant contends that the Subject Judge: (1) refused to allow him to put something on the record; (2) did not allow Complainant to present his client's case at trial; (3) required Complainant to file several briefs and affidavits regarding a fee petition; (4) criticized the failure to keep track of hours contemporaneously; (5) criticized Complainant's performance at trial; (6) reprimanded Complainant for his lack of familiarity with the Federal Rules of Civil Procedure and the Federal Rules of Evidence; (7) stated incorrectly that Complainant submitted a "grossly exaggerated petition for fees"; and (8) should recuse himself from Complainant's other cases and those of Complainant's law firm.

These allegations are merits-related and are not cognizable under the Judicial Conduct and Disability Act. 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). 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).

Notably, counsel for Complainant raised some of these same allegations in an unsuccessful appeal of the Subject Judge's decision denying Complainant's fee petition. In a precedential opinion, a panel of Third Circuit judges affirmed the District Court.

Complainant further alleges that the Subject Judge's statements, including a reference to requesting the assistance of the U.S. Marshals, were improper and reflected a personal animus against Complainant. Complainant also contends that the Subject Judge's opinion denying the fee petition and the statements therein violated "numerous" Judicial Canons. The transcripts and other documents submitted by Complainant have been reviewed and they do not support Complainant's allegations of judicial misconduct. Complainant's allegations are based largely on his disagreement with the Subject Judge's rulings. As discussed above, such merits-related allegations are not cognizable in the present proceedings. Furthermore, although the Subject Judge was highly critical of Complainant in his memorandum opinion and the underlying proceedings, it appears that the Subject Judge was responding to Complainant's repeated failure to adhere to the Subject Judge's directives and rulings. As stated in the Subject Judge's memorandum opinion, on "approximately 75 occasions during the course of the five day trial . . . [Complainant] had to be admonished for his conduct" It is well established that,

“judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge Not establishing bias or partiality, however, are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display. A judge’s ordinary efforts at courtroom administration—even a stern and short-tempered judge’s ordinary efforts at courtroom administration—remain immune.” *Liteky v. United States*, 510 U.S. 540, 555–56, 114 S. Ct. 1147, 1157 (1994).

Moreover, the Subject Judge’s opinion was reviewed on direct appeal by a panel of Third Circuit judges who praised the Subject Judge as follows:

Review of the record and the District Court’s comprehensive opinion makes clear that denial of a fee award was entirely appropriate under the circumstances of this case. Counsel’s success at trial notwithstanding, the fee petition was severely deficient in numerous ways.

The panel also stated that Complainant’s performance at trial was “subpar” and observed that the time entries submitted were vague and excessive. The panel concluded that the Subject Judge provided a “thorough explanation of how counsel failed to fulfill their duty to the court. This failure, coupled with the other deficiencies in the petition and counsel’s substandard performance, justified the District Court’s decision to deny the fee request in its entirety. That decision was not an abuse of discretion.” Accordingly, under the circumstances presented here, the Subject Judge’s comments and/or actions do not constitute judicial misconduct. Complainant’s allegations are dismissed as frivolous and

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)(C), (D), *Rules for Judicial-Conduct and Judicial-Disability Proceedings*.

Finally, the Subject Judge’s referral of Complainant’s conduct to the state disciplinary board in a judicial opinion does not constitute a violation of the Judicial Conduct and Disability Act. Canon 3B(5) of the *Code of Conduct for United States Judges* provides that a “judge should take appropriate action upon learning of reliable evidence indicating the likelihood that . . . a lawyer violated applicable rules of professional conduct.” Here, the Subject Judge stated that a copy of his opinion would be referred to the Disciplinary Board for its “independent determination of whether disciplinary action should be taken” This action does not constitute judicial misconduct and the allegation is dismissed. 28 U.S.C. § 352(b)(1)(A)(iii); Rules 11(c)(1)(A) and 11(c)(1)(C), *Rules for Judicial-Conduct and Judicial-Disability Proceedings*.

For the foregoing reasons, the complaint is 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: December 6, 2018)

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.

Rule 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 6, 2018